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Addressing the Aggravated Meeting Points of Race and Religion

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ADDRESSING THE AGGRAVATED MEETING POINTS OF RACE AND RELIGION

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"In case you haven't noticed, our unelected leaders have dehumanised millions and millions of human beings simply because of their religion and race."
-KURT VONNEGUT, A MAN WITHOUT A COUNTRY (2006)

I. INTRODUCTION

There are parallel, unequal regimes for the elimination of racial discrimination and the elimination of religious intolerance in international human rights law. While the movement towards the elimination of all forms of racial discrimination within the United Nations (UN) has been clear-sighted and tenacious, "the story of the drafting of the religious intolerance instruments . . . is a tale punctuated by hypocrisy, procedural jockeying and false starts."[1] This contradistinction renders it difficult to ascertain the legal basis for investigating "aggravated discrimination,"[2] which describes the

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1. Roger Clark, *The United Nations and Religious Freedom*, 11 N.Y.U J. INT'L L. & POL. 197, 220 (1978-1979).

2. The term "aggravated" has a settled legal meaning in the context of domestic criminal law in many States. According to Ballentine's Law Dictionary, the term "aggravation" is "[t]hat which enhances the gravity of a criminal or tortious act." BALLENTINE'S LAW DICTIONARY, 109 (3d ed. 1969). There is no comparative understanding of its meaning in international human rights law. The term "aggravated discrimination," to specifically describe racial discrimination aggravated by religious discrimination, was employed by Abdelfattah Amor, former special rapporteur on Freedom of Religion or Belief, in a 2000 report to the Preparatory Committee to the World Conference against Racism. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, May 1-5, 2000, *Racial Discrimination and Religious Discrimination: Identification and Measures*, U.N. Doc. A/CONF.189/PC.1/7 (Apr. 13, 2000) (preparatory remarks of Special Rapporteur Abdelfattah Amor) [hereinafter *World Conference*]. It is unclear if Amor coined the term; however, no other UN documentation appears to have employed it before (or since). The Report is discussed in Section III(i) below. The Committee on the Elimination of Racial Discrimination refers to "multiple discrimination" in their General Recommendation XXIX on descent-based discrimination. Comm. on the Elimination of Racial Discrimination, Report *of the Committee on the Elimination of Racial Discrimination*, 111-17, U.N. Doc. A/57/18 (2002). This concept addresses discrimination suffered by women members of descent-based communities on the basis of gender and on the basis of descent. It is submitted that "aggravated discrimination" should not be confused with

common ground between racial and religious discrimination. Yet, according to Davis, "[i]n the twentieth century alone, by some estimates, as many as 170 million human beings were the innocent victims of ethnic cleansing. The majority of these episodes of annihilation were religiously motivated."[3]

International legal protection in the area of freedom of religion or belief is not as robust as it is in the protection of other basic human rights. Concerning freedom of religion, there are two primary instruments of protection: the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 (the 1981 Declaration),[4] which is specific to religious intolerance and discrimination but non-binding;[5] and the International Covenant on Civil and Political Rights 1966 (ICCPR),[6] which is binding on states parties but non-specific to religious intolerance and discrimination.[7] By contrast, the primary instrument in the fight against racial discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD),[8] is both specific and binding on states parties. This imbalance prompts Lerner to ask:

> [W]hether the international community is . . . ready to make additional advancements in the area of freedom of religion or belief by, perhaps, adopting a mandatory treaty based upon an existing draft or other instrument. Conversely, if the international community sees this next step as premature, undesirable, or risky, the question becomes whether it is possible to agree

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multiple discrimination, and should refer only to the common ground between race and religion, as outlined by Amor.

3. Derek Davis, *Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, 2002 BYU L. REV. 217, 219 (2002).

4. G.A. Res. 36/55, at 171, U.N. GAOR, 36th Sess., Supp. No. 21, U.N. Doc. A/36/684 (Nov. 25, 1981).

5. Non-binding or "soft law" provisions are intended to set standards and provide guidelines, but are not translated into law through the treaty mechanism.

6. G.A. Res. 2200A (XXI), at 51, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

7. For a commentary on freedom of religion under article 18 ICCPR, see MANFRED NOWAK, THE U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 406-36 (N.P. Engel Kehl ed., 2d ed. 2005).

8. G.A. Res. 2106 (XX), at 47, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965).

> upon another way to place freedom of religion or belief on equal footing with other basic human rights.[9]

Ironically, the origin of the ICERD is rooted in religious intolerance. A decision was made following an outbreak of anti-Semitic incidents to draft two treaties, one on racial discrimination and one on religious intolerance.[10] The latter was never achieved, despite the existence of a draft Convention on the Elimination of All Forms of Religious Intolerance in 1965.[11] Meanwhile, the movement towards the elimination of all forms of racial discrimination evolved in the forty years since the ICERD, and the concept of racial discrimination has expanded. According to Thornberry:

> [T]he umbrella term for the Convention is 'racial discrimination,' not race. Thus, racial discrimination is given a stipulative meaning by the Convention: as precisely the five terms set out in Article 1, which mentions 'race' but four other terms as well. It is thus clear that the scope of the Convention is broader than . . . notions of race, which in any case may express many usages.[12]

The common ground between race and religion forms part of this process. Clearly, "religion plays a weighty role in xenophobia, racism, group hatred, and even territorial changes."[13] However, Chan and Arzt argue that "race is composed significantly of a religious dimension that has not been critically isolated, analyzed or discussed."[14] Nevertheless, the role of religion in racial discrimination has not escaped the attention of the Committee on the Elimination of

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9. Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 BYU L. REV. 906, 921 (2000).

10. Preparation of a Draft Declaration and a Draft Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 1780 (XVII), ¶ 2, U.N. Doc. A/5217 (Dec. 7, 1962); Preparation of a Draft Declaration and a Draft Convention on the Elimination of all Forms of Religious Intolerance, G.A. Res. 1781 (XVII), ¶ 2, U.N. Doc. A/5217 (Dec. 7, 1962).

11. U.N. Econ. & Soc. Council, *Draft Convention on the Elimination of All Forms of Religious Intolerance*, U.N. Doc. E/CN.4/882 (Feb. 4, 1965).

12. Patrick Thornberry, *The Convention on the Elimination of Racial Discrimination, Indigenous Peoples, and Caste/Descent-based Discrimination*, INT'L LAW AND INDIGENOUS PEOPLES 17, 19 (Joshua Castellino & Niamh Walsh eds., 2005).

13. Lerner, *supra* note 9, at 921.

14. Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2004-2005).

Racial Discrimination (CERD), which in recent years has displayed a growing awareness of the common ground between race and religion.

The absence of a binding convention on religious intolerance places additional weight on the existing mechanisms for the elimination of all forms of racial discrimination to identify the common ground between race and religion. There is a growing phenomenon of discrimination on the basis of race and religion, rather than on one of these grounds only. Evidence for this is found in a 2000 presentation to the Preparatory Committee of the World Conference against Racism in Geneva, by the then Special Rapporteur on Freedom of Religion and Belief, Abdelfattah Amor, which called for the identification of "a possible legal basis for racial discrimination aggravated by religious discrimination."[15]

This paper will argue the ICERD represents the primary legal basis for addressing aggravated discrimination. Section I will chart the birth of the "Race Convention," emphasising the role of religious intolerance in the form of anti-Semitism in its elaboration. Section II will examine the death of the "Religion Convention," and will explore whether it is viable to resurrect the proposal for a specific binding instrument in this area. Section III will set out the common ground between race and religion, as presented in two reports from independent experts - the 2000 Geneva report, and the second a joint report by the Special Rapporteur on racism and the Special Rapporteur on religion. Section IV will look at the work of the Committee on the Elimination of Racial Discrimination in highlighting instances of ethno-religious discrimination, and will argue that Article 5(d)(vii) of the ICERD should represent the primary legal basis for addressing aggravated discrimination. This provision requires states to prohibit and eliminate racial discrimination in the enjoyment of "the right to freedom of thought, conscience and religion". The aim is to signal the need for a specific movement towards the elimination of "aggravated discrimination," as advocated by the Special Rapporteur in 2000, and suggest the means by which this may be achieved at the international level.

15. *World Conference*, *supra* note 2, at ¶ 8.

II. THE BIRTH OF THE RACE CONVENTION

The movement toward international legislation against racial and religious discrimination began as a response to a growing number of anti-Semitic incidents that took place in the winter of 1959 and 1960, known as the "swastika epidemic."[16] Developing countries supported the creation of international legislation against racial and religious discrimination.[17] As a consequence, the Sub-Commission unanimously adopted a Resolution in the wake of the "swastika epidemic":

> Deeply concerned by the manifestations of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature, which have occurred in various countries, reminiscent of the crimes and outrages committed by Nazis prior to and during the Second World War . . . Condemns these manifestations as violations of principles embodied in the Charter of the United Nations and in the Universal Declaration of Human Rights . . . .[18]

The Resolution also requested the Secretary-General to obtain information and comments on these manifestations from state members of the United Nations. In their responses, many states drew

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16. *See* Howard J. Ehrlich, *The Swastika Epidemic of 1959-1960: Anti-Semitism and Community Characteristics*, 9 SOC. PROBS. 264 (1961-1962) (description of the "swastika epidemic").

> Set off by the apparently symbolic and widely publicised desecration of a synagogue in Cologne, Germany, on Christmas morning of 1959, an unprecedented wave of overt anti-Jewish incidents swept the world. By the following day, swastika paintings, the display of anti-Semitic slogans, and physical attacks on Jewish property had begun in the United States; within one month reports of such episodes had come from approximately 34 countries and almost every major capital city. The unprecedented character of this mass phenomenon resided in the generally isolated and frequently capricious nature of the incidents that occurred.

Id. According to the International Centre for the Study of Anti-Semitism, of the Hebrew University of Jerusalem, "The wave's two principle traits - its universality and its unexpected onset - still have no adequate explanation." Simon Epstein, *Cyclical Patterns in Antisemitism: The Dynamics of Anti-Jewish Violence in Western Countries since the 1950s*, 2 ANALYSIS OF CURRENT TRENDS IN ANTISEMITISM (1993), *available at* http://sicsa.huji.ac.il/2cycles. htm.

17. NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 46 (1991).

18. U.N. Econ. & Soc. Council, Sub-Comm. on the Protection and Promotion of Human Rights, U.N. Doc. E/CN.4/Sub.2/206 (1960).

attention to the outbreak of graffiti and desecration of Jewish cemeteries that had spontaneously erupted in December 1959 and January 1960[19] - no evidence of coordination behind these manifestations ever emerged. The countries affected included Austria, Belgium, Brazil, Canada, Costa Rica, Denmark, Ireland, Italy, New Zealand, Norway, Spain, Sweden, the United Kingdom, the United States and, in particular, Germany.[20]

A convention on the elimination of racial discrimination was proposed, which received widespread support in the course of the debates in the Third Committee of the General Assembly on these "manifestations of racial prejudice and religious intolerance."[21] Leflerova (Czechoslovakia) stated that her delegation was prepared to support and co-sponsor the draft Resolution calling for the preparation of a draft convention and outlined the form such a document should take:

> Such a convention should include a definition of racial hatred and discrimination that included all forms of preaching racial superiority or incitement to racial hatred; an obligation on the contracting states to prevent, within their territories, any manifestation of hatred based on race or colour; an obligation on the contracting States to make the incitement or manifestation of racial hatred a criminal offence; and an obligation on the contracting States to carry out, within a specified time limit, all the legislative, administrative and other measures required for the implementation of the convention.[22]

The Third Committee decided to split the issues of racial and religious discrimination, resulting in two separate Resolutions, 1780 (XVII)[23] and 1781 (XVII).[24] They called for the preparation of draft declarations and conventions dealing separately with racial

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19. *Id.*

20. *Id.* As a result the Federal Government of Germany issued a white paper on 17 February 1960 on manifestations of anti-Semitism, annexed to the Secretary General's Report.

21. U.N. Gen. Assembly, Third Comm., Draft, U.N. Doc. A/C.3/L.1006/Rev. 1 (1962).

22. U.N. Gen. Assembly, Third Comm., Summary, U.N. Doc. A/C.3/SR.1165 (Oct. 29, 1962).

23. Preparation of a Draft Declaration and a Draft Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 1780 (XVII), at 32, U.N. Doc. A/5217 (Dec. 7, 1962).

24. *Id.* at 33.

discrimination and religious intolerance. Both documents were similarly worded,[25] and both called for "[a] draft international convention . . . to be submitted to the Assembly . . . not later than its twentieth session."[26]

The decision to separate religious intolerance from racial discrimination was largely the result of Arab opposition to the inclusion of religious intolerance in a Resolution concerning racial discrimination. They held that an inclusion of a reference to anti-Semitism could be read as recognition of the state of Israel.[27] In addition, Soviet and Eastern European countries viewed racial discrimination as being significantly more important than religious intolerance.[28] With the decision to separate the instruments, it was understood that the draft declaration and convention on racial discrimination would receive priority.

In the Third Committee, Rousseau (Mali) introduced on behalf of several sponsors a draft Resolution on the preparation of a declaration and a covenant on the elimination of religious discrimination.[29] In support of her Resolution, she stated that that her delegation objected to the inclusion of the question of religious intolerance in any convention on racial discrimination.[30] Maamouri (Tunisia) echoed this stance:

> [T]he most important matter before the Committee had been the question of eliminating racial discrimination, which affected a large part of mankind. He therefore welcomed the fact that the questions of racial discrimination and religious intolerance had now been made the subject of separate draft Resolutions . . . he hoped that priority would be given to the preparation of

25. The only difference is in the preamble of General Assembly Resolution 1781, which notes that "the Commission on Human Rights is preparing draft principles in the matter of religious rights and practices." Preparation of a Draft Declaration and a Draft Convention on the Elimination of all Forms of Religious Intolerance, G.A. Res. 1781 (XVII), U.N. Doc. A/5217 (Dec. 7, 1962).

26. G.A. Res. 1780 (XVII), ¶ 2; G.A. Res. 1781 (XVII), ¶ 2.

27. NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 82 (1970).

28. Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 999 (1966).

29. U.N. Gen. Assembly, Third Comm., Draft, A/C.3/L.1016 (1965).

30. U.N. Gen. Assembly, Third Committee, Summary, U.N. Doc. A/C.3/SR.1173 (Nov. 5, 1962). The resolution, as amended verbally, was adopted unanimously.

> the draft declaration and convention on the elimination of racial discrimination.[31]

The 1963 Declaration on the Elimination of All Forms of Racial Discrimination, which contained eleven Articles (but no definition of "racial discrimination"), was proclaimed on 20 November 1963.[32] It was followed by the preparation of a Convention of ten Articles and a preamble by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in January 1964,[33] and submitted to the Commission on Human Rights, who adopted the substantive Articles and dealt with additional documentation.[34] This was in turn submitted to the General Assembly in the form of Resolution 1015B by the Economic and Social Council in July 1964 along with a draft Article on implementation and the text of an additional Article on anti-Semitism proposed by the USA, and shadowed by a sub-amendment submitted by the USSR.[35]

The US representative in the Commission had initially proposed attaching a prohibition on anti-Semitism to Article 3, which condemns racial segregation and apartheid.[36] The proposal was subsequently changed to the form of a separate Article, whereby state parties would "condemn anti-Semitism and . . . take action as appropriate for its speedy eradication in the territories subject to their jurisdiction."[37] The US argued that the Convention would be incomplete if it failed to take cognisance of a planned programme of

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31. *Id.*

32. G.A. Res. 1904 (XVIII), at 35, U.N. Doc. A/5515 (Nov. 20, 1963). The Declaration was adopted in the Third Committee by 89 votes to 0, with 17 abstentions, which were all the result of objections on the basis of the Declaration's conflict with the right to freedom of expression.

33. U.N. Econ. & Soc. Council, Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, U.N. Doc. E/Cn.4/Sub.2/873 (Jan. 1964).

34. U.N. Econ. & Soc. Council, Comm. on Human Rights, *Report on the 20th Session*, U.N. Doc. E/3873 (1964).

35. LERNER, *supra* note 27, at 78.

36. Under article 3 of the Convention, states parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction. The reference to apartheid was directed exclusively to the Government of South Africa, who did not participate in the debate or in any of the roll call votes relating to the Convention, in the Third Committee or in plenary. Schwelb, *supra* note 28, at 1021.

37. U.N. Econ & Soc. Council, Comm. on Human Rights, Draft, U.N. Doc. E/CN.4/L.701 (July 1964) [hereinafter 1964 Draft].

annihilation, which had wiped out a third of the Jews in the world during World War II.[38]

The sub-amendment from the USSR to the Commission read that states parties would condemn "Nazism, including all its new manifestations (neo-Nazism), genocide, anti-Semitism, as also other forms of racial discrimination."[39] Introducing the proposal, the Soviet representative stated:

> [A]ll the members of the Commission agreed that anti-Semitism, in all its manifestations, past and present, was a repugnant form of racial discrimination . . . anti-Semitism was only one of the manifestations of racial discrimination and of the causes of genocide committed by the Nazis. A separate Article on anti-Semitism would, of course, be merely an elaboration of the definition in Article 1.[40]

While there was support within the Commission for the United States amendment, there was a preference for the new Article "to contain a reasonable number of examples of discrimination to its singling out of anti-Semitism only."[41] Rather than attempt a draft Article, the US proposal and USSR amendment were passed to the General Assembly for consideration by its Third Committee in the 1965 session.[42]

However, the Third Committee did not share the broad consensus of the Commission to adopt the US and USSR proposals regarding anti-Semitism and Nazism.[43] In particular, the Arab delegations were dissatisfied with the specific reference to anti-Semitism. Baroody (Saudi Arabia) "objected . . . to the Brazilian and US amendment which would condemn anti-Semitism."[44] The

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38. U.N. Econ. & Soc. Council, Comm. on Human Rights, Summary, U.N. Doc. E/CN.4/SR.807 (July 1964) [hereinafter 1964 Summary].

39. 1964 Draft, *supra* note 37.

40. 1964 Summary, *supra* note 38.

41. U.N. Econ. & Soc. Council, Comm. on Human Rights, Summary, E/CN.4/SR.808 (Lebanon) (July 1964).

42. U.N. Gen. Assembly, Third Comm., U.N. Doc. A/C.3/SR.1301 (1965) [hereinafter 1965 Draft]. In the Third Committee, Brazil joined the United States in proposing the draft article. *Id.*

43. Natan Lerner, *Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, 1 ISRAELI YEARBOOK ON HUMAN RIGHTS 110 (1971) [hereinafter *Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*].

44. 1965 Draft, *supra* note 42.

Hungarian representative, Beck, put forward the belief that anti-Semitism should not be regarded as a form of racial discrimination, stating "as Judaism was primarily a religion, it would be more appropriate to refer to anti-Semitism in the context of the discussion of religious intolerance. . . ."[45]

The main shift came when the Soviet Union moved another amendment to the US-Brazilian proposal, which was considerably different from the text they had proposed in the Commission. The new Soviet amendment, articulated by Chkhikvadze, equated Zionism and colonialism with anti-Semitism, Nazism and neo-Nazism,[46] causing the Israeli representative to describe it as tantamount to substituting the victims for the perpetrators.[47]

Irrespective of the furore generated by the Soviet amendment, the proposed Article on anti-Semitism had not enjoyed broad support in the Third Committee. Delegates expressed the view that the Convention should be a timeless one, applicable without any qualification to every kind of racial discrimination.[48] Most believed that to single out certain forms of racial discrimination to the exclusion of others would be inappropriate.[49] The representative of Ghana noted that "all forms of racial discrimination" would cover anti-Semitism and Nazism,[50] and there was a general consensus that, as expressed by the United Kingdom delegate Lady Gaitskell, anti-Semitism was "a particularly virulent and persistent form of racial discrimination."[51]

A proposal by Greece and Hungary in the Third Committee not to include any reference to specific forms of racial discrimination in the draft Convention was approved by a large majority in a roll-call vote,[52] and the proposed Article on anti-Semitism was excluded. On 21

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45. *Id.*

46. U.N. Gen. Assembly, Third Comm., U.N. Doc. A/C.3/SR.1302 (1965) ("Nazism and fascism were quite as dangerous as apartheid, and Zionism as anti-Semitism . . . Either the draft Convention must confine itself to a general prohibition and condemnation of all forms and manifestations of racial discrimination, or it must enumerate the various forms.").

47. *Id.*

48. U.N. Gen. Assembly, Third Comm., Summary, U.N. Doc. A/C.3/SR.1313 (Miss Hart, New Zealand) (1965).

49. U.N. Gen. Assembly, Third Comm., Summary, U.N. Doc. A/C.3/SR.1311 (Kirwan, Ireland) (1965). Combal (France) "considered it unfortunate that a general text like the one drawn up by the Commission on Human Rights should be complicated by the mention of particular forms of racial discrimination." *Id.*

50. U.N. Gen. Assembly, Third Committee, Summary, U.N. Doc. A/C.3/SR.1313: Lamptey (Ghana) (1965).

51. *Id.* Two years later, UNESCO would mention anti-Semitism as an example of racism in its Statement on Race and Racial Prejudice 1967.

52. U.N. Gen. Assembly, Third Comm., Summary, U.N. Doc. A/C.3/SR.1312 (1965). The proposal passed 82 votes to 12, with 10 abstentions. Lerner notes that as "a result of the

December 1965, the Convention on the Elimination of All Forms of Racial Discrimination was adopted in the General Assembly in plenary session unopposed with 106 votes in favour. Mexico abstained on technical grounds but was not opposed to the principles of the treaty.[53]

III. THE DEATH OF THE RELIGION CONVENTION

In 1962, General Assembly Resolution 1781 (XVII) requested the Economic and Social Council to ask the Commission on Human Rights, bearing in mind the views of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to prepare a draft declaration and convention on the elimination of all forms of religious intolerance.[54] As with the ICERD, the origin of the draft convention on religious intolerance was anti-Semitism.[55]

In 1956, the UN Sub-Commission had appointed a Special Rapporteur, Arcot Krishnaswami (India), to study religious rights. His 1959 report "became an important basis for the many proposals that have since been considered at different United Nations levels."[56] Entitled *Study of Discrimination in the Matter of Religious Rights and Practices*,[57] the report presented an analysis of norms and state practice. The report is described as an "exceptionally comprehensive and constructive work."[58] It was based on eighty-six monographs on religious rights and practices, compiled by Krishnawami with the aid

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vote, the following amendments could not be considered: The Brazil-USA amendment condemning anti-Semitism; the Soviet sub-amendment condemning not only anti-Semitism but also Zionism, Nazism and neo-Nazism; the Bolivian sub-amendment deleting the word 'Zionism' from the Russian amendment, and Polish and Czech amendments, specifying Nazism and fascism." LERNER, *supra* note 27, at 82. He describes the result of "the obvious purely political Soviet manoeuvre" that equated Zionism with Nazism as creating a situation in which "a big majority vote prevented the incorporation of the article on anti-Semitism." *Id.*

53. G.A. Res. 2106A (XX), U.N. Doc. A/PV.1406 (21 December 1965). Mexico abstained from voting on the draft Convention as a whole because it objected to the reservations clause, but it subsequently announced that it was giving its affirmative vote to the Convention.

54. G.A. Res. 1781 (XVII), ¶ 1, U.N. Doc. A/5217 (Dec. 7, 1962).

55. *See Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, *supra* note 43, at 111.

56. Natan Lerner, *Toward a Draft Declaration against Religious Intolerance and Discrimination*, 11 ISRAELI YEARBOOK ON HUMAN RIGHTS 84 (1981) [hereinafter *Toward a Draft Declaration against Religious Intolerance and Discrimination*].

57. A. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1959).

58. Theo van Boven, *Advances and Obstacles in Building Understanding and Respect between Peoples of Diverse Religions and Beliefs*, 13 HUMAN RIGHTS QUARTERLY 438 (1991).

of the UN Secretariat, and is perceived as "the classic work in an extremely delicate and controversial field."[59] Sixteen basic rules were formulated, and draft principles were prepared by the Sub-Commission on the basis of these rules.[60]

A first draft for the Convention was prepared by the Sub-Commission in 1965 titled the International Convention on the Elimination of All Forms of Religious Intolerance.[61] The Commission worked on the draft at its 1965 (XXI), 1966 (XXII) and 1967 (XXIII) sessions.[62] In 1967, the Commission submitted to ECOSOC, for transmission to the General Assembly, a preamble and twelve Articles of a draft Convention. These documents contained additional draft Articles submitted by Jamaica and the Sub-Commission, as well as a preliminary draft on measures of implementation prepared by the Sub-Commission.[63] At its twenty-second session, the General Assembly examined the draft Convention, and the Third Committee adopted the preamble and Article 1.[64] The document that emerged from the twenty-second session included the following express reference to anti-Semitism in its Article V: "prejudices, as, for example, anti-Semitism and other manifestations which lead to religious intolerance and to discrimination on the ground of religion or belief."[65]

The reference remained in the document that emerged from the twenty-third session of the Sub-Commission in Article VI of the draft convention. The reference was a result of a sub-amendment submitted by Chile,[66] which was adopted by a vote of twelve in favor, four against, and three abstentions.[67] A Soviet sub-amendment to expand the provision to include specific reference to "Christian, Moslem, Buddhist, Hindu, Judaic and other religions" was defeated.[68]

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59. *Id.*

60. Sub-Comm. on Prevention of Discrimination and Protection of Minorities, *Draft Principles on Freedom and Non-discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960).

61. U.N. Econ. & Soc. Council, *Draft Convention on the Elimination of All Forms of Religious Intolerance*, U.N. Doc. E/CN.4/882 (Feb. 4, 1965).

62. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 87.

63. *Id.*

64. *Id.*

65. Commission on Human Rights, *Report on the 22nd Session*, U.N. Doc. E/4184 (1966).

66. U.N. Doc. E/CN.4/L.797. Israel had proposed a similar amendment, but withdrew in support of the Chilean sub-amendment.

67. *Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, *supra* note 43, at 113 (citing U.N. Doc, E/4184 ¶ 69).

68. *Id.* at 113 (citing U.N. Doc E/CN.4/L.796). The vote was 12 against 13 with 6 abstentions. *Id.*

According to Lerner, those who defended the inclusion of the specific reference to anti-Semitism considered it "the most typical and blatant phenomenon of religious intolerance and discrimination, and that which had motivated the most ruthless religious persecution of recent times."[69] It was argued that it should occupy the same position as *apartheid* did in the ICERD.[70]

In its 1967 meeting, the Third Committee considered the Commission's draft and decided against a specific reference to anti-Semitism.[71] In Resolution 2295 (XXII), the General Assembly recalled Resolution 1781 and decided "not to mention any specific examples of religious intolerance in the draft International Convention on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief."[72] The debate was similar to the one that took place in the course of the drafting of the ICERD. A proposal by Upper Volta not to mention any specific example of religious intolerance was approved by 87 in favour, 2 against, and 7 abstentions.[73] Lerner observes that "an analysis of the vote shows that the opposition to a reference to anti-Semitism was stronger in the case of the Religious Convention than in the one on Racism."[74]

Thereafter the General Assembly postponed consideration of the convention until 1972, when it decided to accord priority to the completion of a draft declaration.[75] This was the period in which the draft Convention was effectively lost. The period is described as follows:

> Nothing happened in the next four years. In 1972, at its twenty-seventh session, the General Assembly adopted a crucial decision, which accelerated the preparation of a draft Declaration, but caused an

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69. *Id.*

70. Although the Third Committee had taken a decision not to include in the ICERD any reference to specific forms of discrimination, it had retained a particular reference to *apartheid* because "it differed from other forms [of racial discrimination] in that it was the official policy of a State Member of the United Nations." U.N. Doc. A/C.3/SR.1313.

71. *Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, *supra* note 43, at 114.

72. G.A. Res. 2295, U.N. GAOR, 22nd Sess. (Dec. 11, 1967).

73. U.N. Gen. Assembly, Third Comm., U.N. Doc. A/C.3/L.1467 (1967). Israel and the United States opposed the amendment.

74. *Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, *supra* note 43, at 114 n.5. In the debate on the ICERD, the vote was 82 to 12, with 10 abstentions. The hardening of attitudes may be attributable to the Six-Day War of June 1967.

75. U.N. Gen. Assembly, Third Comm., U.N. Doc. A/8730 (1972).

> indefinite postponement of the preparation of a convention. The Assembly decided to accord priority to the completion of the declaration before resuming consideration of the draft Convention.[76]

Commenting on the same period, Clark attributes the lack of progress to a prior decision to concentrate on a convention rather than a declaration stating, "[t]his slow and circuitous progress may be attributed to the illogical decision by the General Assembly in 1967 to give priority to the drafting of the Convention prior to the completion of the Declaration, a decision that was reversed in 1973, when work on the declaration resumed."[77]

Work on the draft declaration in the Commission was slow, and it took from 1974 until 1981 to finally adopt the text.[78] The Commission had established an informal Working Group during each session to oversee the preparation.[79] In 1977, the Working Group adopted a preamble. At its thirty-fifth session in 1979, the Commission adopted the first three draft Articles.[80] It also requested the Secretary General to invite UNESCO to organise a consultation, embracing various established schools of religious thought "on the cultural and religious basis of human rights in relation to the phenomenon of religious intolerance."[81] The UNESCO experts met in Bangkok in December 1979, and their report was put before the Commission in 1980.[82] The Commission decided that work on the draft Declaration should be continued at the next session as a matter of high priority.[83] At its thirty-seventh session the Commission finally adopted the text of a full draft, which was adopted unopposed with 33 votes in favour, and 5 abstentions.[84]

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76. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 87.

77. Clark, *supra* note 1, at 208.

78. Donna Sullivan, *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

79. *Id.*

80. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 88.

81. *Id.* at 84.

82. Meeting of Experts on the Place of Human Rights in Cultural and Religious Traditions organized by UNESCO, U.N. Doc. E/CN.4/1375, 11 (Feb. 1980).

83. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 88.

84. *Id.* at 88 (noting that the ECOSOC resolution was adopted by 45 to 0, with 5 abstentions).

The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted by consensus in 1981,[85] nearly twenty years following the adoption of Resolution 1781 calling for the preparation of a draft declaration and convention on the elimination of all forms of religious intolerance.[86] The document "affords more specific, and therefore more rigorous, protection to the freedom to manifest belief than to the freedom from discrimination."[87] The original title did not mention either "discrimination" or "belief."[88] The change was the result of a proposal submitted in the Third Committee in 1973 by Morocco,[89] in order to bring the title of the Declaration in line with the modified title of the then draft Convention, and with the wording of Article 18 of the Universal Declaration of Human Rights (UDHR).[90]

Articles 2 and 3 of the Declaration prohibit discrimination on grounds of religion or belief, regardless of who is causing it – an individual, a group of persons, an institution or the state. Article 2 follows the wording of Article 1 in ICERD, while Article 3 is similar to Article 1 of the Declaration on the Elimination of All Forms of Racial Discrimination 1963.[91] Lerner notes that the term "discrimination" has a precise international legal meaning, but the term "intolerance" is considerably less precise. He finds that "we are . . . confronted by the difficulties related to the distinction between discrimination and intolerance; the first is a well defined legal concept, and the second a term with evident moral and social implications, but without a precise legal meaning."[92]

In 1983, the Sub-Commission appointed a Special Rapporteur, Elizabeth Odio Benito, to report on the causes and current dimensions of religious intolerance and discrimination on the grounds of religion or belief, and to propose remedial measures.[93] In addition, the Commission on Human Rights mandated a Special Rapporteur in 1986, Angelo Ribeiro, with the task of examining incidents of

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85. G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

86. Preparation of a draft declaration and a draft convention on the elimination of all forms of religious intolerance, G.A. Res. 1781, U.N. Doc. A/5217 (Dec. 7, 1962).

87. Sullivan, *supra* note 78 at 507.

88. U.N. Doc. A/C.3/SR.2012 (1973).

89. *Id.*

90. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 90.

91. *Id.* at 97.

92. *Id.* at 100.

93. U.N. Econ. & Soc. Council, Sub-Comm. on the Protection and Promotion of Human Rights, U.N. Doc. E/CN.4/Sub.2/1983/43 (1983).

religious intolerance and discrimination.[94] Both Rapporteurs recommended reopening the question of drafting a convention on the elimination of all forms of religious intolerance.[95] Ribeiro, the Special Rapporteur for the Commission, recommended that an open-ended working group be established in order to consider the possibility of preparing a convention on religious intolerance.[96] In his final report in 1993, he stated, "States must also continue to seriously envisage the possibility of drafting an international instrument towards the elimination of intolerance and discrimination on the basis of religion or belief."[97] Ribeiro's successor, Abdelfattah Amor, repeated the call in his first annual report in 1994:

> States should also examine the possibility of preparing a binding international instrument on the elimination of intolerance and discrimination based on religion or belief, pursuant to the recommendations made by Mr. Theo van Boven, expert of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Such an instrument should not, however, be hastily drafted.[98]

Subsequent to his first report in 1994, Special Rapporteur Amor did not call for the preparation of a convention in his annual reports. Also, his successor, Asma Jahingir, as Special Rapporteur on freedom of religion or belief,[99] has made no reference to a draft convention. She had the opportunity to do so in her first annual report

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94. U.N. Econ. & Soc. Council, Sub-Comm. on the Protection and Promotion of Human Rights, U.N. Doc. E/CN.4/1986/65 (1986).

95. Sullivan, *supra* note 78, at 489 (citing Ribeiro report, U.N. Doc E/CN.4/1988/45 at 25, 27; Benito report, U.N. Doc. E/CN.4/Sub/2/1987/26 at 52-53, 57).

96. *Id.* at 519 (citing U.N. Doc. E/CN.4/1988/44).

97. Comm. on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief: Report submitted by Angelo Ribeiro, Special Rapporteur, in accordance with Commission on Human Rights Resolution 1986/20*, U.N. Doc. E/CN.4/1993/62, ¶ 89 (1993) ("Les Etats devraient aussi continuer à envisager sérieusement la possibilité d'élaborer un instrument international contraignant relatif à l'élimination de l'intolérance et de la discrimination fondées sur la religion ou la conviction.").

98. Comm. on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief: Report submitted by Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights Resolution 1993/25*, U.N. Doc. E/CN.4/1994/79, ¶ 111 (1994).

99. The name was changed from "Special Rapporteur on Religious Intolerance" to "Special Rapporteur on Freedom of Religion or Belief" as a result of repeated urgings from Abdelfattah Amor to adopt a less combative title.

in 2005, which re-examined the legal framework for her mandate, yet she did not suggest the preparation of a binding convention, and, in fact, did not mention a convention at all.[100] The strong emphasis on existing provisions in the 2005 report, combined with the absence of any call for such an instrument since 1994, would indicate that the issue is no longer seen as forming part of the Special Rapporteur's mandate. Instead, the Special Rapporteur acts as an unofficial monitoring body for the implementation of the 1981 Declaration. "It is to be noted that the Special Rapporteurs appointed since 1986 have been performing the role usually assigned to formal mechanisms incorporated into mandatory treaties."[101] Lerner describes the 1981 Declaration as "an important breakthrough in the prolonged struggle to achieve for religious groups at least some of the protection granted in present human rights law to racial and ethnic groups."[102]

He tempers this statement by highlighting the shortcomings of the document. Also, he notes that the document is "only . . . a declaration, namely a non-binding instrument which only carries with it the moral weight of a United Nations solemn statement . . . [and] a strong expectation that members of the international community will abide by it."[103] He makes the point that it may impede progress on a binding convention stating that "[i]t seems realistic to fear that the adoption of the Declaration will eventually provide those not interested in effective international legislation on this matter with an argument to oppose further pressure for a binding convention."[104]

The comment is made in light of the difficulties experienced in reaching consensus amongst the delegates in the Third Committee. In a later Article, he describes opposition to the final draft as twofold; the communist objections to "the lack of reference to the rights of non-believers"[105] and the Muslim objections to "the question of conversion or change of religion."[106] He considers these difficulties, and the

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100. Comm. on Human Rights, *Civil and Political Rights, Including the Question of Religious Intolerance: Report submitted by Asma Jahingir, Special Rapporteur on Freedom of Religion or Belief,* U.N. Doc. E/CN.4/2005/61, ¶¶ 15-20 (2005).

101. Lerner, *supra* note 9, at 921.

102. *Toward a Draft Declaration against Religious Intolerance and Discrimination, supra* note 56, at 103.

103. *Id.*

104. *Id.*

105. Natan Lerner, *The Final Text of the UN Declaration Against Intolerance and Discrimination based on Religion or Belief,* 12 ISRAEL YEARBOOK ON HUMAN RIGHTS 186-87 (1982) [hereinafter *The Final Text of the UN Declaration Against Intolerance and Discrimination based on Religion or Belief*].

106. *Id.* at 189 (noting that the Declaration ultimately excluded an explicit reference to the right to change one's religion as "the view that prevailed was that a Declaration . . . was

lengthy process in achieving the Declaration in general, a result of "the profound complications existing in the matter of religion, which are absent from the universal condemnation of racial discrimination."[107] Similarly, Drinan attributes the fact that religion has been forsaken by the UN, the "very body that was created to forestall another Holocaust," to the "uncertainty," "volatility," and "complexity" of religious questions.[108]

By contrast, Clark, writing in 1978, expresses the view that poor practice was primarily responsible for the delays in producing a declaration and the failure to draft a convention.[109] Describing the Declaration as being "at a higher level of generality than the convention," he finds that the 1967 decision to proceed with a convention in the absence of a declaration is crucial, noting that "[p]articularly when agreement in theory, to say nothing of state practice, is low, the declaration would be the logical starting point. Its completion would have helped to crystallize any possibly emerging consensus and might then be followed a few years later by a more detailed and enforceable Convention."[110]

In support, he notes "United Nations practice in relation to the Universal Declaration . . . and the ensuing Covenants . . . and the Declaration and subsequent convention on the Elimination of all Forms of Racial Discrimination."[111] This argument would seem to suggest that a convention would inevitably have resulted if the usual procedures had been followed and a declaration would have come much earlier. Nevertheless, Clarke also states that the "slow progress shows rather plainly that there is still no clear consensus on the details of what freedom of religion involves."[112] It may be surmised that even if proper practice had been followed, agreement on a binding convention may never have been reached.

While the difference between religious intolerance and racial discrimination is appreciated, Lerner nevertheless believes that the gap between the level of protection afforded to groups on the basis of race

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needed at this stage, even at the price of silence concerning the right to change one's religion.").

107. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 104.

108. Chon & Arzt, *supra* note 14, at 232 (quoting Robert Drinan, CAN GOD AND CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW 3, 42, and 13 (Yale University Press) (2004)).

109. Clark, *supra* note 1, at 208.

110. *Id.* at 208.

111. *Id.* at 208 n.45.

112. *Id.* at 197.

and that afforded to groups on the basis of religious belief is unjust. The 1981 Declaration is a step towards correcting the imbalance. "It redresses an injustice, partially correcting the double standard which permitted putting so much emphasis on the rights of racial and ethnic groups while disregarding completely the rights of religious groups."[113]

The use of the word "partially" indicates Lerner's belief that, irrespective of existing protections, a draft convention is required if religious discrimination is to be targeted in the same sense at the international level as racial discrimination. Theo van Boven, referred to in Special Rapporteur Amor's 1994 annual report, conducted a study on the possibility of drafting a convention on behalf of the Commission and the Sub-Commission[114] and presented a Working Paper to the Sub-Commission in 1989.[115] He has summarised his findings as follows:

> The question of whether the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief should be implemented by a binding instrument still remains an open issue . . . I advised to approach the matter with caution. I recommended solid preparatory work on the basis of sound research and careful analysis, if it was to be decided to draft such a binding instrument at all. I also pointed out that any drafting process should be accompanied by consultation and dialogue among interested groups, organizations and movements from across a broad sociological and religious spectrum. It is my considered view that the complexity of the subject matter and the potential divisiveness of religious prejudice and intolerance warrant a great deal of diligence and wisdom. In addition, the issue of implementation merits thought and reflection in terms of long-term approaches and solutions.[116]

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113. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 104.

114. *See* U.N. Doc. E/CN.4/1988/88 (1988); *see also* U.N. Doc. E/CN.4/Sub.2/1988/45 (1988).

115. *See* U.N. Doc. E/CN.4/Sub.2/1989/32 at 17-21 (1989).

116. van Boven, *supra* note 58, at 444-45.

The cautionary tone of van Boven's recommendations is underlined by reference to a joint recommendation of the UN treaty-monitoring bodies, which stressed existing legal mechanisms.[117] In their third report to the UN General Assembly on the effective implementation of UN instruments on human rights and functioning of bodies established pursuant to such instruments, issued in 1990, the chairpersons of the treaty bodies stated, "[a]s far as possible and appropriate, the supervision of new human rights treaty obligations should be entrusted to one or other of the existing treaty bodies. Similarly, careful consideration should always be given to the drafting of protocols to existing instruments in preference to entirely new treaties, whenever appropriate."[118]

Van Boven finds that he agrees with this point, and writes:

> I therefore believe that, if a new binding international instrument on freedom of religion or belief is to be drafted, it should take the form of a new protocol to the International Covenant on Civil and Political Rights. Furthermore I think that we should not rush into such an exercise.[119]

The proposition to draft a protocol to the ICCPR on the topic has not garnered further attention. However, the idea that the existing treaty-bodies be employed more fully is relevant, in particular in the area of racial discrimination. In the absence of a specific corpus of rights in the form of a binding convention, religious discrimination has increasingly been deemed to constitute a form of racial discrimination. This is exacerbated by the fact that it is often difficult to "separate the religious elements from 'racial' or 'ethnic' components of group identity."[120]

117. *Id.*
118. *Id.* (quoting U.N. Doc. A/45/636 para. 2 (1990)).
119. *Id.*
120. Sullivan, *supra* note 78, at 508.

IV. RACIAL DISCRIMINATION AND RELIGIOUS INTOLERANCE

A. Special Rapporteur's Report to the Durban Preparatory Conference

In 1999, in preparations for the World Conference against Racism in Durban, the UN Commission on Human Rights issued a Resolution entitled *Racism, Racial Discrimination, Xenophobia, and Related Intolerance.*[121] This Resolution invited the then Special Rapporteur on religious intolerance to participate actively in the preparatory process and in the World Conference by initiating studies on actions to combat incitement to hatred and religious intolerance.[122] In May of 2000, the Preparatory Committee in Geneva examined the report by Special Rapporteur Amor, titled *Racial Discrimination and Religious Discrimination: Identification and Measures.*"[123]

The report set out the Special Rapporteur's belief that "even from a legal viewpoint, racial discrimination and religious discrimination overlap," and sought "a possible legal basis for racial discrimination aggravated by religious discrimination."[124] It is necessary to address this form of discrimination because "it is difficult in some instances to dissociate ethnic aspects from religious aspects."[125] The concept of minority was considered "the cardinal point, or the node where race and religion intersect."[126]

The reach of the concept of aggravated discrimination was clarified by the Special Rapporteur. Many cases of discrimination, in which the person's religion or belief was targeted, must be excluded as being outside the scope of the study.[127] The person concerned must be ethnically different from the majority, or from other minority or ethnic or religious groups, or from other ethnic groups of the same minority to claim that he or she is suffering from aggravated discrimination.[128] There was some discussion on the meaning of the term "minority." and

121. Comm. on Human Rights Resolution 1999/78.

122. *Id.* at ¶ 63(c).

123. *World Conference*, supra note 2, at ¶ 56.

124. *Id.* at ¶ 8.

125. *Id.* at ¶ 29.

126. *Id.* at ¶ 12.

127. *See id.* at ¶ 10 and n.7 ("This kind of discrimination can affect several categories of persons, including individuals, religious groups and religious minorities who are not ethnically different from the rest of the population but who do not belong to, or who state that they do not belong to, the dominant religion.").

128. *Id.* at ¶ 10.

it was noted that the various definitions offered had overlapping elements, including a consensus on the division of the concept of minority into three categories of ethnic, religious or linguistic minorities.[129] These categories are "far from mutually exclusive . . . several religious minorities are at the same time ethnic and/or linguistic minorities."[130] Thus, the interconnection of religion and race is entwined in minority rights protection.

The report points to the 1978 UNESCO Declaration on Race and Racial Prejudice, which "renders the legal bases for prohibiting aggravated discrimination more forcefully."[131] The UNESCO Declaration states in its Article 3:

> Any distinction, exclusion, restriction or preference based on race, colour, ethnic or national origin or religious intolerance motivated by racist considerations, which destroys or compromises the sovereign equality of States and the right of peoples to self-determination, or which limits in an arbitrary or discriminatory manner the right of every human being and group to full development, is incompatible with the requirements of an international order which is just and guarantees respect for human rights.[132]

The language employed by the UNESCO Declaration is interesting because it follows the definition of racial discrimination in Article 1(1) of the ICERD with two changes: the exclusion of the ground "descent," and the inclusion of the ground "religious intolerance."[133] The Declaration is stating that religion is encompassed by the concept of racial discrimination.

The Special Rapporteur contrasts this document with the 1981 UN Declaration on the Elimination of Religious Intolerance and Discrimination which holds in its preamble that "freedom of religion and belief should also contribute...to the elimination . . . of racial

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129. *Id.*

130. *Id.*

131. *Id.* at ¶ 55.

132. Declaration on Race and Racial Prejudice, art. 3, U.N. GCESCO 20th Sess., Nov. 27, 1978, E/CN.4/Sub.2/1982/2/Add.1, annex V (1982).

133. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 1(1), U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014 (Dec. 12, 1965) (defining racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin.").

discrimination."[134] Therefore, with "religion . . . encompassing race," the 1981 UN Declaration is the reverse of the 1978 UNESCO Declaration.[135] Despite this exception, the Special Rapporteur concluded that "discrimination against a person or minority group on religious grounds may be characterized as racial discrimination."[136]

The report audits the international human rights treaties in search of a legal basis for action to counter aggravated discrimination. The concept of aggravated discrimination does not appear explicitly in any of the international treaties. Similarly, none of these instruments claim to protect minorities as such; they seek only to protect individuals belonging to minorities.[137] The Special Rapporteur suggests that this may be the reason why aggravated discrimination is not singled out for special treatment by the human rights treaties.[138] Yet, the intersection between race and religion is raised in a number of contexts. For example the UDHR,[139] the UN Charter,[140] the international covenants of 1966,[141] the Genocide Convention,[142] the Statute of the International Tribunal for the former Yugoslavia,[143] the UNESCO conventions and extra-conventional materials,[144] and the instruments and declarations relating to the elimination of discrimination,[145] are all said to support the concept of aggravated discrimination.[146] In the alternative one can argue that "none of the instruments studies looks unfavourably"[147] on religious intolerance as an aggravated form of racial discrimination.

Allied to the international analysis, the regional mechanisms for the protection of human rights are examined,[148] including the

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134. *World Conference*, *supra* note 2, at ¶ 56.
135. *Id.* at ¶ 58.
136. *Id.*
137. Joel Oestreich, *Liberal Theory and Minority Group Rights*, 21 HUM. RTS. Q. 108 (1999) (noting that "[t]he current international human rights regime is a development of the Western liberal interest in the rights of the individual.").
138. *World Conference*, *supra* note 2, at ¶ 20.
139. *Id.* at ¶ 24.
140. *Id.* at ¶¶ 21-22.
141. *Id.* at ¶¶ 25-38.
142. *Id.* at ¶¶ 40-42.
143. *Id.* at ¶¶ 43-52.
144. *Id.* at ¶¶ 61-64.
145. *Id.* at ¶¶ 53-59.
146. *Id.* at ¶ 20.
147. *Id.*
148. According to Alston and Steiner "[t]he relationship between 'universal' [UN] and regional human rights arrangements is a complex one. In addition to the three major systems [Africa, Americas and Europe] there is a largely dormant Arab system and a proposal for the

Charter of the Organization of African Unity,[149] the Cairo Declaration on Human Rights in Islam,[150] the Arab Charter on Human Rights,[151] the Declaration on the Fundamental Duties of Asian Peoples and States,[152] the American Convention on Human Rights,[153] and the European Convention on Human Rights and Framework Convention for the Protection of National Minorities.[154] The regional legal systems are said to be widely divergent, and the report warns that "the development of [racial and religious] conflicts or tension is certainly not in proportion to the actual or potential intensity of separate or aggravated forms of discrimination."[155] None of the regional systems contain a reference to race and religion combined, as an aggravated form of discrimination.

Although the absence of explicit references is noted, the report is optimistic on the possibility that both international and regional instruments may be interpreted to provide a legal basis for the elimination of aggravated discrimination.[156] This renders the identification of the existence of aggravated discrimination the next step. The Report suggests a number of situations in which aggravated discrimination could be said to be taking place and groups aggravated discrimination into two categories.

The first is discrimination involving a majority and one or more ethnic and religious minorities.[157] The following states are identified in this regard: India,[158] Bangladesh,[159] Sri Lanka,[160]

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creation of an Asian regional system." P. ALSTON AND H. STEINER, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 780 (2000).

> For a long time, regionalism in the matter of human rights was not popular at the United Nations; there was often a tendency to regard it as the expression of a breakaway movement, calling the universality of human rights into question. However . . . [the UN is] less suspicious (less jealous, some would say) towards regionalism in human rights, especially after the adoption of the Covenants in 1966.

Id. (quoting K. Vasak and P. Alston).

149. *World Conference*, *supra* note 2, at ¶ 66.

150. *Id.* at ¶ 67.

151. *Id.* at ¶ 68.

152. *Id.* at ¶ 69.

153. *Id.* at 70.

154. *Id.* at ¶ 71.

155. *Id.* at ¶ 65.

156. *Id.* at ¶ 128.

157. *Id.* at ¶ 86.

158. *See id.* at ¶ 87. Relations between Hindus and Muslims involve "the exploitation of religion to further a programme which is in fact political." *Id.* The particular situation of the Muslims in Kashmir is cited. *Id.*

159. *Id.* at ¶ 88. "Ethnic and religious minorities...are allegedly the victims of acts of intolerance committed by Muslim extremists." *Id.*

Mongolia,[161] Iran,[162] Turkey,[163] Greece,[164] Sudan,[165] Thailand,[166] Viet Nam,[167] Indonesia,[168] Australia,[169] United States of America,[170] Israel[171] and Afghanistan.[172] This category also includes discrimination involving a majority and ethnic and religious groups not defined as a minority.[173] Included in this grouping would be: North African or Arab nationals or nationals of North African origin in western Europe and the United States and Turkish nationals or those of Turkish origin in Germany and Austria; discrimination against Palestinians in Israel and the Occupied Palestinian Territories; discrimination against Muslims in the United Kingdom; hate crimes against Jews in the United States; "Islamophobia" in the United States; and discrimination in Arab

160. *Id.* at ¶ 89. "Evangelical Christians are...often subjected to manifestations of hostility, discrimination and violence." *Id.*

161. *Id.* at ¶ 90. "A law passed on 30 November 1993 is said to contravene freedom of religion and the principle of non-discrimination . . . whereby foreign and national Christians...are subjected to many instances of discrimination." *Id.*

162. *Id.* at ¶ 91. "The Jewish, Assyro-Chaldean and Armenian minorities – who define themselves as specific religious and ethnic minorities – are allegedly the victims of restrictions and discrimination in access to the [judiciary, army, and treatment in the courts]." *Id.*

163. *Id.* at ¶ 92. "Assyro-Chaldeans, [for example] are regularly subjected to violence and discrimination." *Id.*

164. *Id.* at ¶ 93. "The Muslim minority in Thrace is said to be hostage to political relations between Greece and Turkey, and is [reportedly] subjected to visible and latent forms of intolerance." *Id.*

165. *Id.* at ¶ 94. "The policy of forced Islamization, [application of Sharia law] and institutional extremism is said to have led to serious violations of the rights of persons belonging to Christian ethnic minorities. . . . [C]riminal legislation appears to discriminate against non-Muslims, who are ethnically different from the majority of the Sudanese people." *Id.*

166. *Id.* at ¶ 95. The special rapporteur pointed out in the 1998 annual report discrimination in favour of the Buddhist religion in textbooks in state schools. *Id.*

167. *Id.* at ¶ 96. The Constitution is an example of "a largely explicit overlapping of racial and the religious dimensions." *Id.*

168. *Id.* at ¶ 97. "The ethnic-Chinese Indonesian minority, made up mostly of Christians, was the victim of a wave of violence, vandalism" and killings during riots in 1998. *Id.*

169. *Id.* at ¶ 98. Aborigines and Australians of Asian origin are sometimes subjected to discrimination concerning, *inter alia*, the criminal justice system. *Id.*

170. *Id.* at ¶ 100. The report notes that "Native Americans are exposed to discrimination that affects them as a group differing from the majority in both ethnic and religious terms. Indeed, the Native Americans are without doubt the community facing the most problematical situation, one inherited from a past denial of their religious identity." The report also highlights the Lubicon v. Canada case before the Human Rights Committee as an example of the past denial of religious identity of Native Americans under article 18 ICCPR. *Id.* at ¶ 99.

171. *Id.* at ¶ 101. "Jews of Ethiopian origin . . . are allegedly subject to frequent discrimination." *Id.*

172. *Id.* at ¶ 102. The conflict in Afghanistan has "resulted in extensive human suffering and forced displacement, including on the grounds of ethnicity, and . . . widespread violations and abuses of human rights, including the right to freedom of religion." *Id.*

173. *Id.* at ¶ 102.

countries against Christians from Western countries.[174] Discrimination and intolerance in the Arab countries of the Gulf directed against foreign nationals whose religion is not sanctioned by the Koran, such as Hindus, Sikhs, and Buddhists, is also singled out as an instance of aggravated discrimination.[175] This would apply in particular to migrant workers.[176]

The second category involves persons belonging to different ethnic and religious minorities and groups where there is not, strictly speaking, a majority.[177] Examples include: Kenya,[178] Ghana,[179] Malaysia[180] and Rwanda.[181] A number of other conflicts between ethnic and religious minorities are cited in the Report.[182] Furthermore, "ethno-centric" nationalist movements are noted, including those in the Balkans, where the collapse of the state gave rise to micro-states that have been "incapable of overcoming the ethnic and religious rivalries between the constituent nations or peoples and other nations and minorities. In these countries there is an ethnic dimension to religion, and religion may even become a nationality."[183]

The categorisation of instances of aggravated discrimination leads to a number of comments of a general nature. Primarily, "it is very difficult to distinguish between religious and racial or ethnic discrimination or intolerance," for "religion shares something of the definition of ethnicity, just as ethnicity is basic to religious identity."[184] The former Special Rapporteur on religious intolerance, Odio Benito, expressed a similar sentiment when she stated that "there does not seem to be any discrimination that is purely and exclusively

174. *Id.* at ¶ 104.

175. *Id.*

176. *Id.* For a recent report by the Human Rights Watch on the appalling treatment and discrimination suffered by migrant workers in the United Arab Emirates, see *Exploitation of Migrant Construction Workers in the United Arab Emirates*, Nov. 2006, available at http://hrw.org/reports/2006/uae1106/.

177. *World Conference*, *supra* note 2, at ¶ 111.

178. *Id.* at ¶ 112 (a). "In Kenya . . . inter-ethnic conflicts between the Masai . . . and the Kikuyu . . . reportedly resulted in massacres and the destruction of Catholic . . . churches." *Id.*

179. *Id.* at ¶ 112 (b). In Ghana, clashes involving members of the Dagomba and Nunumba ethnic groups and the Konkomba have resulted in Catholic churches being attacked, "with Islamized Dagombas suspecting the Catholics of helping the Konkombas." *Id.*

180. *Id.* at ¶ 112 (d). In some states, although Muslims are in a minority, there is still discrimination by the authorities affecting Christians in particular. *Id.*

181. *Id.* at ¶ 112 (e). The Special rapporteur's categorisation may not be fully accurate here; Rwanda has a clear Hutu majority. *Id.*

182. *Id.* at ¶¶ 112-14.

183. *Id.* at ¶ 115 (internal quotation marks omitted).

184. *Id.* at ¶ 122, cmt. 3.

religious."[185] The observation is underlined by the fact that "extremist movements tend to confirm and disseminate, with a good deal of success, an association between the religion or ethnicity of the other."[186] This association can "imperil the human right to peace."[187] As a result, a "special strategy" is needed to address both the causes and effects of aggravated discrimination.[188]

On the question of a legal basis for action against aggravated discrimination, the Special Rapporteur concludes:

> none of the instruments studied contain any special provisions establishing a specific legal regime or special treatment covering acts of aggravated discrimination, particularly those that affect minorities . . . . [Nevertheless] there is a body of sufficiently well-established rules . . . which suggests an openness to theoretical acceptance of a right to freedom from aggravated discrimination.[189]

The universal instruments address the issue of racial and religious discrimination in depth, and the overlap between racial and religious discrimination "is not merely imagined."[190] The study of the facts shows that no region in the world, and no religion, is immune to aggravated discrimination.[191] Subsequently, the current applicability of the human rights instruments to aggravated discrimination must be questioned:

> The instruments studied would appear, therefore to be out of phase with reality. At any rate, they do not appear to accept the full consequences of their own recognition of the links between race and religion . . . . The right to freedom from aggravated discrimination is therefore integral to international human rights

185. ELIZABETH ODIO-BENITO, ELIMINATION OF ALL FORMS OF INTOLERANCE AND DISCRIMINATION BASED ON RELIGION OR BELIEF, ¶ 187, U.N. Sales No. E.89.XIV.3 (1989); *World Conference*, *supra* note 2, at ¶ 123.

186. *Id.* at ¶ 125. Thus "Arabs or North Africans are frequently equated with Islamists, terrorists or fanatics. Likewise, Jews become Zionists or are blamed for all the world's ills. The Christian is automatically White and a colonialist . . . ." *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at ¶¶ 127 & 128.

190. *Id.* at ¶ 128.

191. *Id.* at ¶¶ 128-30.

> protection . . . . Aggravated discrimination deserves special, or even priority, attention.[192]

The Special Rapporteur proposes a number of practical steps that can be taken at the international level within the existing frameworks, beginning with "the adoption of a Resolution dealing specifically with aggravated discrimination."[193] This could be supplemented with provisions from model legislation for the guidance of states in enacting domestic legislation in the area of aggravated discrimination.[194] Such model legislation has already been achieved in the area of racial discrimination,[195] a process which should be extended to aggravated discrimination. He calls for "prioritizing the consideration of cases of discrimination by the various human rights bodies and organisations," and "systematic exchange of information and joint action by Special Rapporteurs."[196] It was not until 2006 that joint action by the two relevant Special Rapporteurs resulted in the issuing of a report on incitement to racial and religious hatred.[197]

B. Joint Report of the Special Rapporteur on Racism and the Special Rapporteur on Religion to the Human Rights Council

At its 24th meeting in June of 2006, the Human Rights Council, taking into account the statements made during its first session expressing deep concern over the increasing trend of defamation of religions, incitement to racial and religious hatred and their recent manifestations, decided to request the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to report to its next session on this phenomenon.[198] The report, entitled *Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, was submitted to the second session of the

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192. *Id.* at ¶ 131.
193. *Id.* at ¶ 134.
194. *Id.* at ¶ 141.
195. Model legislation on racial discrimination was prepared in response to the call by the General Assembly in its resolution 40/22. G.A. Res. 40/22, 96th plen. mtg. at 195, U.N. Doc. A/Res/40/22 (Nov. 29, 1985).
196. *World Conference*, *supra* note 2, at ¶¶ 135-36.
197. General Assembly [GAOR], Human Rights Council, *Report of the Human Rights Council*, pt. I ch. II (B), U.N. Doc A/61/53 (2006).
198. *See id.*

Council in September 2006.[199] The positions taken by the Special Rapporteur on religion, Asma Jahangir, and the Special Rapporteur on racism, Doudou Diène, were decidedly different. While the remit of the report was narrower than the elimination of discrimination, covering only the contemporary questions raised by the issue of incitement (e.g. the controversy surrounding the "Danish cartoons"), it represents an important document because it fuses the questions of racial discrimination and religious intolerance. For the Special Rapporteur on racism "the increasing trend in defamation of religions cannot be dissociated from . . . the ominous trends of racism, racial discrimination, xenophobia and related intolerance which in turn fuel and promote racial and religious hatred."[200]

This position had been set out by Diène in his previous annual report, which had a section on the cartoons of the Prophet Muhammad published in a Danish newspaper. In that report, he had noted, "these newspapers intransigent defence of unlimited freedom of expression is out of step with international norms that seek an appropriate balance between freedom of expression and religious freedom, specifically the prohibition of incitement to religious and racial hatred."[201]

Diène had also produced a report on *Defamation of Religions and Global Efforts to Combat Racism: Anti-Semitism, Christianophobia and Islamophobia* for the Commission on Human Rights in 2005. That report stated, "The Special rapporteur invites the Commission, in measures to combat racism and discrimination, to take greater account than in the past of two developments: the increasing

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199. General Assembly [GAOR], Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, U.N. Doc A/HRC/2/3 (2006) (*prepared by* Asma Jahangir) [hereinafter *Implementation*].

200. *Id.*

201. Economic and Social Council [ESCOR], Comm'n on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶¶ 28, 30, U.N. Doc. E/CN.4/2006/17 (Feb. 13, 2006) (*prepared by* Doudou Diène) (internal quotation marks omitted). The absence of criminal proceedings in Denmark against the relevant newspapers was noted in a tone that suggests condemnation of the impunity offered to the editors.

> As regards the legal position, it was reported that one person had been charged in connection with death threats received by the newspaper's receptionist on 30 September, and the police were making inquiries regarding four threats received by telephone and e-mail following the publication of the cartoons. Meanwhile, the regional public prosecutor decided to discontinue his investigation of a complaint against *Jyllands-Posten* filed by certain private associations, on the grounds that there was no "reasonable suspicion that a criminal offence indictable by the State has been committed.

Id.

intertwining of race, ethnicity, culture and religion and, in this context, the rise of anti-Semitism, Christianophobia and Islamophobia."[202]

Similarly, Diène's submission to the Human Rights Council draws attention to "the amalgamation of the factors of race, culture and religion."[203] In particular, the combat against terrorism was cited as a major contributor to the increased levels of racial discrimination and religious intolerance, and the marginalization of the Durban Declaration and Programme of Action.[204] One result is that governments, political leaders, intellectuals and the media "have flagged and radically set against each other freedom of expression and freedom of religion."[205] Citing racism and xenophobia, rather than terrorism, as "the most serious threats to democracy",[206] Diène notes "the centrality of the amalgamation of the factors of race, culture and religion in the post-9/11 ideological atmosphere of intolerance and polarization."[207]

By contrast, the Special Rapporteur on religious intolerance, Jahangir, took a far more muted approach to the issue of defamation of religion. She held that "criminalizing defamation of religion can be counterproductive,"[208] and criticised the fact that in a number of states, defamation of religion constituted a criminal offence.[209] Expressions should only be prohibited, she urges, "if they represent incitement to imminent acts of violence or discrimination against a specific individual or group."[210] On the link between religion and race, she states:

> The Special rapporteur cautions against confusion between a racist statement and an act of defamation of religion. The elements that constitute a racist statement are not the same as those that constitute a statement defaming a religion. To this extent, the legal measures, and in particular the criminal measures, adopted by national legal systems to fight racism may

202. Economic and Social Council [ESCOR], Comm'n on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination,* ¶ 66, U.N. Doc. E/CN.4/2005/18/Add.4 (Dec. 13, 2004) (*prepared by* Doudou Diène).

203. *Implementation*, *supra* note 199, at ¶ 7.

204. *Id.*

205. *Id.* at ¶ 8.

206. *Id.* at ¶ 14.

207. *Id.* at ¶ 21.

208. *Id.* at ¶ 42.

209. *Id.*

210. *Id.* at ¶ 47.

> not necessarily be applicable to defamation of religion.[211]

The statement is made in the context of the debate on freedom of expression, and is not a more general criticism of treating religious intolerance under the rubric of racial discrimination. Nevertheless there is clearly a sentiment on the part of Jahingir that the concepts should be separate, at least in relation to religious defamation. The report commissioned by the Council was required to examine the issue under Article 20(2) ICCPR, which provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[212] Jahinger writes that the threshold of acts committed under Article 20(2) "is relatively high," and points out the link that has been made between Article 20(2) and Article 4 ICERD, on the prohibition of racist propaganda.[213] However the 1981 UN Declaration contains no provision similar to that in Article 4 ICERD.[214] Therefore Jahingir concludes that defamation of religion should not be considered a racist statement, and should not invoke Article 20(2) without concurrent incitement to violence.[215]

The Report's conclusion appears as a synthesis of the contrasting views of the Special Rapporteurs. Its final paragraph states that "[m]ember States should avoid stubbornly clinging to free speech in defiance of the sensitivities existing in a society with absolute disregard for religious feelings, nor suffocating criticism of a religion by making it punishable by law."[216] The final line supports the conclusion of Jahingir, however, and cautions: "The situation will not be remedied by preventing ideas about religion from being expressed."[217] The common ground between racial discrimination and religious intolerance is not further elaborated, although the conclusions do call for the adoption of "complimentary standards on the interrelations between freedom of expression, freedom of religion and

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211. *Id.* at ¶ 49.

212. On the drafting history and reach of article 20 ICCPR see Michael Kearney, *The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights*, 23 NETH. Q. OF HUMAN RTS. 4, 551-70 (2005).

213. *Implementation*, *supra* note 199, at ¶ 48.

214. *Id.* at ¶ 49.

215. *Id.* at ¶¶ 47-49.

216. *Id.* at ¶ 66.

217. *Id.*

non-discrimination, in particular by drafting a general comment on Article 20."[218]

V. THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The *travaux préparatoires* to the ICERD reveal that the prohibition on racial discrimination at the international level includes discrimination on the basis of religion. There is a specific reference to this in the contributory documentation to the ICERD. The Declaration on the Elimination of Racial Discrimination 1963 states explicitly in its Article 3(1) that "[p]articular efforts shall be made to prevent discrimination on the basis of race . . . especially in the fields of . . . religion."[219]

Nevertheless, the definition of racial discrimination in Article 1(1) of the 1965 ICERD forbids distinctions, exclusions, restrictions or preferences on the basis only of "race, colour, descent and national or ethnic origin."[220] Therefore, religion does not obviously fall within its ambit. Article 5(d)(vii) of the Convention clarifies the scope of the instrument in this regard, and requires states to prohibit and eliminate racial discrimination in the enjoyment of "the right to freedom of thought, conscience and religion."[221] According to Special Rapporteur Amor's report, this provision means that "racial, in the sense of ethnic matters, fully encompass the religious aspect."[222]

In the early days of the Committee, there was debate on whether the Convention covered religious discrimination. A 1984 case involving Norway led to some discussion on the topic in the Committee. The Norwegian Supreme Court had assessed a conviction of a defendant for distributing leaflets vilifying Islam as well as a Norwegian immigration policy regarding Islamic foreign workers and Islamic immigrants.[223] According to CERD's report, the author of the

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218. *Id.* at ¶ 61. In fact, there is a General Comment on article 20. *See* International Human Rights Instruments, July 29, 1994, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* gen. cmt. 11, art. 20, U.N. Doc. HRI\GEN\1\Rev.1.(stating that "paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.").

219. G.A. Res. 1904 (XVIII), art. 3, U.N. Doc. A/5515 (Nov. 20, 1963).

220. *World Conference*, *supra* note 2, at ¶ 55.

221. *Id.*

222. *Id.*

223. Sullivan, *supra* note 78, at 508-09 (citing CERD/C/107/Add.4 at 14) (1984)).

leaflets "had treated the religious beliefs of the immigrants as the hallmark of their racial and ethnic identity and had explicitly invoked racial categories and racist attitudes."[224]

In the discussion on the judgment, members of CERD asked whether Article 1 of the Convention applies to religious discrimination. According to Sullivan, "[s]ome members believed attacks on identifiable ethnic or national groups would breach the Convention but attacks on a specific religion would not. Others disagreed, stating that good grounds could be found for extending the convention to cover attacks against religion."[225]

The first Special Rapporteur on religious intolerance for the Commission on Human Rights, Angelo Ribeiro, recommended in his 1988 annual report that the procedures established by CERD be used to monitor the implementation of international standards on the elimination of religious intolerance and discrimination.[226] Although CERD has made no express statement that religious discrimination forms part of its remit, there is conclusive evidence from the reporting procedure that this approach has been adopted. Furthermore, references to the common ground between race and religion have been made. In particular, the Committee's concluding observations to Nigeria's state report, issued in 2005, highlight the link between race and religion, and the willingness on the part of CERD to address instances of religious intolerance.[227] The Committee noted that "[i]n the light of the 'intersectionality' of ethnic and religious discrimination, the Committee remains concerned that members of ethnic communities of the Muslim faith, in particular, Muslim women, can be subjected to harsher sentences than other Nigerians."[228]

Another passage expressed deep concern about numerous reports of ill treatment, use of excessive force and extrajudicial killings in Nigeria as well as arbitrary arrests and detentions by law enforcement officials in attempts to quell incidents of "intercommunal, inter ethnic and interreligious violence."[229] The Committee recommended that the State party carefully monitor the negative impact of its efforts to promote national unity through regional and

224. *Id.* at 508-09 (quoting CERD/C/107/Add.4 at 20-21 (1984)).

225. *Id.* at 509 (citing U.N. Doc. A/39/18 (1984)).

226. *Id.* at 509 (citing Ribeiro report, U.N. Doc.E/CN.4/1988/45 at 28).

227. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 20, U.N. Doc. CERD/C/NGA/CO/18 (Aug. 19, 2005) [hereinafter *Consideration of Reports*].

228. *Id.*

229. *Id.* at ¶ 16.

state action and, in particular, "the effects on relations between and among ethno-religious groups."[230]

In its concluding observations to Turkmenistan's first report, the Committee referred to Article 5(d) of the Convention:

> [W]hile stressing the complex relationship between ethnicity and religion in Turkmenistan, [the Committee] notes with concern information that members of religious groups do not fully enjoy their rights to freedom of religion and that some religious confessions remain unregistered . . . . The Committee recalls the State party's obligation to ensure that all persons enjoy their right to freedom of religion, without any discrimination based on national or ethnic origin, in accordance with Article 5(d) of the Convention.[231]

In the examination of Ireland's report, it was noted:

> The Committee, recognizing the "intersectionality" of racial and religious discrimination, encourages the State party to promote the establishment of non-denominational or multidenominational schools and to amend the existing legislative framework so that no discrimination may take place as far as the admission of pupils (of all religions) to schools is concerned.[232]

Ghana's state report of 2002 described how religious intolerance could be considered a form of indirect racial discrimination:

> The protection granted against racial discrimination under chapter 5 of the Constitution, and enforced by the CHRAJ [Commission on Human Rights and Administrative Justice] under chapter 18 of

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230. *Consideration of Reports*, *supra* note 227, at ¶ 14.

231. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 17, U.N. Doc. CERD/C/TKM/CO/5 (Nov. 1, 2005).

232. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 18, U.N. Doc. CERD/C/IRL/CO/2 (Apr. 14, 2005).

> the Constitution, has been exercised in practice numerous times . . . . While detailed statistics relating to these cases are not available, fewer than five related directly to racial discrimination. The majority of the complaints of discrimination received were cases of religious discrimination which, because religion in Ghana is often related to ethnicity, could be classified indirectly, in some cases, as racial discrimination.[233]

In an illuminating passage in its consideration of Georgia's report, the Committee clarified:

> Religious questions are of relevance to the Committee when they are linked with issues of ethnicity and racial discrimination. In this connection, and while acknowledging the effort made by the State party to fight ethno-religious violence, the Committee remains concerned about the situation of ethno religious minorities, such as the Yezidi Kurds (art. 5).[234]

The Committee recommended that Georgia include detailed information in its next periodic report on "the situation of ethno-religious minorities," and in particular that it "adopt a bill on freedom of conscience and religion designed to protect those minorities against discrimination, and . . . acts of violence."[235] The observation was repeated when the Committee examined Tanzania's report, but the phrasing was more general:

> Religious questions are of relevance to the Committee when they are linked with ethnicity and

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233. Comm. on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the* Convention, ¶ 127, U.N. Doc. CERD/C/431/Add.3 (Oct. 1, 2002). CERD's concluding observations to Ghana's report repeated this paragraph, and called for "more detailed information" on the matter; Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶16, U.N. Doc. CERD/C/62/CO/4 (June 2, 2003).

234. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 18, U.N. Doc. CERD/C/GEO/CO/3 (Nov. 1, 2005) [hereinafter *Committee Consideration*].

235. *Committee Consideration*, *supra* note 234, at ¶ 18. Georgia's report bracketed religion as being racial in one passage, which states: "Such matters are resolved...regardless of origin, religion or other racial considerations." Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 98, U.N. Doc. CERD/C/461/Add.1 (Oct. 8, 2004).

> racial discrimination. In this connection, the Committee is concerned about the lack of information on the ethno-religious composition of the State party's population and about allegations of tensions between ethno-religious groups (arts. 5 and 7). The Committee recommends that the State party include detailed information in its next periodic report on the situation of ethno-religious communities and the measures taken to promote tolerance between them.[236]

The Tanzanian example shows that CERD is inquiring into ethno-religious discrimination as a matter of course. Yet religion does not form part of any of the Committee's interpretative General Comments. In the 1999 General Comment XXIV, the Committee sets out its reporting requirements, including that:

> the Convention relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples. If the Committee is to secure the proper consideration of the periodic reports of states parties, it is essential that states parties provide as far as possible the Committee with information on the presence within their territory of such groups.[237]

The absence of a reference to religious groups is striking.

Furthermore, state obligations under Article 5(d)(vii) do not extend to granting and monitoring freedom of thought, conscience and religion.[238] General Recommendation XX on implementation of the Convention stresses that Article 5 does not of itself create civil, political, economic and social rights but obliges states to prohibit and

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236. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 20, U.N. Doc. CERD/C/TZA/CO/16 (Nov. 1, 2005).

237. General Assembly [GAOR], *Report of the Committee on the Elimination of Racial Discrimination,* Annex V, U.N. Doc. A/54/18 (1999).

238. Kevin Boyle & Annaliese Baldaccini, *International Human Rights Approaches to Racism, in* DISCRIMINATION AND HUMAN RIGHTS, 153 (Fredman ed. 2001) The obligations of the states parties appear not to refer to the granting of these rights, but only to admitting no racial discrimination in their enjoyment to the extent that they were guaranteed in the domestic law of the states parties. *See id.*

to eliminate racial discrimination in the enjoyment of such human rights.[239] Paragraph 2 holds:

> Whenever a state imposes a restriction upon one of the rights listed in Article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with Article 1 of the Convention as an integral part of international human rights standards.[240]

The Committee can examine whether a restriction on an Article 5 right may have an adverse effect on ethnic groups through the state reporting procedure. The Committee "assumes the existence and recognition of these rights."[241] The Article 5 obligations in relation to religious intolerance must, however, be construed narrowly, and apply only when an infringement on religious freedom has an ethnic component. Thus, CERD is not concerned with religious groups *per se*. There must also be distinctions of ethnicity.

The aggravated meeting point of race and religion, so comprehensively described by the Special Rapporteur to the Preparatory Committee in Geneva, is primarily CERD's domain. From a legal point of view, Article 5(d)(vii) is not concerned with religious discrimination but with ethno-religious discrimination. The lack of an interpretative statement requiring states to report on ethno-religious groups within their territory could severely restrict CERD's ability to effectively guarantee protection under Article 5(d)(vii). A General Comment on the topic is essential, to stress the fundamental importance of the Committee in this sphere.

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239. In 1973, the Committee had attempted to examine the meaning and scope of article 5, which resulted in three views in its report to the General Assembly, none of which prevailed. See *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 28th Sess., 2201st plen. mtg., (Dec. 14, 1973), and Karl Josef Partsch, *Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights: A Study of Article 5, subparagraphs (a) to (d), of the International Convention on the Elimination of All Forms of Racial Discrimination*, 14 TEX. INT'L L.J. 191 (1979).

240. General Assembly [GAOR], *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/51/18 (Mar. 1996) [Hereinafter *Report of the Committee*].

241. *Id.* at ¶ 1.

VI. CONCLUSION

In an admonishment of the failure to pursue a binding "religion convention," Jack expresses his refusal to accept that the matter is closed:

> A few observers, and this author is one, will not admit defeat, even if they hardly feel ebullient about the project. They detect a failure of nerve, if not a self-defeating prophecy, in both some NGOs and some Western participants. Have non-governmental organisations really worked hard enough to acquaint public opinion, and ultimately governments, about the necessity of this instrument? It is one thing to bemoan Soviet delaying tactics and even Third World indifference; it is quite another to counter both with aggressive but diplomatic pressures.[242]

The project may be beyond hard work and aggressive diplomatic pressure. The majority of commentators would appear to agree with Davis that "a convention would be premature at this time . . . so many differences still exist among major religious traditions that it is too early to force anyone's hand toward universalising certain human rights."[243]

Given the grave threat posed by religious discrimination, it is of concern that "the existing architecture of domestic and international anti-discrimination law has avoided recognizing racial discrimination based on religious group difference."[244] The lack of a convention on the elimination of religious intolerance is a major gap in the international corpus of rights. The role of anti-Semitism in the enactment of the ICERD should not be overlooked. Anti-Semitism is a form of religious and racial discrimination.[245] It was the specific motivation for international legislation in the area, and yet there is no

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242. H. Jack, *58 Words, Two Commas: Snail-like Motion toward a UN Declaration for Religious Freedom, reprinted in* WORLD WITHOUT WAR COUNCIL, INTERNATIONAL HUMAN RIGHTS KIT 6 (1977), quoted in Roger Clarke, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197, 221.

243. Davis, *supra* note 3, at 231.

244. Chon & Arzt, *supra* note 14, at 216.

245. *See Anti-Semitism as Racial and Religious Discrimination under United Nations Conventions*, *supra* note 43, at 103-04.

binding instrument on religious discrimination; "the omitted cause-effect relation should be kept in mind now."[246] To some extent, it can be argued that the failure to enact binding legislation in the area of religious discrimination is due to an historical unwillingness on the part of some states to emphasise the problem of anti-Semitism:

> The proposal to prepare two "twin", although separate, sets of instruments – on racial discrimination on the one hand, and on religious intolerance, on the other – was a compromise, the practical purpose of which was to overcome the opposition to a joint instrument that came mainly from two quarters: the Communist States, not too eager to deal with religious intolerance . . . and the Arab countries, anxious to avoid too clear a focus on anti-Semitism.[247]

This gives added impetus to the role of CERD in the aggravated meeting point between race and religion, a view that has been upheld by the Committee in its response to recent reports. This has not included use of the phrase "aggravated discrimination," which the Special Rapporteur employed to describe the meeting ground of racial and religious discrimination.[248] The link ought to be explicitly made:

> Religion is a component missing from racial anti-discrimination theory and doctrine for reasons that have little to do with the absence of actual discriminatory action based on religion. If anything, the war on terror has heightened the need for legal shields against religious discrimination as an aspect of racial discrimination.[249]

It is submitted that if CERD were to issue a General Comment on aggravated discrimination, it would galvanise the United Nations treaty-based and charter-based bodies. The process could be conducted in a similar manner to previous interpretative statements in which a

246. *Toward a Draft Declaration against Religious Intolerance and Discrimination*, *supra* note 56, at 85.

247. *Id.*

248. *World Conference*, *supra* note 2, at ¶¶ 8-10.

249. Chon & Arzt, *supra* note 14, at 237.

wide range of governmental and non-governmental bodies and organisations were invited to participate in a "thematic discussion."[250] Furthermore, it served to focus the international bodies, with the result that a coherent approach to tackling the highlighted issue emerged. A General Comment would provide guidance to reporting states, requiring that they investigate instances of aggravated discrimination on their territories. Such a document would also promote coordination between the Special Rapporteur on racism and the Special Rapporteur on religion on the question. It is certainly time within international human rights law to recognise and address the existence and growth of aggravated discrimination.

250. The first "thematic discussion" on the Roma resulted in General Recommendation XXVII, *On Discrimination Against Roma,* 1424th mtg., 57th Sess. (Aug. 16, 2000). The success of the process is illustrated by the fact that CERD has since embarked on two more; on descent, resulting in General Recommendation XXIX, *On Art. 1, Paragraph 1 of the Convention*, 61st Sess. (2002), and, most recently, on non-citizens, resulting in General Recommendation XXX, *Discrimination Against Non Citizens* (Jan. 10, 2004).