

Chapter 4

EXTERNAL MONITORING AND THE INTERNATIONAL PROTECTION OF FREEDOM OF RELIGION OR BELIEF

Peter G. Danchin

I. INTRODUCTION

The origins of the concept of freedom of thought, conscience, and religion can be traced back to ancient sources, both legal and theological.¹ As early as the thirteenth century, Aquinas argued that it was a duty of governments to uphold freedom of dissident religions before the law.² The principles of freedom and tolerance and their relationship to political authority continued to evolve through the writings of theorists such as Suárez in the sixteenth century³ and Locke in the late seventeenth century.⁴ The translation of these ideas into national laws and practices has accordingly been a gradual process that has unfolded unevenly over the last five centuries.

The protection of religious liberty in international law, however, did not occur until the modern era.⁵ Early international recognition of the concept can similarly be traced back in history, most commonly to the early sixteenth century. At that time European peace treaties and treaties between European states and the Ottoman Empire included limited protections for religious minorities. Later in the seventeenth century the 1648 Treaty of Westphalia granted religious rights to the Protestants in Germany and several other treaties incorporated clauses ensuring certain rights to individuals or groups with a religion different from that of the majority.⁶ But it was not until after the Second World War,

and the failure of the League of Nations minority treaty regime, that the individual right to freedom of thought, conscience, and religion became enshrined in international law as part of the human rights regime created under the auspices of the United Nations.

Today, it is universally accepted that religious freedom is a fundamental human right protected by customary and conventional international law.⁷ Article 18 of the International Covenant on Civil and Political Rights (the ICCPR) is stipulated as one of the core internationally recognized human rights which states parties may not derogate from even in times of public emergency. At the same time, it is widely recognized that a divide persists between states' verbal assertions that they uphold the rights of individuals and their actual behavior. While the principle of religious liberty has been affirmed by virtually every national government as a part of its domestic law, the violations which the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the "1981 Declaration")⁸ was designed to address remain evident in varying forms and degrees around the world.

If indeed the implementation of UN standards, and in particular the 1981 Declaration, is of paramount importance,⁹ how might we narrow the distance between broadly accepted legal norms governing religious freedom and their repeated violation? While we are witnessing increasing interdependence, global awareness, and cooperation among states, nations, and groups (including strengthened interreligious relationships) we are at the same time continuing to witness violent interreligious conflicts, religious extremism, fundamentalism, and ethno-religious wars in many regions of the globe.¹⁰ The problem to be addressed then is how, against the background of intersecting cultures, belief systems, political ideologies, economic disparities, and deep-seated feelings of intolerance and mistrust, to improve and ensure effective international monitoring and protection of freedom of religion or belief.

In addressing these questions, it is important to recognize the inchoate nature of the area of "religious human rights." As David Little has observed:

Investigating the "history, grounds, character, scope and efforts at implementation" of existing legal means for protecting religious interests and prohibiting religious bias is obviously a highly complex activity. And complexities increase when the variety of considerations involved in examining "the responses and evaluations of various religious communities and traditions regarding these same legal means" is figured in.¹¹

In acknowledgment of this complexity, this essay attempts to identify the contours of these issues and to place them in the context of international human rights law, processes, and institutions. My approach is first to set out the general scope of the problem to be addressed and then to consider the possible range

of responses that can be pursued, at local, regional, and international levels. In particular, I examine the evolving bilateral and multilateral mechanisms that currently exist to monitor and protect the international right to freedom of religion or belief.

My objective in undertaking this review is to suggest strategies for bridging the gap between principle and practice. I suggest that, while there remains disagreement over international standards governing religious freedom, the standard-setting achievements of international actors and institutions have been a relative success. The more significant challenges lie ahead in seeking compliance with even minimally-agreed-upon standards. Many factors are relevant here, among them the politics as well as the architecture of new international institutions. That architecture requires ongoing evaluation and revision, for much of the effectiveness of international human rights depends on the degree to which norms are not free floating, but anchored in competent institutions that are committed to their implementation.

On the question of compliance, I argue that regional and multilateral approaches are preferable to bilateral or unilateral attempts to monitor and enforce international standards of religious freedom. A state or groups of states may, of course, seek to monitor the behavior of another state and to exert pressure for that state to modify its behavior toward religious minorities. Such an approach has recently been followed in the United States with the enactment of the International Religious Freedom Act of 1998. The Act provides for the appointment of an Ambassador-at-large for Religious Freedom within the State Department and the creation of a Commission on International Religious Freedom charged with monitoring and identifying those countries that deny religious freedom and persecute religious groups.¹² I suggest that this unilateral strategy of elevating and isolating religious freedom as part of U.S. foreign policy stands in an uneasy relationship with existing multilateral mechanisms and institutions that currently seek to monitor and protect religious freedom.

In order to assess the relative merits of bilateral versus multilateral approaches, it is first necessary to understand why states violate the rights of religious minorities and what the incentives are for states to comply with international standards. In line with recent scholarship on the issue of why states comply with international regulatory regimes, I suggest that the kind of coercive enforcement that lies at the heart of the U.S. approach, while perhaps more immediate and direct than current UN protection mechanisms, involves a range of long-term risks, most particularly to the universality of the human rights idea itself. A preferable approach is for states fully to participate in and to strengthen external monitoring and international scrutiny through multilateral regimes. This is an increasingly effective option in the context of the decline of statist conceptions of sovereignty and the increasing penetration of international legal process in the conduct of states. I further suggest that evolu-

ing UN ad hoc mechanisms and the ability of individuals to bring communications to bodies such as the Human Rights Committee should be further developed. Similarly, NGOs and religious institutions are themselves significant actors, both internally and externally, that need to be fostered, encouraged, and developed.

II. CAUSES AND CONSEQUENCES OF OPPRESSION OF RELIGIOUS MINORITIES

The publication in 1997 by Boyle and Sheen of their World Report on Freedom of Religion and Belief demonstrated in stark terms that widespread manifestations of intolerance and discrimination on religious grounds exist in the world today.¹³ In assessing how to monitor these violations, and how best to implement international standards, it is first necessary to understand something about the causes and consequences of religious discrimination, persecution, and oppression. Yoram Dinstein has commented that:

In all likelihood, freedom of religion is the most persistently violated human right in the annals of the species. Religious intolerance has generated more wars, misery and suffering than any other type of discrimination or bias. In the name of this or that deity, for the glory of a divine cause, or in order to settle abstruse theological disputes, human blood has been shed for thousands of years. History is replete with holy wars and crusades against infidels, religious persecution and oppression, inquisitions and *autos-da-fé*. The paradox is that the very groups who have been persecuted for religious deviation are frequently animated by a spirit of intolerance when encountering other beliefs.¹⁴

What then are some of the general factors or indicators that we might identify to assist in targeting those regions or types of violations most in need of international scrutiny? The first point to make is that religious intolerance is a phenomenon that implicates a seamless web of social, ethnic, cultural, political, and economic factors. Intolerance most often is a function of the unwillingness to accept the right of everyone to be different and thus may stem from a lack of respect for the beliefs of others. Historically, this is what has often led majorities to exercise domination over minorities with different beliefs. Religious intolerance may also be a function of a perception of superiority and the desire to find a scapegoat for social or economic problems. Basic factors such as these are becoming better studied and understood today, especially as a result of the investigations conducted over the last few years by the various UN Special Rapporteurs on Religious Intolerance.

In his 1996 report to the UN Commission on Human Rights, Special Rapporteur Abdelfattah Amor identified six broad categories of violations, as follows:

1. Violations of the principle of non-discrimination with regard to religion or belief including allegations of discriminatory policies and/or laws and regulations concerning religion and belief;
2. Violations of the principle of tolerance in the area of religion and belief, particularly concerning religious extremism;
3. Violations of freedom of thought, conscience and religion or belief including questions of conscientious objection, official campaigns to renounce faith and freedom to change one's religion;
4. Violations of the freedom to manifest one's religion or belief including control by the authorities of religious activities;
5. Violations of the freedom to dispose of religious property including destruction and desecration of places of worship; and
6. Violations of the right to life, physical integrity and health of persons including both clergy and believers.¹⁵

Dinstein has similarly identified at least six dimensions to the interplay between religion and discrimination, as follows:

- a. religious discrimination against minority groups may be achieved by seemingly neutral laws of general application, such as legislation pertaining to a weekly day of rest in Christian states that may impact on the religious practices of Jewish and Muslim minorities;
- b. religious discrimination may impinge on other human rights such as the right to work, to receive access to public education or freedom of emigration;
- c. infringements of freedom of religion may occur not by discrimination *per se* but by absolute denial of free exercise, such as by an atheistic regime prohibiting all forms of religious worship in public;
- d. freedom of religion may be impaired because of discrimination on a ground other than religion, for example discrimination between co-religionists on the basis of race or ethnic origin;
- e. religious discrimination may occur when the State provides *illegitimate* financial support and benefits (i.e., leaving aside questions of affirmative action or special measures) to only certain religious groups; and
- f. religious discrimination may derive from religious doctrine postulating the inferiority of some believers on the ground of race, sex, birth and so on, such as was involved in the constitutional abolition of "untouchability" in India.¹⁶

In assessing these broad categories of violations, I would like to make two initial observations. First, threats to religious liberty may originate not only with governments and by official interference, but also with religious leaders and ethnic, religious, and cultural communities within states. Thus, religious groups, whether majorities or minorities, may themselves be the source of violations of human rights as against their own members, or as against other religious groups within the state. This fact is clearly relevant to the design and conception of international monitoring and protection mechanisms. Not only must state action be held accountable to international human rights standards, but what Andrew Clapham has termed "human rights in the private sphere" must also be subject to international scrutiny.¹⁷

This insight has particular importance for human rights pertaining to freedom of religion. For example, the potential for conflict between religious and human rights norms in the area of women's rights is widely recognized. Donna Sullivan has observed that many religious tenets governing rights associated with the life of the family, particularly those pertaining to marriage and divorce, inheritance, and personal status, often set religious law and practices in opposition to the prohibition of discrimination against women in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁸ This fact challenges several traditional assumptions concerning human rights law, most pertinently the public/private distinction and orientation toward "state action." If the 1981 Declaration is to have a real effect in preventing widespread and entrenched violations of religious freedom, it must therefore extend to the actions of private bodies and relations between individuals *inter se*.

That the drafters of the 1981 Declaration intended for it to extend beyond state action to discrimination and intolerance in the private sphere is beyond doubt. Article 2 provides that "[n]o one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or other beliefs." Article 3 states that "[d]iscrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity"; and Article 5 provides that "[a]ll States shall take effective measures to prevent and eliminate" such discrimination. Of course, as Sullivan notes, this extended reach may also create normative conflicts between the rights stated in the Declaration and other human rights, in particular between freedom of religion itself and other norms requiring women's equality and nondiscrimination.¹⁹ This raises Kymlicka's distinction (discussed in the Introduction to this collection²⁰) between "external protections" and "internal restrictions," and the tension between the values of tolerance and autonomy in liberal human rights theory. While such conflicts may require a careful balancing of competing rights, they do not obviate the express intention for the Declaration to regulate discrimi-

natory and intolerant conduct on the grounds of religion or belief in the private sphere.

Second, the relationships between different forms of discrimination need to be better understood in approaching the task of reforming and streamlining international monitoring and protection mechanisms. The findings of the various UN Special Rapporteurs on Religious Intolerance have established that no country in the world, indeed no economic, social, or ideological system, has escaped manifestations of intolerance and discrimination on the grounds of religion or belief.²¹ In 1986, Special Rapporteur Odio Benito proposed her own typology of these manifestations, as follows:

(1) among religions; (2) within religions; (3) among beliefs; (4) within beliefs; (5) between religions and beliefs; (6) between the state and religions and beliefs; (7) among individuals or groups of individuals having different religions or beliefs; (8) among nations; and (9) within nations.²²

This classification illustrates once again the range of interrelationships that exist in the field of human rights in relation to freedom of religion or belief.

In designing the most effective means by which to monitor and protect against such practices, it may be useful to make an initial distinction between "open" and "structural" forms of intolerance and discrimination. "Open" intolerance may be defined as discriminatory or intolerant behavior whereby individuals or institutions themselves advocate or practice violence. "Structural" intolerance, on the other hand, may be defined as that propensity which exists in political, cultural, religious, public, or private institutions, in the mass media, and in some traditions of society.²³ For example, the principles of nondiscrimination, religious freedom, and the rights of religious minorities enjoy national, constitutional, and international support by the vast majority of Muslim states today, including Egypt, Gambia, Guinea, Niger, Senegal, Sierra Leone, and Tunisia.²⁴ However, while the formal legal systems of these countries do not openly authorize discrimination on the grounds of religion, such discrimination does in fact exist.²⁵ It is more difficult to design international monitoring and protection mechanisms to deal effectively with this latter type of activity, which does not involve open advocacy of intolerance, but implicitly sanctions and encourages it. In order to monitor this form of intolerance, external mechanisms must be designed to probe further than the formal protections provided by states in their constitutions and to examine even neutral, nonreligious criminal and administrative laws, regulations, and procedures that in practice may limit religious liberty.

Another distinction that may be useful is the difference between violations of the *forum internum* and the *forum externum*. The *forum internum* may be

said to encompass the right to *have or adopt* a religion or belief. It may be violated in a number of ways: for example, by discrimination for having, or not having, a certain religion; proscription of membership of certain religions under law; coercion to reveal one's religion without consent; or the use of threats, physical force, or penal sanctions to compel individuals to adhere or recant to certain religious beliefs. The *forum externum*, on the other hand, may be said to encompass the right to *manifest* a religion or belief. This too may be violated in a variety of ways: for example, restrictions or proscriptions of freedom to worship or assemble; freedom to establish charitable or humanitarian institutions; freedom to make, acquire, and use religious objects; freedom to write, disseminate, and issue publications; freedom to teach a religion or belief, and so on.²⁶ Again, it may be easier to monitor and protect against violations in the first category where limitations on the right are absolutely prohibited under international human rights law, whereas violations in the second category may require more sophisticated indicators and monitoring techniques in order to distinguish between valid and invalid limitations on the rights of minorities to manifest their religion or beliefs.

Whatever distinctions are drawn, a crucial part of this inquiry must involve the process of examining root causes. In her review of the various reports of the Special Rapporteurs, Bahiyyih Tahzib has identified three such dominant causes. First, *pervasive ignorance and lack of understanding of other beliefs*. As Odio Benito has suggested, this is perhaps the primary cause of religious intolerance and is influenced by the particular societal environment, the degree to which information is available and accurate, and the possibility for interreligious dialogue. The connection between ignorance and an enduring tradition of fear and distrust is discernible in many of the world's interreligious conflicts.²⁷ Second, *claims to a monopoly of truth*. Claims to the inherent superiority of one's own belief inevitably leads to a refusal to accept the equal dignity and worth of members of other beliefs. Claims to a monopoly of religious truth have served as one of the primary bases for centuries of holy, divine, or just wars. As Vidal d'Almeida Ribeiro indicated in his 1987 Report, this is one of the primary causes of attitudes of religious intolerance deriving from religious institutions themselves.²⁸ And third, *legal, social, political, and economic inequalities*. In some instances, prejudice itself may not manifest itself directly or indirectly, but may remain latent as a form of structural intolerance. This prejudice may be activated by legal, social, political, or economic inequalities and may lead to violations of freedom of religion or belief. Struggles for political power, for social position, for wealth, for the maintenance of the existing sociopolitical order, or for the establishment of a new sociopolitical structure can often be identified at the root of religious discrimination. History is replete with examples of governments or individuals finding vulnerable scapegoats for social or

economic ills, or to provide a unifying influence for the citizens of a country, uniting them against a common target.²⁹

In addition to these three general root causes, we might identify a number of related factors. For example, the historical configuration of relations between church and state in different parts of the world;³⁰ the role played by patterns of monolithic nationalism in discrimination against minority religious groups (which is a factor of particular importance in many parts of Eastern Europe where belief systems have been integral in the formation of national identity and where preferences to a majority religion are often a component of the nation-building process); and differing conceptions by governments of police power concerns such as public safety, order, health, and morality. This last factor, in particular, has special relevance in East European states where, for a variety of historical reasons, governments controlled by the majority religious, ethnic, or cultural group tend to perceive religious, ethnic, or cultural minorities as giving rise to security concerns that justify severe limitations on even the most basic rights and freedoms such as the rights of religious minorities openly to practice their religion and language.

III. POSSIBLE RANGE OF RESPONSES

What are the appropriate responses to these wide-ranging forms of discrimination and intolerance? In answering this question, we must first distinguish between *internal* and *external* actors, institutions and regimes. The strategic role and significance of external pressure and monitoring by outside actors of human rights abuses occurring within states is increasingly being acknowledged today. However, while external monitoring by nongovernmental organizations (NGOs), international organizations (IOs, such as the UN), intergovernmental organizations (such as the Organization for Security and Cooperation in Europe—OSCE), and regional organizations (such as the European Union) may be necessary, such monitoring is not sufficient, nor was it ever intended to be. International and regional human rights regimes do not seek to replace the constitutional, legislative, or administrative systems of states. Rather they seek to supplement and strengthen those systems. Thus, the most effective and direct response remains for states to reform their own anachronistic or unjust legal, economic, social, and political structures.

This task may require far-reaching and complex adjustments. As a matter of legal reform, both legislative measures and the provision of adequate judicial or other remedies for victims of intolerance and discrimination based on religion or belief are required. Beyond the legal sphere, education, teaching, and information programs have been advocated by the Special Rapporteurs as effective responses, as has the fostering of interreligious dialogue between reli-

gious groups. In her review of the factors influencing effective protection of religious freedom, Tahzib has reached a similar conclusion, stating that

the phenomenon of intolerance and discrimination on the grounds of religion or belief is highly complex and of a sensitive nature. It has proven impossible to approach that phenomenon from solely a legal point of view. Intervention and action in different domains and at multiple levels are called for.³¹

The effective protection of freedom of religion and belief is also inseparable from the more general project of promoting respect for all human rights and cultivating a culture of rights within states. This point was made explicitly by Special Rapporteur Amor in his 1996 Report:

[A]ction to promote human rights must include measures to establish, strengthen and protect democracy as an expression of human rights at the political level and, at the same time, measures to contain and progressively eliminate extreme poverty and promote the right of individuals and peoples to development as an expression of human rights and human solidarity in the economic, social and cultural areas.³²

As Amartya Sen so elegantly reminds us, the tripartite norms of democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.³³ The rights of religious minorities are far more likely to be respected in states that eschew authoritarianism and enshrine democratic principles that include basic civil and political freedoms and that provide for the basic economic needs of their citizens.

From among this range of *internal* responses, I wish to make some additional comments in two areas—first, in relation to the role of religious leaders and institutions in the protection of religious freedom, and second, in relation to the effects of “constitutionalism” and the struggle for constitutional justice in the newly democratic states of Eastern Europe.

A. RELIGION & RELIGIOUS INSTITUTIONS

There is a growing body of thought within the human rights movement itself that religion and religious institutions are underutilized in securing and promoting human rights and contributing to the prevention of religious conflict.³⁴ Before even beginning to assess the relative effectiveness of multilateral and bilateral mechanisms in preventing religious conflict and discrimination, it must be recognized that the strengthening of civil society through the work and vitality of religious leaders and institutions may play an important role. This

relates both to the local and transnational activities of religious organizations, a topic taken up in the chapters by Byrnes and Goeckel in this collection.³⁵

The 1997 Carnegie Commission Report on Preventing Deadly Conflict identified five factors that combine to provide such organizations and leaders with a comparative advantage in dealing with religious conflict: First, they can provide a clear message that is able to resonate with their followers; second, they have a long-standing and pervasive presence on the ground; third, they have access to a well-developed infrastructure that often includes sophisticated communications networks connecting local, national, and international offices; fourth, they have established legitimacy for speaking out on crisis issues; and fifth, they have a traditional orientation to peace and goodwill.³⁶

There is some evidence today of religious groups seeking to build bridges between factions in conflict: for example, the Corrymeela Community in Northern Ireland and the permanent Inter-Religious Council in the former Yugoslavia (which has Muslim, Jewish, Serb, Orthodox, and Roman Catholic members). The Inter-Religious Council, in particular, has attempted to promote religious cooperation in Bosnia Herzegovina by identifying and expressing common concerns independent of politics. Religious advocacy is also particularly effective when it includes many faiths. Inter-faith dialogue on key public policy issues is vital. For example, in the post-Vatican II era, the Catholic Church has established three bodies to deal with interreligious dialogue: the Pontifical Council for Inter-Religious Dialogue, whose mandate covers all religious communities except for Jews and non-Catholic Christians; the Commission for Religious Relations with Jews; and the Pontifical Council for Promoting Christian Unity.³⁷ In other circumstances, where a religious community is perceived as neutral and apolitical, it may be an ideal vehicle to act as an honest broker and neutral mediator. The fact that religious groups are simultaneously local, national, and international entities provides them with access to unique transnational networks. This is considered to be one of the main factors in the Soviet bloc that ensured that religious consciousness remained alive during the communist period.³⁸

Of course, there are inherent difficulties when churches operate as political actors. This approach runs the risk of distorting the separation of religious bodies from the state and, by using their elevated moral and political status to exert political pressure, the groups themselves may risk shifting their focus away from individual salvation and spirituality. But in the context of the broader protection of religious freedom in many states, I believe that this is an area that requires further consideration. Part of that process must include finding more effective ways for religious groups to work with the international human rights community. As Michael Young has observed, religious communities have often mistrusted the strong secular and humanistic thrust of human rights advocates and have consequently eschewed either identification with or participation in

the human rights movement.³⁹ The challenge for the future is for both communities to find modes and avenues for more systematic and institutionalized patterns of cooperation that will lead to a mutual strengthening of their respective agendas.⁴⁰

B. CONSTITUTIONALISM AND EFFECTIVE REMEDIES

A second key component of the effective protection of religious liberty is the need for constitutional arrangements that require governments to respect and ensure fundamental rights and freedoms. Until recently, this has not been a dominant feature of the constitutions in Eastern Europe. As Louis Henkin has observed, the socialist constitutions of Eastern Europe after the Second World War have been

essentially manifestoes, programmatic. They describe the kind of government and the institutions of government that have already been established and indicate plans and make promises for the future. They nod to the rights of the individual in society but declare the rights which government is prepared to grant, rather than recognizing rights which the government is obligated to respect. (These constitutions also have tended to stress the citizen's duties rather than his (her) rights and to subordinate rights to duties.) Ordinarily, such constitutions have not been enforceable as law and had little normative character. They can be readily amended by political authority.⁴¹

Since the historic events of 1989, however, that situation has radically altered as constitutional reforms have swept across Eastern Europe following the collapse of communism. The political systems of Russia, Romania, Bulgaria, Hungary, Poland, and the Czech and Slovak Republics have all embraced the idea of "constitutionalism," and have incorporated the concepts of judicial independence, the rule of law, human rights, and liberal democracy into their revised constitutions. These countries have also created new and innovative constitutional courts with exclusive jurisdiction to strike down nonconforming laws and decrees and, in some cases, even to mandate the enactment of laws to fill constitutional "gaps."⁴² Of course, it remains an open question as to how effective these new constitutional arrangements will be in protecting the rights of religious minorities.

At the heart of this process lies the difficult task of developing respect for the rule of law and cultivating a culture of rights. In the conditions of many Eastern European countries, the legacy of communism has created a discernable skep-

ticism toward the efficacy of legal norms, reinforced by widespread corruption, and a relatively weak civil society. Furthermore, any progress toward constitutional democracy is tied closely to the fortunes of economic transformation, a most relevant factor given the economic devastation left behind by the communist regimes. As the late Chief Justice Mohamed commented in the context of the constitutional transformation that has occurred in South Africa following the demise of apartheid:

A formal constitutional democracy which eloquently guarantees through the Constitutional Court, the civil and political rights of its citizens, but is unable to redress the very deeply perceived social and economic needs of those inheriting the monstrous legacy of a manifestly unacceptable past, must therefore remain dangerously vulnerable to rapid instability and disintegration.⁴³

This warning is no less relevant to the new democracies of Eastern Europe as they move toward establishing a culture of constitutionalism, rule of law and human rights in the midst of an unpredictable economic transformation. For this project to succeed, these states require more than constitutional courts—they require human rights ideas and norms to be widely disseminated by the nongovernmental structures of civil society, permeating the schools, the universities, the electronic media, the free press, and the trade unions. If the culture of human rights and constitutionalism does not become part of the national ethos internalized within the psyche of its citizens, the jurisprudence and integrity of the new constitutional courts will remain permanently vulnerable.

Nevertheless, it is interesting to observe that several of the early decisions of the Eastern European constitutional courts indicate a willingness to protect both the rights of religious minorities and religious freedom more generally. For example, the new Bulgarian Constitutional Court has handed down several decisions since 1991 in relation to the historically troubled relationship between the Bulgarian majority and the Turkish minority. The most notable of these was a case decided by the Court in 1991. The Bulgarian Constitution contains only limited protections for minorities, mainly in the areas of language and cultural rights, although restrictions on the grounds of religion are expressly prohibited.⁴⁴ The Constitution does, however, ban ethnic parties and movements and prohibits citizen's associations (including trade unions) from participating in politics.⁴⁵ These limitations are mirrored in statutes and have been used to limit the rights of minority groups to form associations and participate in political activities. This has led to ethnic and racial minority groups being denied certification by local courts and there have been reports of meetings of minority groups being dispersed by the police.⁴⁶

In a narrow decision by the Court in 1991, the Movement for Rights and

Freedoms (MRF), which has 99 percent Muslim and Turkish members, prevailed against a challenge taken to the Court by the Bulgarian Socialist Party (BSP) challenging the right of the MRF to run as a political party. According to Vanelin Ganey, the case "in effect obviated the ban on ethnic parties," such that by 1996 there were as many as three Turkish parties and a dozen Roma and Macedonian parties.⁴⁷ In a later decision on June 11, 1992 dealing directly with religious freedom, the Court halted attempts by the Directorate of Religions, then controlled by the Union of Democratic Forces (UDF), to oust the incumbent heads of the Orthodox Church and Islamic community on the ground that no state interference in religious matters was permitted. Court Chairman Asen Manov ruled that the religious groups would need to settle the matter of their leaderships among themselves.⁴⁸

Two further aspects of the early jurisprudence of the Bulgarian Constitutional Court are pertinent here. First, it is clear that the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR),⁴⁹ both of which are discussed in more detail below, have had discernable effects on the legal reasoning and political functioning of the Court. Herman Schwartz has suggested that the Court's decision in the 1991 MRF case was greatly influenced by pressure from the Council of Europe, which admitted Bulgaria as a member state two weeks after the decision was handed down.⁵⁰ In a later case in which the BSP sought a ruling on whether various provisions of the Council of Europe's Framework Convention for the Protection of National Minorities were consistent with the Bulgarian Constitution, the Court ruled on February 18, 1998 that the Convention was "compatible with the Constitution since both the Framework Convention and the Bulgarian Constitution correspond to the European Convention on Human Rights, which sets the standards for both documents."⁵¹ Thus, Bulgaria's membership in the Council of Europe and adherence to the ECHR can be seen to have had a direct effect on Bulgarian law in the area of minority rights.

This type of normative influence by regional and international human rights norms on domestic laws and practices is an important result of external monitoring and protection mechanisms. Indeed, Schwartz has suggested that the civil and political rights jurisprudence of most of the ex-communist states may soon be determined not so much by how the various constitutional courts interpret and apply their own constitutions, but by how the European Court of Human Rights interprets the ECHR.⁵² Countries such as Bulgaria, Russia, Poland, Hungary, Slovakia, the Czech Republic, Albania, Georgia, Slovenia, and Estonia are all now members of the Council of Europe and are thus bound by the Convention. The jurisprudence of the European Court of Human Rights since 1990 regarding freedom of religion, its relevance for religious minorities, and its influence on constitutionalism in Eastern Europe, is discussed in the next chapter of this collection.

Second, a significant limitation on the Bulgarian Constitutional Court's effectiveness is the absence of a provision for individual complaints. The above decisions reached the Court only because the parties had standing as public officials under the Constitutional Court Law. Because individual complaints for human rights violations cannot be brought before the Court, instances of police brutality and interference as part of nationalist attacks against Roma, for example, have not been subject to constitutional review.⁵³ Given this restriction on the availability of effective redress in Bulgaria for human rights violations, it is perhaps not surprising that the European Roma Rights Center has urged Eastern European activists and public interest lawyers to consider European Court of Human Rights-based strategies, particularly given that the European Court is relatively progressive, the media are interested, and legislators can now be pushed more readily to conform to ECHR standards.⁵⁴

This strategy is strengthened by the fact that, as discussed above, the Council of Europe is continuing to evaluate a number of East European countries for membership, and many of these are willing to attend to human rights concerns in order to join. A good example of this is the case of Slovakia, which was admitted to the Council of Europe in May 1993 subject to ten requirements, including specific provisions on minority rights.⁵⁵ When the Meciar government initially refused to comply with the Council of Europe's requirements, especially in relation to the rights of their Hungarian minority, Hungary began to protest and gained much external support. The result was that the Slovakian government's minority policy was a factor in Slovakia's denial of first-wave entry into the European Union.⁵⁶

In summary, then, a vital component of protecting the right to freedom of religion or belief in the former communist states of Eastern Europe is the establishment, broadly conceived, of constitutionalism and the flourishing of a culture of human rights.⁵⁷ This will necessarily develop over time as the newly created constitutional courts seek to incorporate international and regional human rights principles into their evolving constitutional systems, and as the new democracies become full and active members of, and subject to, the laws, institutions and discipline of the Council of Europe, European Union, and UN.

IV. EXTERNAL MONITORING OF FREEDOM OF RELIGION OR BELIEF

Having reviewed a few of the possible responses by internal actors, I now turn to consider how *external* actors monitor and protect the rights of religious minorities, both in cooperation with state institutions and, where necessary, by exposing and seeking to redress violations by state and non-state actors. At the international level, it is helpful to distinguish between three types of external actors: first, multilateral regimes, both global and regional, which are generally

monitored by treaty bodies supervising a specific human rights convention or agreement; second, bilateral mechanisms, whereby individual countries seek to monitor and exert pressure on the behavior of other countries; and third, NGOs which contribute to the overall effectiveness of both.

A. LEGITIMACY OF EXTERNAL MONITORING

A threshold issue here is the legitimacy of external actors monitoring the internal affairs of other countries. As a matter of international law and politics, states have been divided on the issue of their readiness to address charges of their own human rights violations. Some states have resisted the airing of such charges on the grounds that these are outside the proper sphere of operation of international organizations such as the UN, which is forbidden under the terms of its own Charter "to intervene in any matters which are essentially within the domestic jurisdiction of any state." As Henkin has observed, however, UN practice long ago rejected that objection, in effect reflecting the conclusion that human rights violations were not a matter of domestic jurisdiction, or that UN discussion of them is not intervention, or both. Nevertheless, some states remain sensitive about anything in the nature of international examination of their human rights record, invoking arguments about their national sovereignty and Article 2(7) of the UN Charter. It has been a distinct achievement, therefore, to get many states to accept even the modest reporting measures established under the ICCPR.⁵⁸

Over the course of more than half a century, UN organs and other multilateral and regional institutions have systematically reduced the scope claimed for the so-called *domain réservé*. The Helsinki Accords and follow on agreements have given rise to the OSCE, which has become a unique phenomenon in international relations.⁵⁹ The vast array of UN human rights, labor, environmental, and economic agreements increasingly allow review of behavior previously considered to be purely the province of national governments. The case of Poland well illustrates this point. In 1983, Poland insisted on a very high threshold for alleged violations before UN organs could even begin to consider human rights concerns in a particular state. By October 1991, however, Poland had endorsed the following conclusion of the Moscow Meeting of the Conference on the Human Dimension of the Helsinki process:

The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all

participating States and do not belong exclusively to the internal affairs of the State concerned.⁶⁰

The result of the Helsinki Accords was that if a signatory country failed to abide by CSCE standards, that failure was a legitimate matter for multilateral discussion and action. In this way, states became able to scrutinize appropriately and legitimately the purely internal behavior of other countries in an international setting.⁶¹

The relationship between human rights and international institutions has subsequently deepened and broadened beyond the "political" nature of the Helsinki undertakings. The influence of UN bodies such as the Human Rights Committee established under the ICCPR, and of regional bodies such as the European Court of Human Rights established under the ECHR, have had a profound influence in inducing compliance by states with human rights standards. Equally importantly, a customary international law of human rights has been widely recognized since the drafting of the Universal Declaration of Human Rights in 1948, and this too has exerted an influence on state adherence to basic human rights norms.⁶²

Having addressed the question of legitimacy, what then is the purpose or function of external monitoring and scrutiny of human rights violations? Here, my focus is on the role of multilateral and NGO monitoring of the rights of religious minorities, and I leave the question of bilateral monitoring for later discussion.

B. EXTERNAL MONITORING BY INTERNATIONAL AND REGIONAL ORGANIZATIONS

At both the global and regional levels, monitoring and supervisory mechanisms have evolved in principally three spheres—state reporting procedures; individual complaint procedures; and inter-state complaint procedures. While the last of these mechanisms has not been relied upon by states and has been superseded by the first two, in the space of little over fifty years reporting, supervision and individual complaint procedures have revolutionized the international protection of human rights. These procedures have been built into human rights treaties and have usually involved the following characteristics:

- periodic reports by states in accordance with detailed guidelines;
- review by a committee, accompanied by questions to the reporting states;
- in some cases detailed inquiry by a subcommittee or individual rapporteur;

- a committee report noting discrepancies between states' conduct and the requirements of the treaty or applicable law.⁶³

The opportunity for individuals or governments to initiate complaints before international treaty supervisory bodies has been achieved largely by the addition of optional protocols to the covenants. The common pattern is for these complaints to be investigated by a committee or special rapporteur who then issues public "views" or transmits conclusions to a relevant parent body. The crucial element here is the ability of the international rapporteur or authority to perform effective fact-finding, a process that depends to a high degree on cooperation by the governments concerned.⁶⁴

1. UNITED NATIONS MECHANISMS

A primary purpose of the United Nations is "to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."⁶⁵ There are three principal ways in which the UN pursues this objective: first, by standard setting—that is, by articulating and elevating international human rights norms to the status of international law; second, by promoting human rights—that is, by educating different communities, promulgating human rights standards, and disseminating relevant information; and third, by implementing human rights. It is the third objective that has proved the most elusive to realize in practice.

The process of implementation involves at least three sub-tasks: first, monitoring violations of human rights, including efforts to anticipate and seek to prevent violations through early warning, mediation, or conciliation, and through publicity of alleged violations; second, responding to violations through pressure and the "mobilization of shame;" and third, the capacity for stronger action to deter or reduce violations, such as by imposing sanctions or other punitive measures, and by securing relief for victims by delivering timely humanitarian aid. It is the first of these sub-tasks that is my concern here.

How then does the UN seek to monitor and implement existing international standards regarding religious freedom, and how effective is it in this endeavor? At the outset it should be observed that, in the absence of a binding international covenant, there is no specialized treaty supervisory committee with individual experts in the field of freedom of religion or belief. Rather, issues of religious intolerance and persecution fall under the general mandate of the human rights monitoring and protection functions of the UN, which are carried out by three separate bodies. The first is the Commission on Human Rights, which is a functional commission of the Economic and Social Council. The Commission is responsible for developing and overseeing all international human rights

instruments, and it also oversees numerous "extra-conventional mechanisms" such as thematic working groups and special rapporteurs appointed as human rights monitors for selected countries. The Commission meets annually to hear reports and make recommendations regarding human rights performance of selected states. Accordingly, the Commission annually considers what measures are necessary to implement the 1981 Declaration pursuant to requests by the General Assembly.⁶⁶ At its thirty-ninth session in 1983, the Commission requested the UN Secretary-General to hold a seminar on "the encouragement of understanding, tolerance and respect in matters relating to freedom of religion or belief."⁶⁷

The second body is the Human Rights Committee instituted under the ICCPR. The Committee reviews annual reports from member states and has the capacity to accept individual communications in the case of member states that have signed the Optional Protocol. The third is the UN Office of the High Commissioner for Human Rights (the OHCHR), which has overarching responsibility for overseeing and coordinating all UN human rights activities.⁶⁸ In connection with the 1997 program for reform of the UN,⁶⁹ the OHCHR and the Center for Human Rights, which previously was the office of the UN Secretariat charged with conducting fact-finding and producing reports in connection with the activities of the Commission and the Human Rights Committee, were consolidated into a single office as of September 15, 1997. Thus, the new OHCHR has assumed as part of its mandate the program of advisory services and technical assistance that the UN Center made available to states upon request, including assistance on the preparation of reports under international human rights treaties.

(a) The Emerging Role of Ad Hoc and Extra-Conventional Monitoring

One of the most rapidly evolving areas of external monitoring and protection lies outside of the traditional judicial and quasi-judicial monitoring mechanisms established by convention, and in an area known today as extra-conventional and ad hoc human rights machinery.⁷⁰ This includes the Special Rapporteurs and Working Groups of the UN Commission on Human Rights; various activities and operations of the recently reformed OHCHR; and country verification missions.

In its first twenty years, the Commission on Human Rights maintained that it had "no power to take any action in regard to any complaints concerning human rights."⁷¹ As more petitioners sought individual assistance, however, in 1967 the Economic and Social Council (ECOSOC) adopted Resolution 1235 authorizing the Commission to "make a thorough study of situations which reveal a consistent pattern of violations of human rights."⁷² Although not initially intended, the 1235 procedure soon became a vehicle for the establishment of country-oriented study groups and thematic rapporteurs. By 1994, seventeen

countries were subject to some form of country-oriented procedure; twelve of these were monitored by special rapporteurs, three by representatives of the Secretary-General, and two by independent experts appointed under advisory services (a more consensual, cooperative form of human rights monitoring).

The first thematic procedure established by the Commission was in 1980 with the Working Group on Enforced or Involuntary Disappearances. The five-member working group proved to be a prototype for a new genus of UN monitoring machinery. In 1982, the post of Special Rapporteur on Summary or Arbitrary Executions was created, and by 1984 the post of Special Rapporteur on Torture. Since 1985, special rapporteurs have become more numerous. For present purposes the relevant post is that of the Special Rapporteur on Religious Intolerance.

While special rapporteurs attempt to examine information from all relevant sources, they are not mandated to respond effectively to individual complaints. They carry out investigations, *in situ* if possible, and make recommendations in a public report. Due to the inability of rapporteurs to provide rapid response to violations, the Commission now also convenes extraordinary sessions in the event of human rights emergencies, in addition to its annual sessions.⁷³

The main function of thematic rapporteurs is to transmit allegations of human rights violations to governments. Their role is humanitarian, not accusatory or judgmental. And although no explicit fact-finding function was included in the original grant of authority, the thematic procedures have evolved a practice of making country visits (provided they have the consent and cooperation of the government concerned). The rapporteurs meet with government officials and interview members of the judiciary, NGOs, and individuals. They are not limited in their sources of information and draw on a wide range of governmental, inter-governmental, and NGO groups and organizations. Their mission reports contain judgments about country conditions in the form of conclusions and recommendations. Increasingly, the emphasis is on determining the facts implicating state responsibility.⁷⁴

Before the creation of the special rapporteur posts, the only remedial avenues open at the international level to individuals whose human rights had been violated were the individual complaint mechanism under the Optional Protocol to the ICCPR and the confidential procedure established by ECOSOC Resolution 1503. Both of these involve significant procedural limitations. Under the ICCPR, for example, an individual can obtain access to the Human Rights Committee only if his or her complaint derives from a country that has recognized the competence of the Committee to receive individual communications; the author of the communication must have suffered some direct injury; third parties such as NGOs or relatives cannot petition the Committee; and complainants are required to exhaust all domestic remedies. Even if an individual communication is successful, the primary purpose of the procedure is

to establish whether a state party has breached its treaty obligations, not to provide relief to the injured individual or family member. Similarly, under the 1503 procedure, all deliberations are private and the purpose is to establish a pattern of gross violations, not to take action on particular cases.⁷⁵

To some extent, the special rapporteur and working group mechanisms avoid these restrictions. States need not have recognized the competence of a particular thematic procedure, or have acceded to a relevant international convention, for their human rights practices to be the subject of examination. There is no "standing" requirement, and friends, family, legal counsel, and NGOs may all submit information. Importantly, the purpose of these procedures is on providing redress to individuals, not only documenting patterns of gross violations. The thematic procedures are thus more focused on the situation of individuals.

At the same time, it should be noted that these thematic procedures are subject to other major weaknesses. Despite their proliferation within the UN system, there has been no attempt made to formalize fact-finding procedures. Fact-finding guidelines have been resisted on the grounds that they would interfere with the need for confidentiality and protection of witnesses. This has resulted in thematic procedures running the risk of inconsistency. Rapporteurs have also not always been provided unlimited access to regions or situations where human rights violations are thought to be occurring, and the ability of rapporteurs to recommend and ensure effective remedial measures for victims of human rights violations has generally been limited.

The significance of these thematic mechanisms, however, is the diminishing relevance of the domestic jurisdiction defense by states in relation to UN monitoring and fact-finding procedures, even in the case of non-parties to the major international human rights conventions.⁷⁶ What the expansion and institutionalization of these mechanisms reflects are changes in the position of the individual in the international system and the role of the UN itself. This has led Professor Bruno Simma to comment that "the decisive human rights bridge-heads in areas of formerly unfettered domestic jurisdiction of states . . . have been gained less by force of treaty-making than by . . . soft law processes on the modest hard-law basis of a few very general Charter provisions."⁷⁷ Similarly, Thomas Buergenthal has concluded that

the nonintervention doctrine is dead and . . . the [UN] Organization has proved more willing to pierce the veil of national sovereignty to deal with large-scale violations of human rights. In this context, the institutions of special human rights missions and human rights rapporteurs with investigative powers, as well as humanitarian missions, gained significance. These activities have not always been clear successes. They also have not always been based solely on powers derived from the Charter—concep-

tual neatness and institutional clarity are not necessarily hallmarks of UN actions. This is all to the good, for the United Nations tends to be more effective when its actions are shrouded in legal and political ambiguity.⁷⁸

The growth of ad hoc and extra-conventional mechanisms also illustrates what has been termed the "NGO-ization" of the UN.⁷⁹ These mechanisms have borrowed quite significantly from the procedures and methods of human rights NGOs, and indeed a number of NGOs have been significant actors in their creation. Techniques such as case-by-case reporting, urgent appeals, and the process of sending letters directly to governments about particular cases (as opposed to themes or wider phenomena) mirror much NGO activity. Exposure is thus now a major objective of both the NGO community and the UN. This in turn has encouraged a greater degree of activism and flexibility in UN human rights machinery. In some instances, several of the Special Rapporteurs themselves worked in prior incarnations at human rights NGOs. This has helped to ensure that UN monitoring has become more public and vocal than in former times when it was largely dominated by career diplomats. Indeed, in comparison with many international and domestic NGOs, which lack the legitimacy and authority of the UN, the Special Rapporteurs have achieved success in pressuring governments concerned about their international image to be more cooperative and responsive.

This success is evident in the evolution of the role of the various Special Rapporteurs in the field of freedom of religion or belief. Elizabeth Odio Benito, a member of the Sub-Commission on the Promotion and Protection of Human Rights, was the first Special Rapporteur appointed in 1983 to undertake a comprehensive study of "the problems of intolerance and of discrimination on grounds of religion or belief."⁸⁰ By 1986, the Commission on Human Rights was becoming increasingly concerned about implementation of the 1981 Declaration and decided to create the dedicated position of Special Rapporteur on Religious Intolerance. Vidal d'Almeida Ribeiro was appointed to the position and held that post for seven years until his resignation on February 18, 1993. Abdelfattah Amor was appointed thereafter and continues in that position today. Thus since 1987, the Special Rapporteurs have been examining incidents and governmental action in all parts of the world thought to be inconsistent with the 1981 Declaration and have been submitting annual reports to the Commission (and since 1994 to the UN General Assembly).

A brief review of the 1999 Report by Amor to the Commission reveals the following areas of coverage:

- a. a report on communications sent by the Special Rapporteur and replies received from states which, in 1999, included 93 communi-

- cations (of which 2 were urgent appeals) sent to 55 states and 23 replies;
- b. a description of special initiatives undertaken by the Commission and Special Rapporteur concerning studies, legislation, and fostering a culture of tolerance;
 - c. a description of *in situ* visits intended to initiate dialogue with the main religions and beliefs on the 1981 Declaration and to encourage solutions to problems of intolerance and discrimination;
 - d. an analysis of violations of freedom of religion or belief during 1999 based on the identification of the main trends; and
 - e. recommendations designed to prevent the violations of the 1981 Declaration that have been found to exist.

Included among the communications sent by the Special Rapporteur were the following East Central European and former Soviet states: Azerbaijan, Belarus, Bulgaria (twice), Georgia (twice), Greece, Kazakhstan, Republic of Moldova (twice), Russian Federation, Tajikistan, Turkmenistan (three times), Ukraine (twice) and Uzbekistan (three times).⁸¹

The conclusions and recommendations at the end of the report reinforce many of the themes and patterns discussed above. For example, Amor identifies the spread of religious extremism as affecting most religions. He notes that this may take on inter-religious dimensions (that is, directed against other religions and beliefs) and intra-religious dimensions (that is, directed against communities belonging to the same religion). The main victims of both forms of extremism are minorities and women, both of whom may be subjected to discriminatory measures giving them an inferior or even non-legal status and exposing them to expressions of violence such as attacks, kidnappings, and rape. Amor explicitly notes that these forms of extremism often originate with non-governmental bodies, sometimes with groups acting out of fanaticism, sometimes with extremist communities aiming to employ politics to impose their religious views on society. He recommends vigilance in monitoring active and passive complicity of state entities in both cases.⁸²

Of direct relevance to the position of religious minorities in the newly democratic states of Central and Eastern Europe, Amor also identifies a "general tendency to perpetuate policies, legislation and practices which affect freedom of religion and belief." He notes that while there has been a gradual decline in anti-religious and religious control policies in the interest of political ideology since the end of the cold war, many of these policies persist, often in subtle forms, in a number of states. The aim is no longer officially to eradicate religion, but to recognize and regulate it by a framework of strict controls which amount to interference incompatible with international law.⁸³ In terms of the effects on religious minorities, Amor notes:

- a. The pursuit of policies of intolerance and discrimination by authoritarian regimes against communities of religion and belief seen as opposing the authorities' goals;
- b. The maintenance of policies and practices of intolerance and discrimination against certain communities, particularly ethno-religious communities, within the framework of essentially political conflicts;
- c. The pursuit of policies, legislation, and practices hostile to religious minorities in countries with an official religion or where the majority of the population belongs to one faith;
- d. The upsurge of intolerant and discriminatory policies and practices directed against "sects or new religious movements;"
- e. The maintenance of policies, legislation and practices opposed to conscientious objection.⁸⁴

On the question of responding to these deeply entrenched tendencies, Amor recommends daily "management" of such phenomena through further communications, urgent appeals, and *in situ* visits. He also recommends more attention concerning prevention, mainly through education and inter-religious dialogue to prevent currently observed violations resulting from religious extremism; from special policies, legislations and practices; and from discrimination attributed to religion affecting women.⁸⁵ These recommendations have been accepted by the UN General Assembly.⁸⁶ Thus, it can be seen that the creation of the Special Rapporteur mechanism has had a discernible impact within the international monitoring and protection functions of the UN.

Another important actor in the area of ad hoc and extra-conventional monitoring is the office of UN High Commissioner for Human Rights. The High Commissioner (like the UN Secretary-General) has the capacity to perform "good offices" functions in the field of human rights. This role is in many respects a formalization or institutionalization of the Secretary-General's ad hoc good offices but with a specific human rights mandate. It involves engaging "in a dialogue with all governments . . . with a view to securing respect for all human rights,"⁸⁷ but also provides the opportunity to create a type of "early warning" system designed to alert the UN to impending emergencies and situations requiring urgent action.

The effectiveness of the High Commissioner's role is linked in practice to day to day cooperation and consultation with governments: that is, by facilitating the accession and ratification of international human rights instruments; by promoting legislative reforms; by implementing recommendations of treaty bodies; by seeking to strengthen the rule of law and democratic institutions; by encouraging the training of the judiciary and the police; and by elaborating national plans of action in the field of human rights. Thus, in comparison with

the rapporteurs and other thematic mechanisms, the role of the High Commissioner emphasizes more consensual and cooperative activities.

The undefined and consensual nature of the role is also the source of its major weaknesses. There are no formal follow-up procedures, nor are there procedures for systematic response on the part of the Human Rights Commission or the General Assembly to the reports of fact-finders such as the rapporteurs or indeed the High Commissioner herself.⁸⁸ There is therefore an urgent need to increase and improve communication between these bodies and to coordinate each component of the UN human rights machinery. The High Commissioner is likely to be a key actor in that process in the years ahead.

(b) The Human Rights Committee

The Human Rights Committee is the permanent treaty body whose function is to monitor and implement the ICCPR. Membership of the Committee consists of eighteen experts elected by the states parties. The Committee has three main areas of operation: first, the mandatory reporting procedure under Article 40 by which the Committee considers and studies reports submitted by states parties on the measures they have adopted to implement the rights recognized in the Covenant; second, the optional interstate procedure under Articles 41 and 42 by which the Committee may consider complaints that another state party is not fulfilling its obligations under the Covenant (which has never been used); and third, the optional individual communications procedure under the First Optional Protocol to the Covenant by which the Committee may receive and consider communications from individuals subject to the jurisdiction of a state party to the Protocol who claim to be a victim of a violation of any of the rights in the Covenant.⁸⁹ Apart from submitting an annual report on its activities to the UN General Assembly, the Committee also prepares General Comments on specific articles and in this way a "jurisprudence" of the Covenant is emerging on its meaning and scope. In the area of freedom of religion or belief, the Committee has for more than two decades scrutinized state reports, issued General Comments and received individual communications in relation to both Articles 18 and 27. While a full review of these activities is beyond the scope of this chapter,⁹⁰ a few general observations may be made.

The most effective function of the Committee in terms of monitoring and implementing these rights has been in the examination of state party reports. This has created an energetic dialogue between the experts on the Committee and states that has exerted pressure for domestic and constitutional systems to comply with international human rights standards. As might be expected, the Committee has on the whole been cautious in criticizing states for limitations or violations of rights of freedom of religion or belief. This has perhaps been due to the sensitivity and complexity of the subject and the need to maintain an ongoing dialogue with states parties. With the end of cold war divisions and

with its own maturation as a quasi-judicial deliberative body, however, it would be a mistake to underestimate the normative effects of ongoing dialogue between the Committee and governments from divergent religious, political, economic, and social systems. For example, on July 23, 1993 the Committee adopted General Comment No. 22 on Article 18 providing a wide interpretation and indicating a willingness to confront controversies in this area (including the freedom to change religions and conscientious objection).

On the question of individual communications, between 1976 and 1995 there were fourteen communications alleging violations of Article 18 including issues of conscientious objection, manifestation of religion or belief, permissible limitations, and parental rights in education. These came from five states: Finland, the Netherlands, Canada, Germany, and Colombia. The Committee declared eight of these communications inadmissible and expressed views on the remaining five. In no case did it find a violation of Article 18. The Committee's interpretation of Article 18 has thus been restrictive, particularly in relation to conscientious objection,⁹¹ and it has only infrequently referred to the 1981 Declaration.

In the area of minority rights under Article 27, the record during the same period is only marginally better, commencing with the well known 1977 communication in *Lovelace v. Canada*,⁹² and more recently with the communication in *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*.⁹³ However, these communications have involved minority questions of language and culture and not religion. We can therefore conclude that during these years the individual communication mechanism failed to function in the sphere of freedom of religion or belief.

Since 1995, however, the position has slowly begun to change. There has been an increase in the number of communications in relation to Articles 18, 26 (the nondiscrimination provision) and 27 suggesting greater reliance by individuals on the procedure to allege instances of religious intolerance and discrimination. For example, on November 3, 1999 in *Arieh Hollis Waldman v. Canada*, the Committee found that because the Roman Catholic denomination is the only one that has the right to government funding in Ontario for the purposes of education, this constituted discrimination under Article 26 because the author, a member of the Jewish faith, had to meet the full cost of education in a religious school for his children.⁹⁴

The extent to which further communications of this kind will be initiated, and whether they will be successful before the Committee, is an open question. There are two foreseeable obstacles to this occurring. First, the Committee will need to interpret Article 18 more broadly than in its earlier views and more closely in accordance with General Comment No. 22. Second, the area most in need of reform is that of standing and access to the communication procedure itself. At present, only individuals may bring communications to the Com-

mittee. If the Optional Protocol were amended to allow NGOs to initiate communications, or to act more closely in conjunction with individuals in preparing communications, it is conceivable that more cases would be brought as familiarity with the procedure increased.⁹⁵ This is particularly important in Eastern Europe and the former Soviet Union where increased involvement of NGOs in the work of the Committee would enhance knowledge and understanding in the region of religious freedom and human rights and would provide an avenue for redress and pressure on governments beyond local and regional legal systems.⁹⁶ If this were to occur, however, the workload of the Committee would increase and, without the allocation of far greater resources and personnel from the UN, it is unlikely that the Committee would be able to cope with the added influx of communications.

In conclusion, monitoring and protection of freedom of religion or belief at the international level is currently carried out by a number of ad hoc and extra-conventional mechanisms, principally the Special Rapporteur on Religious Intolerance and the High Commissioner for Human Rights, and by the treaty-based Human Rights Committee. The emphasis is on fact-finding and reporting and on exerting external pressure on governments as a matter of international law, politics, and relations to bring their domestic laws and practices into line with international human rights standards. While there is the capacity to bring individual complaints at the international level, this mechanism is relatively undeveloped and does not approximate judicial process or remedy under domestic legal systems.

2. REGIONAL ORGANIZATIONS IN THE "NEW EUROPE"

At the regional level in Europe the situation is greatly more developed, particularly in relation to the availability of judicial remedies for individuals who have been subject to human rights violations. As the next two chapters in this volume attest, there is today a variety of systems operating in Europe for the protection of human rights. The reasons for this variety reflect historical developments in a political and economic environment that has been in a steady state of evolution for the last fifty years. As Europe has become more politically homogenous, the membership of states in organizations such as the European Union (the EU) and the Council of Europe has become increasingly similar. There are now forty-one members of the Council of Europe, and therefore to the ECHR. This represents a massive increase in membership since the early 1990s, primarily from countries in Central and Eastern Europe, including many from the former Soviet Union.⁹⁷ As will be discussed below, human rights "conditionality" has in this way become a key component for these states in the entry to and full participation in the Council of Europe and EU.

The Council of Europe, the EU and the OSCE are all concerned with

ensuring that human rights are protected. As at the global level, each organization has its own constitutive human rights instruments with a corresponding treaty body supervising compliance with the relevant obligations. As Giorgio Gaja has observed, these instruments and mechanisms supplement those established at the global level for the same rights with the ensuing result being a "fairly complex picture."⁹⁸ It is in fact possible for individuals to seek remedies at both levels, although some states that are parties to both the ECHR and the Optional Protocol have entered reservations to the Protocol in order to avoid having to defend themselves first against a petition to the Court in Strasbourg and then against a communication to the Human Rights Committee.⁹⁹ For example, in the case of *Coriel and Aurik*,¹⁰⁰ two years after the European Court held a claimant's petition to be inadmissible, the Human Rights Committee found that the Netherlands had violated the Covenant when it denied the claimants the right to change their surnames for religious reasons.¹⁰¹

While the ECHR system provides a more effective means of obtaining judicial remedies for individuals than does the ICCPR, it does not expressly protect the rights of minorities. The only reference to the rights of minorities is in Article 14, which deals with, *inter alia*, the question of discrimination against national minorities. Nevertheless, the political changes in Eastern and Central Europe and the resulting increase in the mobility of people have created more awareness of issues of intolerance and discrimination against minority groups, and the Council of Europe has responded in a number of ways. First, it has cooperated with and contributed to the work of the OSCE on minority issues. Second, and crucially, the Parliamentary Assembly and the Committee of Ministers now take into account principles of genuine pluralist democracy and human rights in considering applications for membership of the Council of Europe. Pluralist elections must be held at reasonable intervals, by secret ballot and with universal suffrage, to parliaments made up of political party representatives who are free to organize and express themselves.¹⁰² In dealing with applications for membership, special attention is given to the way in which minorities are treated.¹⁰³

Similarly, human rights have come to play a greater role in EU policy and membership criteria. The progressive development of the EU into an "area of freedom, security and justice" has now been recognized as one of the five objectives of the Union. Article 6(1) of the Treaty on European Union has been substantially revised to read as follows: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States."¹⁰⁴ Whether or not human rights are regarded as an objective or merely a principle of the EU, they have now achieved such prominence in the EU's internal and external policies that they were proclaimed in the Amsterdam Treaty as explicit preconditions for EU membership.¹⁰⁵

What all of this indicates is the full recognition in Europe of the idea that how states treat their national, ethnic, and religious minorities is a legitimate matter of international concern that has broad implications beyond the individual states themselves. The policy has been to include rights-based protections for minority groups in regional legal processes and mechanisms as a means to promote and secure peace and fairness across both Eastern and Western Europe. Thus, minority rights and human rights more generally have come to play a defining role in Europe's international institutions and relations.

In conjunction with the changes to the notion of "citizenship" that the EU has generated, minority questions in Europe are today very much on the international agenda. Indeed, in 1990 the European Commission for Democracy through Law prepared a draft European Convention for the Protection of Minorities and this was subsequently superseded by the adoption on November 10, 1994 of the Framework Convention for the Protection of National Minorities. The Convention entered into force in February 1998 and as of January 2000 had been ratified by twenty-eight states.¹⁰⁶ It is the first binding international instrument devoted exclusively to the protection of national minorities and it includes a monitoring mechanism for its implementation. This task is entrusted to the Committee of Ministers, which has created an advisory committee to evaluate the reports transmitted periodically by the states parties.¹⁰⁷ In this respect, the European Framework Convention provides a legally binding regional mechanism by which to implement the otherwise nonbinding 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the substantive content of the two documents being similar.¹⁰⁸

While the Framework Convention is legally binding under international law, the level of generality of certain of its obligations and the lack of specific enforcement machinery akin to that existing under the ECHR (or even under the ICCPR with its review of state-submitted reports and decisions on individual communications) makes it a "soft law" regime in most respects. Scholars in Europe have quickly criticized the Framework Convention for its lack of definition and inadequate supervisory mechanisms with Oberleitner describing the reporting function as the "weakest" available mechanism.¹⁰⁹ This reflects the fact that the governments of Europe have produced these new standards in order to sound both unified and progressive, but the softness of the regime reflects the hesitancy of many governments regarding minority issues.¹¹⁰ Nevertheless, I would suggest that the "compliance-pull" of these soft law mechanisms, in conjunction with the effects of human rights "conditionality" discussed above, are encouraging changes in state behavior. Increasing interaction between states, NGOs, and supervisory bodies is resulting in dialogue and progress on many levels beyond mere reporting.¹¹¹ Within this context the moni-

toring of minority rights by NGOs plays a particularly important role, and it is to this issue that I now turn.

C. EXTERNAL MONITORING BY NGOS

Central to the increasing legitimacy of external monitoring at both the global and regional levels has been the contribution of NGOs to the protection of human rights. NGOs were active in promoting human rights even before the postwar human rights movement and contributed greatly to initiating and maintaining that movement. They pressed governments to internationalize human rights and to develop an international law of human rights. They helped promote the human rights provisions in the UN Charter, the Universal Declaration of Human Rights, the Covenants, and subsequent conventions on human rights. They continue to press for better laws. Especially since the "Helsinki monitors" acting pursuant to the Helsinki Accords, NGOs have established themselves as principal monitors of human rights compliance.¹¹² With the support of the communications media, they have continued to mobilize "shame," to press governments to terminate human rights violations and to improve their laws and institutions so as to prevent or avoid future violations. NGOs are also more free to criticize where criticism may be due as states are generally more concerned to keep bilateral relations on a friendly basis.

What I would like to suggest here is that NGOs can play a vital role in protecting and monitoring religious freedom in cooperation with the various treaty supervisory bodies. As less than two percent of the UN's total budget is allocated to human rights work, the UN human rights machinery lacks the resources needed to obtain credible, systematic, and detailed information on rights violations.¹¹³ It is here that NGOs have a key role to play. For example, as part of the scrutiny of state party reports by the Human Rights Committee, NGOs are able in certain instances to work with the Committee to help with the formulation of questions to be used in investigations and to be put to states appearing before the Committee. Under the European Convention, individuals, NGOs, or groups of individual petitioners can submit applications against states that have accepted the right of individual petition. It is therefore possible for NGOs to institute proceedings or intervene as a party, act as an expert, testify as a witness, or act as *amicus curiae*. While these NGO functions have undoubtedly increased the effectiveness of human rights regimes, reform is still needed if NGOs are to play a more dynamic role in the process of implementing human rights standards in the domestic sphere.

Other domains where NGOs have been effective are in convening inter-

national conferences to raise awareness and in conducting research to document violations. For example, Project Tandem was formed in 1985 to educate and encourage governments and to provide support to the UN.¹¹⁴ Since that time, Tandem has organized three international conferences to study the 1981 Declaration, bringing together national and international experts. The Human Rights Center at the University of Essex, in collaboration with the Tandem Project and a host of other NGO researchers and contributors, also produced the 1997 World Report on Freedom of Religion or Belief. This helped to establish a strong activist network and to compile, for the first time, comprehensive data on the state of religious freedom in many parts of the world.¹¹⁵ At the UN there are also NGO Committees on Freedom of Religion or Belief in both New York and Geneva, and NGOs are able to attend most UN meetings, including the sessions of the treaty bodies, the working groups, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹¹⁶

NGOs are therefore a crucial international monitoring mechanism and means of exerting pressure on targeted countries. They do this through publicity and lobbying their own governments to exert pressure on other countries, and also by operating within international and regional organizations to put pressure on states. This form of coalition between NGOs and multilateral regimes has the advantage of relative objectivity and legitimacy. Unlike bilateral monitoring between countries, NGOs are more neutral and tend to target the highest priority issues for scrutiny, whether at home or abroad. Given the inevitability of monitoring of some form today, states are beginning to realize that it is politically wise to allow and indeed facilitate neutral even-handed monitoring. In a country such as the United States, this may gradually reduce the pressure for bilateral action.

V. BILATERAL MONITORING AND PROTECTION OF FREEDOM OF RELIGION OR BELIEF

Bilateral monitoring—sometimes referred to as unilateral monitoring—is the final avenue for the external protection of religious freedom. In the area of minority rights, this has generally taken one of two forms—first, bilateral treaties between individual countries that contain provisions on minorities, particularly agreements between a state and an adjoining state where a national, ethnic or religious group exists as a majority in one state and as a minority in the second state; and second, the unilateral monitoring of minority rights issues in states by another (powerful) state as an element of foreign political and economic relations.

A. PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES

Article 18(1) of the Council of Europe's Framework Convention provides that:

[T]he parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.¹¹⁷

Over the last few years, many former socialist states in Eastern and Central Europe have attempted to improve their mutual bilateral relations by concluding what Bloed and van Dijk refer to as bilateral treaties of "co-operation, friendship and good-neighbourliness."¹¹⁸ These agreements generally contain provisions that address the rights and obligations of the national, ethnic, and religious minority groups in their respective countries, and they borrow heavily from the language of UN, Council of Europe, and OSCE standards in various multilateral instruments.¹¹⁹

Since 1990, for example, Russia has entered into a complex web of bilateral agreements containing minority protections with Lithuania, Latvia, Estonia, Ukraine, Belarus, Moldova, Armenia, Azerbaijan, Kazakstan, Kyrgyzstan, Georgia, Tajikistan, Uzbekistan, Turkmenistan, and a number of the previously independent states (including the Federal Republic of Germany, Poland, Finland, Hungary, and Slovakia).¹²⁰ This network of bilateral ties evidences an attempt by Russia to set legal standards and expectations governing the status of ethnic Russians and the behavior of neighboring states. On October 21, 1994, Russia also concluded a CIS convention guaranteeing the rights of persons belonging to national minorities. The convention expressly recognizes existing international human rights standards and, in the area of religious rights, contains legally binding obligations in line with the principles enshrined in the 1981 Declaration.¹²¹

Concerns have been raised, however, that this attempt by Russia to develop standards and practices of minority protection among the CIS states may indicate a lack of willingness to implement OSCE, UN, and Council of Europe norms. This fear is further confirmed by the fact that the CIS standard on minority rights is both lower than international standards and dramatically skewed toward the protection of ethnic Russians.¹²² This type of state political self-interest is, of course, one of the major dangers of bilateral treaty arrangements regarding human rights protections when compared to either regional or global human rights treaty regimes.

Likewise, both Poland and Hungary have entered into a series of bilateral

treaties and declarations.¹²³ The most heavily negotiated and controversial issue in these treaties has been the pursuit of autonomy protections for minority groups—that is, autonomous minority self-governing bodies and autonomous structures in neighboring “kin” states. Hungary, in particular, has sought strong protections for the autonomy of Hungarian minority groups in other states, while neighboring states such as Slovakia and Romania have rejected any recognition of collective rights that would “admit the creation of autonomous structures on the ethnic principle.”¹²⁴ It would appear that the concept of autonomy is closely associated by these states with notions of internal territorial delimitation and even separatism and, as noted in the Introduction to this collection, this immediately elevates minority issues to a question of national security. Nevertheless, it is pertinent to recall that Slovakia’s entry into the Council of Europe was ultimately delayed until such time as it had demonstrated compliance with specific provisions on minority rights.¹²⁵

What can we conclude about the comparative strengths and weaknesses of bilateral treaty arrangements in the area of the rights of religious minorities? Their main advantage would appear to be in contributing to regional stability and confidence-building. However, it is equally clear that weak and politically self-interested treaties can ultimately have the opposite effect and cause destabilization. Similarly, while international human rights norms and standards have had a strong influence on the content and language of these bilateral arrangements, it is equally clear that many of these agreements fall short in important respects in comparison with internationally accepted standards. Thus, while bilateral agreements may be tailored to be more situation specific, there is a tendency to relegate multilateral standards to the background if they prove inconvenient to entrenched state interests.¹²⁶

Alfredsson summarizes the legal and political disadvantages of bilateral minority treaties as follows:

- the danger of reduced standards as compared with the international and regional instruments,
- the emphasis on political rather than legal commitments,
- the unequal position of the parties to the situation,
- the possible discrimination between different groups within a contracting state, prompting a proposal for the ‘most-favored-minority-clause,’ and
- the possible destabilizing effects on relations between the parties.¹²⁷

In Alfredsson’s view, long-term peaceful relations between Central and Eastern European states would be better served by eliminating any direct role for kinship states and by transferring the role of guaranteeing and monitoring respect for minority rights to the more balanced and objective scrutiny of international

and regional organizations (that is, the monitoring mechanisms of the UN, OSCE, and Council of Europe). The history of religious wars in the region dating back centuries reveals that the wish to protect religious minorities has frequently been used by rulers as the reason for their intervention in foreign states. This suggests that regional and international approaches—at least in addition to, or as a supervisory check on, bilateral arrangements—offer a preferable way to advance peaceful relations and respect for human rights.¹²⁸

B. UNILATERAL MONITORING AND THE U.S. INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998

The second form of external scrutiny is unilateral monitoring. The U.S. has been perhaps the most aggressive of all states in the world in scrutinizing human rights abroad as a key part of its foreign policy agenda and its relations with other countries. As Michael Young notes, the U.S. often employs economic leverage in dealing with targeted problems like human rights, environment, and labor.¹²⁹ In this section, I review the means by which the U.S. currently seeks to monitor and protect the rights of religious minorities in other countries.

In 1998, President Clinton signed the International Religious Freedom Act of 1998 thereby directly incorporating concern for religious freedom into U.S. foreign policy.¹³⁰ The Act relies on the rationale that the U.S. has an obligation (derived primarily from its constitutional history, which places great importance on ideas of religious freedom, and from international law) to support and protect religious minorities around the world by fighting religious intolerance in states that limit the religious rights of their people. Under the Act, the U.S. will investigate allegations of religious persecution worldwide and pursue diplomatic, cultural, or economic measures against those states where religious discrimination exists.¹³¹ As noted above, the Act achieves these ends by establishing an Office of International Religious Freedom within the U.S. State Department to which an Ambassador-at-Large is appointed. The Ambassador-at-Large is responsible for investigating states that deny religious freedom, proposing potential U.S. responses and acting as a policy advisor to the President on religious matters. Similar to many multilateral treaty regimes, the Act requires the Ambassador-at-Large to produce an annual report on international religious freedom highlighting states of “particular concern for religious freedom.” The Act also creates a Commission on International Religious Freedom which has nine members (in addition to the Ambassador-at-Large) and which is responsible for monitoring the effects of other states’ laws, policies, and practices on religious groups. The Commission is also required to submit an annual report to the President setting out its findings and policy recommendations for the U.S. government.

The key part of the Act, however, is Title IV—*Presidential Actions*. Under sections 401(a) and (b), the President is required to identify specific countries that the Commission designates as having violated religious freedom and to design a response. Section 402 requires the President to identify countries as “particularly severe” violators of religious freedom thereby putting them on the more punitive sanctions “track” in sections 405(a)(9) through (15). Particularly severe violations are defined to include systematic, ongoing and egregious acts of torture, prolonged detention, disappearances, or flagrant denial of life and liberty. States that do not fall within the “severe” category of section 402 are handled under the less punitive remedial provisions of sections 405(a)(1) through (8).

Under section 405—*Description of Presidential Actions*, the President must (subject to some exceptions) either enter into a binding agreement with a designated state to end religious persecution, or choose from this list of fifteen increasingly punitive provisions. These include a private or public demarche; a private or public condemnation; the delay or cancellation of scientific or cultural exchanges; the denial, delay, or cancellation of working, official, or state visits; the withdrawal, limitation, or suspension of some forms of U.S. aid; direction to public and private international financial institutions to deny assistance; and sanctions prohibiting the U.S. government from entering into import or export agreements with the designated government.¹³² The Act also contains a provision allowing for a presidential waiver of punitive measures in those instances where a U.S. rebuke of another state may jeopardize “the important national interest of the United States.”¹³³ Finally, while the Act is part of U.S. domestic law it draws expressly on principles of international law in defining the meaning of the right to religious freedom and what acts or practices constitute violations of that right.¹³⁴

The first report of the Commission was released on September 9, 1999. A thousand pages in length, the report cites Afghanistan, China, Iran, Iraq, Saudi Arabia, and Sudan as the most repressive states. It also contains consideration of and recommendations concerning the situation in the Russian Federation and the 1997 Religion Law. The executive summary states, in similar terms to the findings of the UN Special Rapporteur on Religious Intolerance, that many states were deficient on the following grounds: totalitarian or authoritarian attempts to control religious belief or practice; state hostility toward minority or non-approved religions; state neglect of discrimination against, or persecution of, minority or non-approved religions; discriminatory legislation or policies disadvantaging certain religions; and stigmatization of religions by wrongfully associating them with dangerous “cults” or “sects.”¹³⁵ Subsequently, on November 3, 1999, the Secretary of State, under authority delegated by the President, designated Burma, China, Iran, Iraq, and Sudan as “countries of particular concern.”¹³⁶

How should we assess the legitimacy and effectiveness of unilateral attempts such as the U.S. International Religious Freedom Act of 1998 in combating religious persecution of minorities in other states? The first point to note is that the Act, by isolating one right and developing special machinery by which to protect it, immediately creates a hierarchy of human rights in U.S. foreign policy with religious rights at the apex.¹³⁷ This has implications for the protection of human rights at both the domestic and international levels. Domestically, as Hans Morgenthau argued half a century ago, this has the potential of depriving the U.S. of the flexibility required to protect overall foreign-policy interests and opens the U.S. to allegations of unequal implementation of its own standards. This explains the inclusion of the presidential waiver provision in the Act, which would allow for exceptions to be made in the case of states such as Saudi Arabia, Israel and China, which are valuable trading or strategic partners that the U.S. cannot afford to offend.

Internationally, however, the consequences are more far-reaching. A state-created hierarchy, especially by one of the world's most powerful countries, may significantly undermine the universality and "common understanding" upon which the international human rights regime depends.¹³⁸ This danger is particularly acute in relation to the U.S., which has consistently failed to adhere to the majority of international human rights conventions and has refused to allow international scrutiny of its own domestic human rights situation.¹³⁹ Other states may perceive a certain lack of good faith on the part of a powerful state that claims to be promoting and protecting international human rights abroad as part of its foreign relations while at the same time remaining highly selective in the rights it elects to promote and in refusing itself to comply or cooperate with multilateral human rights regimes. In the wake of recent Supreme Court decisions such as *Employment Division v. Smith*,¹⁴⁰ where it was held by the Court that religious minority groups (here, an indigenous group—the Native American Church) can claim no special exemption from criminal laws of general applicability, this further suggests that the U.S. may be trying to achieve abroad what it is not practicing at home.¹⁴¹

These dangers were partly acknowledged by Secretary John Shattuck during a hearing before the House Committee on International Relations on an initial version of the bill titled the Freedom From Persecution Act. Shattuck stated that the Bill would

create a *de facto* hierarchy of human rights violations under U.S. law that would severely damage our efforts to ensure that all aspects of basic civil and political rights, including religious freedom, are protected. It would differentiate between acts motivated by religious discrimination and similar acts based on other forms of repression or bias, such as denial of

political freedom, or racial or ethnic hatred. In doing so, the bill would legislate a hierarchy of human rights into our laws.¹⁴²

As discussed above, the right to religious freedom is inextricably intertwined and interrelated with other human rights and general issues of democracy, constitutionalism, and the rule of law. Will torture on the basis of religious belief now receive preferential treatment as a matter of U.S. foreign policy in comparison with, say, torture or suppression on the basis of political or other factors? Can religious freedom ultimately be respected and ensured without corresponding protections for all other human rights (including both civil and political and economic, social, and cultural rights)? The Act has the effect of artificially elevating just one aspect of a complex series of relationships for special treatment and ignores the root causes of human rights violations.

The second point to observe is the attempt by the U.S. to justify the Act by reference to international standards and definitions regarding religious freedom while reserving to itself a domestic *means* to promote and protect those standards. Rather than investing its resources and political power in supporting existing international and regional treaty regimes and mechanisms, in particular the badly under-resourced UN Human Rights Committee, the Special Rapporteur on Religious Intolerance, and the Office of the High Commissioner for Human Rights, the U.S. has opted instead to create its own domestic commission and bureaucracy within the State Department. What this evidences is not a general lack of respect for human rights (leaving aside for now U.S. non-adherence to conventions such as the ICESCR, CRC, and CEDAW¹⁴³) but a failure of international cooperation.¹⁴⁴ Of course, by employing domestic means of implementation the effectiveness of the Act is increased, at least from the U.S. point of view, by avoiding the need for achieving consensus with other states and by side-stepping the bureaucratic and political constraints of a multilateral organization. But as with the bilateral agreements discussed in the previous section, this increase in effectiveness is achieved at expense to the ideas of the universality and interrelatedness of human rights with international standards being co-opted by a powerful state for subjective political and strategic purposes.¹⁴⁵ This demonstrates an imperialist approach to human rights and runs counter to the aims and spirit of the international human rights movement upon which both the Act and the Commission strongly depend for their legitimacy.¹⁴⁶

The final point to consider is whether the Act's punitive sanctions-based approach will be effective in achieving the ends it seeks, and how that approach compares with the implementation mechanisms under regional and global human rights regimes. In order to address these issues, it is first necessary to understand why states violate human rights (here the rights of religious minorities

in particular) and what the incentives are for states to comply with international regulatory regimes. It is to these issues that I now finally turn.

VI. ASSESSING THE EFFECTIVENESS OF MULTILATERAL AND BILATERAL MONITORING OF FREEDOM OF RELIGION OR BELIEF

A. *BILATERAL VERSUS MULTILATERAL REGIME COMPLIANCE*

The *raison d'être* of the unilateral sanctions-based approach underlying the International Religious Freedom Act of 1998 was expressed by the republican representative Chris Smith during debate over the Act in 1997:

Tyrants understand strength. They also understand weakness This bill is designed to help people whose situation is particularly compelling, and with whom many Americans feel strong bonds of affinity and obligation."¹⁴⁷

The rationale for the Act is to use the force and influence of U.S. economic and political power to punish those states which engage in egregious violations of the rights of minority religious groups of special concern to U.S. interests (although presumably only in cases where U.S. economic or strategic considerations are not paramount). The Act does allow for flexibility in this regard and the government is able to select from a sixteen-item menu of measures ranging from milder actions such as diplomatic protest, to harsher measures such as the imposition of sanctions and the termination of diplomatic relations. The philosophy of the Act, therefore, is punitive or coercive rather than cooperative or incentive-based. It is a stick—not a carrot—to be employed against “rogue” (most likely Islamic or communist) states.

Is such an approach effective? There are I believe, in addition to the concerns outlined above, two major weaknesses to this form of unilateral pressure and sanctions. First, policies of this sort may actually do more harm than good to the very religious minorities whose protection is sought to be achieved.¹⁴⁸ The vast literature on the use of economic sanctions against states such as Iraq and Cuba reveals that it is often the weakest and most vulnerable that are most affected by such policies.¹⁴⁹ Second, it is far from clear that sanctions and related punitive measures are effective in enforcing belief-related rights. If problems of religious discrimination, intolerance, nationalism, and ethnic conflict are as complex and systemic as the various UN Special Rapporteurs have suggested,

then sanctions may be merely a crude response directed at the symptoms of the problem leaving the root causes at the heart of the violations unaddressed.

If this is correct, do regional or multilateral human rights treaty regimes offer a viable alternative? It is clear that at a normative level, international instruments and institutions have greater legitimacy and objectivity in dealing with human rights violations. All states are held to the same standards and therefore the political and national interest dimensions that are so evident in bilateral mechanisms are diminished (although not entirely removed). The concern at the international and regional levels has always been that of effective implementation. The apparent failings and lack of "teeth" of the various UN treaty bodies and actors are often pointed to by U.S. policymakers as justifications for unilateral or bilateral measures. Of course, the U.S. itself has consistently acted to impede the operation of the UN by withholding funding and refusing to adhere to most international human rights treaties, a fact usually obscured in this calculus. Nevertheless, the question remains whether treaty regimes, even if better resourced and widely supported, can be effective in inducing compliance with human rights norms. This involves many complex questions of regime and compliance theory that are beyond the scope of this chapter. However, let me make a few remarks in the context of international monitoring and protection of the rights of religious minorities.

At the heart of this debate are competing conceptions of the international order. Realist international relations theorists perceive a world of moral, political, and legal anarchy where state power and self-interest are the dominant variables.¹⁵⁰ From this vantage point, economic and military sanctions and related coercive measures are the *lingua franca* of international relations. Liberal international law and human rights theorists, on the other hand, start from the assumption famously made by Professor Henkin in the late 1970s that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."¹⁵¹ The assumption underlying the international and regional mechanisms considered in this chapter is that states have a general "propensity to comply" with international obligations. As we have seen, foreign ministers, diplomats and government leaders in Eastern and Central Europe have devoted enormous time, energy, and resources to preparing, drafting, negotiating, and monitoring treaty obligations. Whether this results in legally binding obligations such as the ICCPR or ECHR, or more soft law regimes such as the OSCE, the assumption is that state freedom of action is thereby limited and an expectation arises that other parties to these instruments will be similarly constrained.¹⁵² In the absence of an effective international police force or judicial system, states bind themselves to observe the law (and in this sense compliance is not voluntary) but their compliance is *induced* not *coerced*.¹⁵³

The issue then is *why* states should comply with these norms and *how* outside actors can induce compliance. Chayes and Chayes have advanced the thesis that

as a practical matter, coercive economic—let alone military—measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future. The attempt to devise and incorporate such sanctions in treaties is largely a waste of time.¹⁵⁴

Chayes and Chayes further assert that the primary sources of noncompliance with treaties are not deliberate violations but rather factors such as the ambiguity and indeterminacy of treaty language, limitations on the capacities of parties to carry out their undertakings, and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.¹⁵⁵ If this is correct, this should affect how resources and energy can most effectively be committed to improve compliance with international treaty obligations. My argument here is that even though international and regional treaty regimes may rely on comparatively weaker mechanisms such as state reporting and individual communications, over time these procedures create a dialogic process by which the compliance-pull increases incrementally. The process is one of multilateral cooperation, objective external scrutiny and ideally, as in the case of the ECHR, provision of legally binding remedies to individuals the subject of violations. If this path is pursued then compliance becomes a question of measures designed to *persuade* (rather than coerce) such as ensuring transparency, providing dispute settlement mechanisms, and increasing capacity building and technical assistance.¹⁵⁶ As states participate in the regime, appear before treaty bodies, respond to requests and submit reports this should lead to readjustments to domestic laws, policies, and practices. In this way a "justificatory discourse" becomes the principal method of inducing compliance with all states bound in a "tightly woven fabric of international agreements, organizations, and institutions that shape their relations with each other and penetrate deeply into their internal economics and politics."¹⁵⁷

The situation of minority groups in Europe today bears out many of these ideas. In the context of minority disputes since the 1990s, Ratner has argued that the role of actors such as the OSCE High Commissioner on National Minorities (whom he terms a "normative intermediary") and regimes such as the ICCPR, ECHR and OSCE have eased tensions within states and helped to ensure that disputes are solved in a norm-based way. While "hard" law enforcement through domestic and international courts has been a key means by which to protect the rights of individuals, Ratner suggests that compliance with

soft law instruments in the area of minority rights has been surprisingly effective.¹⁵⁸

If in fact, at least in an ideal world, international and regional mechanisms are to be preferred to bilateral and unilateral measures, how can the former be made more effective and what are the main obstacles to that objective? In my view, the two contentious areas requiring future work and reform are first, limited agreement on international standards in the area of minority rights and second, current institutional and bureaucratic deficiencies of treaty supervisory bodies.

B. LIMITED AGREEMENT ON INTERNATIONAL STANDARDS

It has been suggested by some scholars that, even before considering issues of institutional effectiveness and strategy, a major shortcoming of UN monitoring mechanisms is the absence of agreement among states on the applicable international standards governing issues of freedom of religion or belief. Table 4.1 sets out the essential provisions in international human rights instruments regarding religious freedom.

In assessing these standards, Young has argued that:

International human rights documents such as the Covenant on Civil and Political Rights serve as useful starting points to agreement, but they are only starting points. Careful examination of the language and meaning of these documents reveals them to be both over-and under-inclusive. Monitoring religious liberties presents particularly difficult issues because religious liberties underlie culture, nation-building, history, and a whole range of things even more fundamental than other basic civil and human rights discussed in the international arena. Thus, developing some sort of consensus on monitoring religious liberties presents a considerable challenge.¹⁵⁹

According to Young, one of the primary reasons for this lack of consensus is the absence of

any systematic, effective and universally legitimate method for developing a consensus among countries. This lack of consensus increases the possibility of power politics, including the use of powerful economic and geopolitical positions to define the debates that are otherwise undefinable. For example, to the extent countries are unwilling to engage in this debate or work in good faith to establish mechanisms to decide issues of

TABLE 4.1 International Human Rights Related to Freedom of Religion and Belief

Body	Instrument	Freedom of Religion	Nondiscrimination on the Basis of Religion	Right of Religious Minority Members to Profess & Practice Their Religion	Protection from Incitement to Hostility, Violence, and Discrimination on the Basis of Religion
United Nations	ICCPR	Art. 18	Arts. 2(1), 26	Art. 27	Arts. 19 and 20(2)
	General Comments	No 22	No. 18	No. 23	No. 11
	UN Religion Declaration	Arts. 1, 6	Arts. 2, 3, 4	UN Minorities Declaration Arts. 1-4, 8(3)	Race Convention Art. 4
Council of Europe	European Convention	Art. 9	Art. 14	Framework Convention; esp. Arts. 3, 4, 5, 8, 12, 13, 15, 17, 19, 20, 21	Framework Convention Art. 6
OSCE		1989 Vienna Document, Principles 16 and 17		1990 Copenhagen Document, paras. 30-39 1991 Geneva Document Parts III-IV	1990 Copenhagen Document, para. 40 1991 Geneva Document Part VI
Islamic Conference	Cairo Declaration	Arts. 10, 18(a), 24, 25	Art. 1		Art. 22

this sort, some countries—the United States, for example—will take matters into their own hands and begin to pressure countries to adhere to a standard that is not necessarily universally recognized, but that is imposed by the most powerful.¹⁶⁰

It is of course correct that there is not uniform agreement among states on international standards of religious freedom, or indeed on the definition of the term “religion” itself.¹⁶¹ Furthermore, there remain marked points of disagreement among states as a matter of practice. For example, while the freedom to change one’s religion or belief is entrenched in international human rights standards, its acceptance by many states remains controversial.¹⁶² In many Muslim states, for example, it is considered a central tenet of Islam that there may be no coercion in matters of religion. Certain contemporary interpretations of Islam, however, do not accept the right of a person to abandon their religion or to convert to another, and it is a capital offence under Islamic law for a Muslim to repudiate his or her faith in Islam.¹⁶³ Accordingly, many Islamic states do not formally accept the Human Rights Committee’s interpretation of the right to “have or adopt” a religion as meaning the right to replace one’s current religion or to adopt atheistic views.¹⁶⁴ The result is that today a number of Islamic countries stand outside of international human rights standards.¹⁶⁵

This problem has been further exacerbated by the progressive dilution of the language in the International Bill of Rights and ensuing documents. Article 18 of the UDHR speaks explicitly of the right “to change” one’s religion, whereas the corresponding article in the ICCPR speaks only of the right “to have or adopt” a particular religion or belief. While this change in wording does not deny the right to change religions, it does signal the reluctance of many states to openly confront the implicit consequences of this right.¹⁶⁶ Likewise, proselytizing¹⁶⁷ and conscientious objection¹⁶⁸ continue to be issues that arouse controversy and dissent.

It will come as no surprise that these uncertainties and disagreements are also evident in the area of the rights of religious minorities. As discussed in the Introduction to this collection,¹⁶⁹ Article 27 of the ICCPR guarantees to religious minorities the right, in community with the other members of their group, to profess and practice their own religion. The formulation of Article 27, however, has raised a number of questions. First, there is disagreement as to what constitutes a “religious minority.”¹⁷⁰ Second, there is uncertainty regarding the relationship between Articles 27 and 18. In order for Article 27 to have any independent meaning, it must extend beyond the ambit of protection provided by Article 18. The issue then becomes the extent to which the purpose of Article 27 is to grant collective rights to the members of a religious minority *qua* a group,¹⁷¹ or merely to accord rights to individuals by devolving an obligation on states to adopt active measures aimed at the preservation of the minority

group's identity in the areas of culture, language and religion.¹⁷² This question is controversial and different UN member states have adopted divergent viewpoints.¹⁷³

The individual orientation of Article 27 indicates that members of religious minorities will always be protected from discrimination by the state or dominant religious group on the basis of their membership in their own ethnic, linguistic, or religious minority. However, this protection is premised on the assumption that individuals have the right to choose whether or not to be a member of the group and that this is not a decision for the minority group itself. In other words, there must be a right of exit. Capotorti has described the reasons for this as follows:

[T]he need to safeguard the freedom of choice of any member of a minority deserves attention. Every individual has the right to decide for himself whether he prefers to be treated as a member of the group, enjoying the protection that will preserve its special character—or to be assimilated into the remainder of the population. A decision on this vital point should never be left to the group. Experience teaches that many minorities tend to become oppressive toward their members as soon as some of them show a spontaneous tendency to choose integration within the majority. To consider the protection of collective values of the group as the only goal worthy of pursuit by international norms concerning minorities is dangerous in that dissenting individual members of a minority could get dragged, under the cover of the unitary policy of the group, by the policy actually carried out by its dominant circles.¹⁷⁴

Thus, in accordance with Kymlicka's distinction between "external protections" (where the minority group asserts rights against the economic or political decisions of the majority) and "internal restrictions" (where the minority group demands rights or restrictions against its own members),¹⁷⁵ the position under Article 27 is that both situations may be permissible provided individual members have the right to choose whether to remain as a member of their religious group. Of course, this issue will often implicate the troubled question of the right to change religions discussed previously.

Whether Article 27 is understood to grant collective or individual rights, its main purpose over and above the protection accorded to individuals under Article 18, is to require the state to adopt "positive measures" of protection such as may be necessary to protect the identity of the minority. The Human Rights Committee has stated that such measures are not inconsistent with the general obligations under Articles 2(1) and 26 of the ICCPR against discrimination provided they are based on reasonable and objective criteria.¹⁷⁶ Likewise, the UN Declaration on the Rights of Persons Belonging to National or Ethnic,

Religious or Linguistic Minorities,¹⁷⁷ the Council of Europe's Framework Convention for the Protection of National Minorities,¹⁷⁸ and the CSCE Copenhagen Document¹⁷⁹ all provide that positive measures taken by the state to protect the rights of minority groups do not violate the principles of equality and non-discrimination. Thus, in order to fulfill their obligations under Article 27 states may need to provide minority religions privileges and benefits similar to those provided to the dominant religion where the minority is otherwise inhibited in the exercise of their right to freedom of religion. How far this may extend beyond the nondiscrimination provisions in Articles 2(1) and 26 remains an open question.¹⁸⁰

A closely related issue to that raised by Young regarding lack of consensus on international standards is the problem of harmonizing religious laws with international human rights standards. This has become a volatile and sensitive issue in international relations, particularly regarding the relationship between Islam and human rights. Kevin Boyle describes the issue as follows:

There is a clear challenge of explanation in arguing that the core of tolerance is to accept the reality of diversity of religions and belief in the world, while rejecting the thesis that the substance of this freedom may be different in different cultures. Thus some interpretations of *shariah* law pit Islam against the principle of the primacy of international law, and practices in other countries based on national law directly ignore the requirements of the right to freedom of conscience, religion and belief. The case of China comes to mind. All claims to universality of rights have a credibility problem when we contemplate the denial of full religious freedoms and other rights to the one fifth, or one quarter of the world's population who are Chinese. Nevertheless, the priority accorded to the core international law standards with respect to human rights cannot be answered as a matter of international law by claims of national sovereignty or the requirements of religious law or custom.¹⁸¹

It is the combination of these two factors—absence of consensus on mutually agreed standards and challenges to the universality of human rights—that Young suggests has led powerful states such as the United States to become impatient with multilateral mechanisms and to turn instead to bilateral approaches, thereby avoiding the need for obtaining consensus.

In my view, however, Young's analysis is overly pessimistic and ignores the progress that has in fact been made in defining and universalizing international standards since the birth of the UN Charter in 1945. Disagreement over the meaning of human rights is not unique to the right to freedom of religion or belief. While controversy will always exist over specific conceptions of religious freedom, I would argue that the relevant provisions of the UDHR, ICCPR, and

the 1981 Declaration when viewed together, and in conjunction with the General Comments of the Human Rights Committee, provide a strong foundation for convergence on core minimum standards. There is, for example, growing overlapping consensus among states, albeit at a high level of abstraction, on the idea that freedom of religion or belief requires a rejection of "claims to a monopoly of truth."¹⁸²

In this regard, the landmark Krishnaswami study has exerted a powerful influence and has assisted in the progressive development of international standards that are gradually becoming incorporated into constitutional and domestic legal systems.¹⁸³ Despite the "historical backdrop of civil strife, international warfare and ideological conflict fueled by religion, the [1981] Declaration stands as a milestone in the progressive development of human rights norms."¹⁸⁴ In concluding her analysis of the 1981 Declaration, Sullivan cautions against new standard-setting efforts and movement toward a binding convention. While some of the Declaration's provisions undoubtedly make major concessions and are drafted in over-broad or vague language, the document nevertheless stands as a major advance in the development of international norms in this area. Given the complexity and sensitivity of the issues raised by the Declaration, efforts focused on improved implementation are arguably the better course at this time.¹⁸⁵

C. INSTITUTIONAL DEFICIENCIES

The second major obstacle to the effective international monitoring of religious freedom is the severe resource and bureaucratic constraints faced by international human rights treaty bodies and related institutions. Little has highlighted the two major deficiencies with the UN role in protecting and monitoring human rights. The first is financial—less than two percent of the overall UN budget is dedicated to the promulgation, promotion, and implementation of human rights.¹⁸⁶ The second is structural—the main problem being the uncoordinated proliferation of UN human rights activities and bodies and the fact that

the United Nations is not an effective international authority, one capable of consistently enforcing international human rights. Therefore, even though human rights standards may be adequately articulated, and relatively well disseminated and affirmed (in theory), there are serious deficiencies regarding implementation. Instead of the impartial and reliable system of human rights adjudication and implementation that was originally envisioned, standards get applied sporadically and selectively, and in a way that is subject most decidedly to political influence.¹⁸⁷

UN human rights implementation effectiveness is subject to internal constraints deriving from the nature of the bureaucracy and the pressures placed on it by member states. These constraints have an impact on leadership, the quality and morale of staff, and on the availability of resources.¹⁸⁸ Both the Human Rights Commission and the recently created post of OHCHR are subject to the political manipulation and financial constraints imposed by member states.

On the issue of monitoring compliance by states with their international human rights obligations, Elizabeth Evatt has noted that at a period when the treaty bodies are seeking to make the monitoring system more effective, and when the demands on them are increasing (with more parties, more reports, and more individual communications), the resources available to support their work seems to be diminishing.¹⁸⁹ In this sense, the success of the treaty bodies in developing innovative monitoring techniques and in ensuring the participation of states and NGOs has ironically created a crisis that needs to be addressed if paralysis of the system is to be avoided.¹⁹⁰

VII. CONCLUSION

Despite these obstacles, I believe that the basic assumptions upon which international and regional human rights treaty body regimes are based remain sound and that these mechanisms are to be preferred to bilateral or unilateral responses. In particular, incremental normative influence through universal participation in these systems has been shown to be occurring in spite of severe financial and structural constraints. In Europe, the implementation of international human rights standards into domestic law in conjunction with full participation in treaty regimes such as the ECHR and the ICCPR is creating a culture of rights and encouraging increased compliance by member states. The future success of these processes will be linked to the degree to which all civil society actors, especially NGOs and individuals whose rights have been violated, are able to obtain access to these mechanisms. Improved access must be combined with the distribution among participating groups of the tools, resources, and information necessary to make their participation meaningful. By progressively developing and coordinating the efforts of international organizations, regional bodies, and NGOs it may be possible to forestall the premature action of powerful states, such as the U.S., which are impatient to employ bilateral and unilateral approaches to address global problems.

ENDNOTES

1. For example, early recognition of the concept of freedom of thought and conscience can be traced to the Platonic Dialogues: see Hugh Tredennick and Harold

Tarrant (eds.), *Plato, THE LAST DAYS OF SOCRATES—EUTHYPHRO, APOLOGY, CRITO, PHAEDO* (England: Penguin Books, 1993).

2. *SUMMA THEOLOGICA*, II, II, q.10, a.11 cited in Tad Stahnke and J. Paul Martin (eds.), *RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 3* (New York: Center for the Study of Human Rights, 1998).

3. *DE FIDE*, Disp. 18, sect. 4, No.10 cited in *ibid.*

4. John Locke, *EPISTOLA DE TOLERANTIA: A LETTER ON TOLERATION*, edited by R. Klibansky and translated by J. W. Gough (Oxford, 1968). For an early account of the tension between liberty of conscience and speech and limits on the power of government, see A. S. P. Woodhouse (ed.), *PURITANISM AND LIBERTY, BEING THE ARMY DEBATES (1647–49) FROM THE CLARKE MANUSCRIPTS 58ff* (London: J. M. Dent, 3rd ed., 1992).

5. For a discussion of the development of the right to freedom of thought, conscience, and religion from the writings of early thinkers, into national law, and ultimately into international law, see Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, UN Sales No. 60 XIV.2 (1960). See also Natan Lerner, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (Netherlands: Martinus Nijhoff, 1990).

6. See, e.g., the Treaty of 1536 signed by Francis I of France and Suleiman I of the Ottoman Empire (allowing for the establishment of French merchants in Turkey and granting them individual religious freedom): see Krishnaswami Study, above n. 5, 11. See also Treaty of Oliva (1660) (in favor of the Roman Catholics in Livonia, ceded by Poland to Sweden); Treaty of Nimeguen (1678) (between France and Spain); Treaty of Ryswick (1697) (protecting Catholics in territories ceded by France to Holland); Treaty of Paris (1763) (between France, Spain and Great Britain in favor of Roman Catholics in Canadian territories ceded by France): see Lerner, above n. 5, 7. See further Malcolm D. Evans, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 42–74* (United Kingdom: Cambridge University Press, 1997).

7. See Article 18 of the Universal Declaration of Human Rights, Adopted and Proclaimed by United Nations General Assembly Resolution 217A (III) on 10 December 1948; Article 18 of the International Covenant on Civil and Political Rights, Adopted and Opened for Signature by the United Nations General Assembly Resolution 2200A (XXI) on December 16, 1966, Entered into Force 23 March 1976.

8. Resolution Adopted by the General Assembly on November 25, 1981 [on the Report of the Third Committee (A/36/684)].

9. United Nations Seminar on The Encouragement of Understanding, Tolerance and Respect in Matters Relating to Freedom of Religion or Belief, Geneva, Switzerland, December 3–14, 1984, UN Doc. G/SO 216/3 (37); ST/HR/SER.A/16, 6.

10. In particular, Islamic fundamentalism has risen in the Middle-East and North Africa. Following the end of the Cold War, civil conflict of an inter-religious and ethno-religious nature emerged in Central and Eastern European states. In many respects, these conflicts have triggered a new interest in the connection between religion, international law, and politics: see, e.g., Mark W. Janis (ed.), *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* (Kluwer Academic Publishers, 1991).

11. David Little, *Studying "Religious Human Rights": Methodological Foundations*, in Johan D. van der Vyver and John Witte, Jr (eds.), *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—LEGAL PERSPECTIVES* 46 (The Hague: Martinus Nijhoff Publishers, 1996).
12. See Thomas Lynch, *The International Religious Freedom Act of 1998*, 6 HUM. RTS. BR. 18 (1999).
13. Kevin Boyle and Juliet Sheen (eds.), *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT* (London: Routledge, 1997).
14. Yoram Dinstein, *Freedom of Religion and the Protection of Religious Minorities*, ISRAEL YEARBOOK ON HUM. RTS. 145, 146 [1992].
15. Abdelfattah Amor, *Implementation of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Economic and Social Council, Report Submitted in accordance with Commission on Human Rights Resolution 1996/23, E/CN.4/1997/91, 30 December 1996, paras. 18–24.
16. Dinstein, above n. 14, 165–8.
17. Andrew Clapham, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 1 (New York: Oxford University Press, 1993).
18. See 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, 501 (1988). See also Theodor Meron, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS* 153–60 (1986).
19. *Ibid.* 510.
20. See *Religion, Religious Minorities and Human Rights: An Introduction*, above at n. 34 and accompanying text.
21. See, e.g., Vidal D'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. Doc. E/CN.4/1987/35, para. 89 (1986); *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, Pt I, para. 30 (1993).
22. Elizabeth Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, U.N. Doc. E/CN.4/Sub.2/1987/26 (1986) para. 18.
23. Bahiyyih G. Tahzib, *FREEDOM OF RELIGION OR BELIEF—ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* 24–5 (The Hague: Martinus Nijhoff Publishers, 1996).
24. See Abdullahi An-Na'im, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1, 9 (1987).
25. See Abdullahi An-Na'im, *Religious Liberty in Egypt: Under the Shadow of the Islamic Dhimma System* and Khalid Duran, *Religious Liberty and Human Rights in the Sudan* in Leonard Swidler (ed.), *RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS* 45, 61 (Philadelphia: Ecumenical Press, and New York: Hippocrene Books, 1986).
26. Tahzib, above n. 23, 26.
27. See 1986 Benito Report, above n. 22, para. 167.
28. See 1987 Ribeiro Report, above n. 21, para. 1.

29. See generally Tahzib, above n. 23, 27–33.
30. For a useful overview of this issue, see W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework* in van der Vyver and Witte, above n. 11, 1–44.
31. Tahzib, above n. 23, 5.
32. Amor Report, above n. 15, para. 83.
33. See Amartya Sen, *DEVELOPMENT AS FREEDOM* 146 (New York: Random House, 1999).
34. See Donald W. Shriver, *Religion and Violence Prevention* in Barnett R. Rubin (ed.), *CASES AND STRATEGIES FOR PREVENTIVE ACTION*, Papers from the Center for Preventive Action's Third Annual Conference, vol. 2 (New York: Century Foundation Press, 1998).
35. Note, however, that both Byrnes and Goeckel offer cautionary notes about the capacity of religious organizations to protect the rights of religious minorities: see Byrnes, Chapter 15; Goeckel, Chapter 16.
36. *Preventing Deadly Conflict*, Final Report, Carnegie Commission on Preventing Deadly Conflict 114 (1997).
37. See especially the 1965 Declaration by the Vatican II Council on the Relation of the Church to Non-Christian Religions (*Nostra Aetate*) which states that "[i]n our time, when day by day mankind is being drawn closer, and the ties between different peoples are becoming stronger, the Church examines more closely the relationship with non-Christian religions."
38. *Preventing Deadly Conflict*, above n. 36, 116–17.
39. Michael K. Young, *Religious Liberties and Religious Tolerance: An Agenda for the Future*, 4 B.Y.U. L. REV. 973, 983 (1996).
40. See Michelle Mack, *Religious Human Rights and the International Human Rights Community: Finding Common Ground—Without Compromise*, 13 NOTRE DAME J. L. ETHICS. & PUB. POLICY 455 (1999) (arguing for reconciliation and mutual support between religion and human rights despite their sometimes difficult and paradoxical relationship).
41. Louis Henkin, *Constitutions and the Elements of Constitutionalism*, Occasional Paper Series, Center for the Study of Human Rights, Columbia University, November 1992, at 1.
42. See Herman Schwartz, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* ix–x (2000).
43. Ismail Mohamed, *Constitutional Court of South Africa* in Cheryl Saunders (ed.), *COURTS OF FINAL JURISDICTION—THE MASON COURT IN AUSTRALIA* 173 (Sydney: Federation Press, 1996).
44. Article 36(2) protects "the right to study and use their own language alongside the compulsory study of the Bulgarian language" and Article 54(1) protects the right "to develop his own culture in accordance with his ethnic identification." Article 6 bars "restrictions of rights on the grounds of . . . nationality, ethnic self-identity . . . [and] religion."
45. Articles 11 and 12. See Schwartz, above n. 42, 184.
46. According to Morton Sklar, a large Turkish minority in the Razgrad area claimed state interference with their religious freedom on the grounds that only one

inadequate Moslem mosque was kept open: Morton Sklar, *Memorandum to Council of Europe and UN Human Rights Agency*, June 15, 1992, cited in Schwartz, above n. 42, 305-6.

47. See Vanelin Ganey, *Judicial Independence and Post-totalitarian Politics: The Case of the Bulgarian "Law on Judicial Power,"* 3 PARKER SCH. J. EUR. L. 227 (1996), cited in Schwartz, above n. 42, 184.

48. Decision 5/92, A.C. 11/92, June 11, 1992.

49. The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature by the Council of Europe on November 4, 1959, and entered into force on September 3, 1953: see Martin and Stahnke, above n. 2, 140.

50. Schwartz cites Rumyana Kolarova as authority for this proposition: see Schwartz, above n. 42, 303, fn 54.

51. *Ibid.* 185.

52. Schwartz, above n. 42, 234.

53. See *Snapshots from around Europe*, ROMA RIGHTS, Summer 1997, 10.

54. *Symposium Report*, Symposium on Public Interest Law in Eastern Europe and Russia, Constitutional and Legislative Policy Institute, Budapest, June 29—July 8, 1997, University of Natal, South Africa, Chapter titled "Litigation Project on Discrimination Against Roma," 27.

55. Schwartz, above n. 42, 211.

56. Similarly, Latvia's admission to the European Union in 1999 was linked to implementation of recommendations made by the OSCE High Commissioner on National Minorities on citizenship and language: see Steven Ratner, *Minority Disputes in Europe: Toward New Roles for International Law*, 32 N.Y.U. J. INT. L. & POL. 591, 639 (2000).

57. See further Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHICAGO. L. REV. 447 (1991).

58. Louis Henkin, *THE AGE OF RIGHTS* 51-3 (New York: Columbia University Press, 1990).

59. The original Conference on Security and Co-operation in Europe (CSCE) was based on an intergovernmental conference of all European states, the United States of America and Canada in the first half of the 1970s. This conference resulted in the signature of the Final Act of Helsinki in August 1975. On the basis of the Final Act, an increasing number of CSCE follow-up meetings and specialized conferences took place which resulted in the CSCE being referred to as the "CSCE process" or "Helsinki process": see Arie Bloed, *Monitoring the CSCE Human Dimension: In Search of its Effectiveness* in Arie Bloed, Liselotte Leicht, Manfred Nowak, and Allan Rosas (eds.), *MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS* 45 (Netherlands: Martinus Nijhoff, 1993). See further chapter 6 by Jeremy Gunn in this volume.

60. 30 INT. LEG. MAT. 1670, 1672 (1991) cited in Henry J. Steiner and Philip Alston (eds.), *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 590 (New York: Oxford University Press, 2nd ed., 2000).

61. See Michael Young, *External Monitoring of Domestic Religious Liberties*, 2 B. Y. U. L. REV. 501, 503 (1998).

62. See, e.g., Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990) (discussing the extent to which states are bound by humanitarian or human rights norms regardless of treaties, by way of custom).

63. Oscar Schachter, *The UN Legal Order: An Overview* in Christopher C. Joyner (ed.), *THE UNITED NATIONS AND INTERNATIONAL LAW* 14 (United Kingdom: Cambridge University Press, 1997).

64. *Ibid.*

65. UN Charter, Art. 1(3). See also David Little, *Protecting Human Rights During and After Conflict: The Role of the United Nations*, TULSA J. COMP. INT. L. 87, 87 (1996).

66. See CHR Res. 1995/23 of Feb. 24, 1995, UN Doc E/CN.4/1995/L.11/Add.1 (1995) at 41-5.

67. CHR Res. 1983/40. The request was endorsed by ECOSOC in its Dec. 1983/150, UN ESCOR, 1983, Supp. No 1, 15th plen. mtg. at 41, UN Doc E/1983/83 (1984).

68. The mandate of the OHCHR derives from Arts. 1, 13 and 55 of the UN Charter, the Vienna Declaration and Programme of Action and GA Res. 48/141 of 20 December 1993, by which the GA established the post of United Nations High Commissioner for Human Rights: see <http://www.unhchr.ch/html/hchr.htm>.

69. Report of the Secretary-General to the GA, *Renewing the United Nations: A Programme for Reform*, A/51/950, ¶ 79, July 14, 1997, available at: <http://www.unhchr.ch/html/hchr/unrefor.htm>.

70. Judicial monitoring is employed in treaty regimes such as the Genocide Convention which allows for disputes in relation to a state's responsibility for genocide to be submitted to the International Court of Justice at the request of any of the parties. Quasi-judicial mechanisms encompass the treaty bodies established by the major international human rights conventions: see Alison Jernow, *Ad Hoc and Extra-Conventional Means for Human Rights Monitoring*, N. Y. U. J. INT. L. POL. 785, 836, n. 3 (1996).

71. Report of the Commission on Human Rights to the Economic and Social Council, CHR, 4th Sess., UN Doc E/259 (1947).

72. ESC Res. 1235 (XLII), UN ESCOR, 42nd Sess., Supp. No.1 at 17, UN Doc E/4393 (1967). The 1235 procedure is based on Article 62 of the UN Charter, which empowers ECOSOC to "make or initiate studies and reports with respect to international, economic, social, cultural, educational, health and related matters" and to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms": UN Charter, Art. 62.

73. For example, in August 1992 Special Rapporteur Tadeusz Mazowiecki was appointed in relation to the deteriorating situation in the former Yugoslavia.

74. For a description of the mandate of the Special Rapporteur on Religious Intolerance, see Abdelfattah Amor, *Public Conference: The Mandate of the UN Special Rapporteur*, 12 EMORY INT. L. REV. 945 (1998).

75. This procedure is based on ECOSOC Res. 1503 (XLVIII) of May 27, 1970, UN ESCOR, 48th Sess., Supp. No. 1A, 1693d plen. mtg. at 8, UN Doc. E/4832/Add.1 (1970). See further Philip Alston, *The Commission on Human Rights* in Philip Alston (ed.), *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126, 145-55 (1992).

76. In 1992, the Special Rapporteur on Summary or Arbitrary Executions reported that among the more than 100 states to which he had transmitted allegations, only two had claimed that they did not consider themselves bound by the standards contained in the ICCPR: *see* Report by the Special Rapporteur on Summary or Arbitrary Executions, CHR, 48th Sess., Agenda Item 12, para. 12, UN Doc. E/CN.4/1992/30 (1992).

77. Bruno Simma, *A Hard Look at Soft Law*, 82 AM. SOC. INT. L. PROC. 377, 380 (1988).

78. Thomas Buergenthal, *New Customary Law: Taking Human Rights Seriously?*, 87 AM. SOC. INT. L. PROC. 230, 231 (1993).

79. Jernow, above n. 70, 809.

80. Sub-C. Res. 1983/31 of September 6, 1983, para. 2, UN Docs. E/CN.4/1984/3, E/CN.4/Sub.2/1983/43, at 99 (1983).

81. Report Submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1999/39, E/CN.4/2000/65, February 15, 2000, para. 3.

82. *Ibid.* para. 173.

83. *Ibid.* para. 174.

84. *Ibid.*

85. *Ibid.* para. 181.

86. GA Res. 54/159 Elimination of all forms of religious intolerance, A/RES/54/159, February 22, 2000.

87. High Commissioner for the Promotion and Protection of All Human Rights, GA Res. 48/141, UN GAOR, 48th Sess., UN Doc. A/RES/48/141 (1993).

88. The result is that warnings—like the report of the visit made by the Special Rapporteur on Executions to Rwanda in 1993, before the massacres in Rwanda occurred—may get overlooked.

89. The Optional Protocol entered into force on March 23, 1976. Having considered a communication, the Committee forwards its “views” to the state party and to the individual: *see generally* Dominick McGoldrick, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 50-1 (New York: Oxford, Clarendon Press, 1994).

90. For a comprehensive review of the Committee’s consideration of Article 27, *see* Alan Phillips and Allan Rosas (eds.), *UNIVERSAL MINORITY RIGHTS* (Åbo: Institute for Human Rights and London: Minority Rights Group (International), 1997). For a general overview of the decisions of the Committee, *see* McGoldrick, above n. 89; Sarah Joseph, Jenny Shultz and Melissa Castan, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* (Melbourne: Oxford University Press, 2000).

91. *See, e.g., Westerman v. Netherlands*, Communication No. 682/1996, decided on November 3, 1999 (finding no violation of Article 18 by the Netherlands for refusing an application of conscientious objection to compulsory military service). Note, however, the dissenting views of Committee members P. Bhagwati, L. Henkin, C. Medina Quiroga, F. Pocar and M. Scheinin.

92. Case referred to as Communication No. R.6/24: *see* Report of the Human Rights Committee, GAOR, Thirty-sixth Session, Supplement No. 40 (A/36/40), 166-75.

93. Communication No. 167/1984: see Report of the Human Rights Committee, Vol. II, GAOR, Forty-fifth Session, Supplement No. 40 (A/45/40) 1-30.

94. Communication No. 694/1996. See also Communication No. 816/1998 *Grant Tadman et al v. Canada* decided on October 29, 1999 (ruled inadmissible on grounds that the authors had insufficiently established how they were victims of discrimination).

95. Note that under Art. 20 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Committee against Torture can act of its own volition if it receives well-founded information that torture is systematically being practiced in the territory of a State party.

96. For example, Scheinen notes that in the five Nordic and three Baltic countries (which have incorporated the convention into their domestic law and have a generally well-developed human rights culture) the ICCPR state reporting procedure has involved NGOs at all stages creating a "continuing platform for a domestic human rights discourse": Martin Scheinen, *Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experiences* in Philip Alston and James Crawford (eds.), *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 243 (Cambridge: Cambridge University Press, 2000).

97. See Toby Mendel, *The Strasbourg Safeguard*, TRANSITIONS ONLINE, June 1, 2000 at 2 available at <http://archive.tol.cz/jun00/thestras.html>.

98. Giorgio Gaja, *New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?* in Philip Alston (ed.), *THE EU AND HUMAN RIGHTS* 780 (New York: Oxford University Press, 1999). For a comparison between the ICCPR Optional Protocol and ECHR systems, see Manfred Nowak, *The Inter-relationship between the Covenant on Civil and Political Rights and the European Convention on Human Rights* in S. Vassilouni (ed.), *ASPECTS OF THE PROTECTION OF INDIVIDUAL AND SOCIAL RIGHTS* 131 (1995).

99. Gaja, above n. 98, 788-9.

100. The Commission's decision on App. No. 18050/91 and the Committee's views on Communication 453/1991, both in relation to this case, are reproduced in (1994)15 HUM. RTS. L. J. 448 and 422.

101. At present there are no adequate rules for dealing with overlapping jurisdiction between international human rights institutions. The fact that petitions by the same individual have been addressed by both the Human Rights Committee and the Inter-American Commission on Human Rights was a key factor precipitating recent denunciations of the Commission and the Optional Protocol to the ICCPR by Jamaica, Trinidad and Tobago, and Guyana: see Benedict Kingsbury, *Foreward: Is the Proliferation of International Courts and Tribunals a Systemic Problem?* 31 N.Y.U. J. INT. L. & POL. 679, 683 (1999).

102. *THE COUNCIL OF EUROPE AND HUMAN RIGHTS* 2 (Strasbourg: Council of Europe, 1991).

103. See Eero J. Aarnio, *Minority Rights in the Council of Europe: Current Developments* in Phillips and Rosas, above n. 90, 124.

104. The Amsterdam Treaty of October 2, 1997 entered into force on May 1, 1999. The reference here is to the revised and consolidated version of the TEU.

105. According to a new section in Article 49 TEU only a European state which "respects the principles set out in Article 6(1) may apply to become a member of the Union": see Manfred Nowak, *Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU* in Alston, above n. 98, 689-90.

106. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351 (1995). See Steiner and Alston, above n. 60, 796.

107. See Resolution (97) 10 of the Committee of Ministers of the Council of Europe, Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, September, 17, 1997. See also Gaetano Pentassuglia, *Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities—With Special Reference to the Role of the Advisory Committee*, 6 INT. J. MINORITY & GROUP RTS. 417 (1999).

108. GA Res. 47/135 of December 18, 1992, cited in Stahnke and Martin, above n. 2, 162. The 1992 declaration extends beyond Article 27 and is less hesitant on the issue of the collective nature of minority rights: see H. A. Strydom, *Minority Rights Protection: Implementing International Standards*, 14 STH. AFR. J. HUM. RTS. 373, 376 (1998); Aarnio, above n. 103, 130.

109. Oberleitner further suggests that the problem of overdue and incomplete reports will fundamentally detract from the efficacy of the system and that reform is required to create a more powerful, apolitical supervisory mechanism: see Gerd Oberleitner, *Monitoring Minority Rights under the Council of Europe's Framework Convention* in Peter Cumper and Steven Weatley (eds.), MINORITY RIGHTS IN THE 'NEW' EUROPE 83-4 (The Hague: Martinus Nijhoff, 1999).

110. Ratner, above n. 56, 616 (2000).

111. See Christopher Ward, *Majoring in Minorities: Minority Rights in Europe*, 24 M.U.L.R. 530, 533 (2000).

112. See, e.g., International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America—Report 2000* (IHF: Austria, 2000).

113. Michael Roan, *The Role of Secular Non-Governmental Organizations in the Cultivation and Understanding of Religious Human Rights* in van der Vyver and Witte, above n. 11, 144.

114. *Ibid.* 152-3.

115. Boyle and Sheen, above n. 13. Note also the New York-based Project on Religion and Human Rights: see John Kelsay and Sumner B. Twiss (eds.), RELIGION AND HUMAN RIGHTS (New York: The Project on Religion and Human Rights, 1994).

116. See UN Bulletin of Human Rights, *Implementation of International Human Rights Instruments*, 89/1 (Geneva: Center for Human Rights, 1990) at 25 (noting that NGOs are the main vehicle by which to stir official bodies to action).

117. Framework Convention, above n. 106.

118. Arie Bloed and Peter van Dijk (eds.), PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES—THE CASE OF CENTRAL AND EASTERN EUROPE 2 (The Hague: Kluwer Law International, 1999).

119. Note that most of these bilateral agreements contain a general clause stating

that nothing in the treaty shall be construed as limiting or derogating from any minority rights standards ensured under any treaty or agreement to which the states are parties: *ibid.* 15. Indeed, there is evidence from recent bilateral treaties that OSCE standards in particular are often treated as legally binding: *see, e.g.*, the treaties between Germany and Hungary (Art. 19.1), Romania (Art. 15.1), and Czechoslovakia (Art. 20.1), of February 6, 1992, April 21, 1992, and February 27, 1992, respectively.

120. *See generally* Heather Hurlburt, *Russian Bilateral Treaties and Minority Policy* in Bloed and van Dijk, above n. 118, 55–99.

121. *Ibid.* 85–6.

122. *Ibid.* 87–8.

123. At the beginning of the transition period (1990–1994) Poland had concluded bilateral agreements on friendly co-operation with all its neighboring states including with: Germany (June 17, 1991); Czech and Slovak Republic October 6, 1991; Ukraine (May 18, 1992); Russia (May 22, 1992); Belarus (June 23, 1992); and Lithuania (April 26, 1994). Poland also concluded treaties with Hungary, Latvia, Estonia and Romania during the same period: *see* Jan Barcz, *Poland and its Bilateral Treaties* in Bloed and van Dijk, above n. 118, 101.

124. Statement by the Government of the Slovak Republic on the Treaty with the Republic of Hungary, Bratislava, March 18, 1995, cited in Patrick Thornberry, *Hungarian Bilateral Treaties and Declarations* in Bloed and van Dijk, above n. 118, 127.

144. *See further* Michael Geroe and Thomas Gump, *Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe*, 32 COLUM. J. TRANSNAT'L. L. 673 (1995).

125. *See* above n. 56 and accompanying text.

126. *See generally* Elizabeth Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HASTINGS INT. & COMP. L. REV. 291 (1999).

127. Gudmundur Alfredsson, *Identifying Possible Disadvantages of Bilateral Agreements and Advancing the 'Most-Favoured-Minority-Clause'* in Bloed and van Dijk, above n. 118, 165.

128. *See* Vladimir Ortakovski, *MINORITIES IN THE BALKANS* 12 (New York: Transnational Publishers, 2000).

129. For example, under the Jackson-Vanik Amendment the U.S. predicated normal trade relations with non-market economies on those states' emigration policy: *see* 19 U.S.C. § 2432 (1994). Over time this has expanded to allow broad human rights investigations before "most favored nation" status is granted: Young, above n. 61, 511. U.S. legislation affording human rights influence in formation of foreign policy includes: Foreign Assistance Act of 1973 § 32, Pub. L. No 93–189, 87 Stat. 714, 733 (1973) (denial of economic or military assistance to foreign governments which intern political prisoners); Foreign Assistance Act of 1974 § 502B, Pub. L. No 93–559, 88 Stat. 1795 (1974) (denial of security assistance to foreign governments which engage in a consistent pattern of gross violations of internationally recognized human rights); and International Security Assistance and Arms Export Control Act of 1976 § 502B, Pub. L. No 94329, 22 U.S.C. 2304 (1976) (goal of U.S. foreign policy is increased observance of international human rights and tying military aid programs and security assistance to human rights).

130. The Act was so uncontroversial that it passed the Senate 90–0. The legislative history indicates that the statute was aimed specifically at China (for its conduct in Tibet), Pakistan, and Sudan.

131. Lynch, above n. 12, 18.

132. *Ibid.* 19.

133. Section 407 of Title IV.

134. In particular, the Act draws on Article 18 of the UDHR and Article 18 of the ICCPR (which the U.S. ratified with reservations in April 1992).

135. Sean Murphy (ed.), *Contemporary Practice of the United States Relating to International Law*, 94 A.J.I.L. 102, 108–9 (2000).

136. 64 FED. REG. 59,821 (1999). The second annual report of the Commission was released on September 5, 2000 covering 194 countries and identifying again states of particular concern.

137. See Kristin Wuerffel, *Discrimination Among Rights? A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 VAL. U. L. REV. 369, 371–2 (1998).

138. Religious human rights scholars in the U.S. such as Abdullahi An-Na'im seeking ways of reconciling religious values with international human rights standards in countries that practice egregious violations of human rights are particularly affected by this factor: see Abdullahi An-Na'im, *Islamic Foundations of Human Rights* in Johan van der Vyver and John Witte (eds.), *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—RELIGIOUS PERSPECTIVES* 337, 341 (The Hague: Kluwer Law International, 1996).

139. The U.S. has not ratified the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, nor the International Covenant on the Rights of the Child, adopted by the UN GA on November 20, 1989; entered into force on September 2, 1990 in accordance with Art. 49(1). It also entered numerous reservations in ratifying the ICCPR: see Steiner and Alston, above n. 60, 1039–43.

140. 494 U.S. 872 (1990).

141. Concerns have also been raised whether the Act excessively entangles the U.S. government in matters of religion and thereby violates the Establishment Clause in the First Amendment to the federal constitution. The issue is whether the Act allows for the use of U.S. government funds and property for “religious purposes” and whether this raises any constitutional questions.

142. Freedom From Religious Persecution Act, 1997: Markup on H.R. 1685 Before the House Comm. On International Relations, 105th Cong. (1997) (statement of John Shattuck, Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Dept. of State).

143. Many of the objections in U.S. domestic politics to treaties such as CEDAW and CRC have come from the Christian Right which views the UN as not only a threat to the American family but as a mechanism that allows a secular elite to threaten family values worldwide. UN programs and standards regarding abortion and reproductive freedom are, in particular, regarded as an anathema: see William Martin, *The Religious Right and Foreign Policy*, FOREIGN POLICY 66, 74 (1999).

144. See Stefanie Grant, *The United States and the International Human Rights*

Treaty System: For Export Only? in Alston and Crawford, above n. 96, 317 (arguing that the U.S. has played a strong role in promoting international human rights abroad but its record in doing so at home has been slow and contradictory and has excluded any discussion of economic and social rights).

145. It is widely acknowledged that the domestic political pressure to enact the International Religious Freedom Act of 1998 came predominantly from conservative Christian and evangelical groups concerned about the persecution of Christians in countries such as China, Vietnam, and Sudan: Christy McCormick, *Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L. LEGAL STUD. 283, 285-6 (1998). On July 2, 1997, the first major report released by the Bureau of Democracy, Human Rights and Labor Affairs of the State Department was titled "U.S. Policies in Support of Religious Freedom: Focus on Christians."

146. This was the position taken by the National Council of Churches in mid-1998 arguing that the U.S. should not act "as the religious police of the world," that a "sanctions-based approach would hurt the very people it is intended to help," and that the effort would be best made multilaterally: see National Council of Churches, NCC Statement on Proposed Federal Legislation Addressing Religious Persecution, available at <http://www.nccusa.org>.

147. Lawrence J. Goodrich, *Congress Moves to Punish Religious Persecution Worldwide*, CHRISTIAN SCI. MONITOR, Sept. 25, 1997, at 3.

148. See Sean Murphy (ed.), *Contemporary Practice of the United States Relating to International Law: Sanctions Against States Tolerating Religious Persecution*, 93 AM.J.INT.L. 480, 481 (1999) (arguing that sanctions will be counterproductive, may in fact strengthen the hand of those governments inciting religious intolerance, and may endanger the well-being of those the U.S. is seeking to help).

149. Abram Chayes and Antonia Handler Chayes, *THE NEW SOVEREIGNTY—COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 66 (Cambridge: Harvard University Press, 1995).

150. Jack Donnelly, *REALISM AND INTERNATIONAL RELATIONS* 9 (United Kingdom: Cambridge University Press, 2000).

151. Louis Henkin, *HOW NATIONS BEHAVE* 47 (New York: Columbia University Press, 1979).

152. Chayes and Chayes, above n. 149, 3.

153. Louis Henkin, *Compliance with International Law in an Inter-State System* in Louis Henkin, *INTERNATIONAL LAW: POLITICS AND VALUES* 45 (Netherlands: Martinus Nijhoff, 1995).

154. Chayes and Chayes, above n. 149, 2.

155. *Ibid.* 17. In particular, the third factor helps to explain the divergence noted at the start of this chapter between almost universal ratification of the major human rights conventions and continuing cases of widespread violations.

156. *Ibid.* 22-8.

157. *Ibid.* 26.

158. Ratner, above n. 56, 693-8.

159. Young, above n. 61, 505-6.

160. *Ibid.*

161. See, e.g., W. P. Alston, *Religion*, 7 *ENCYCLOPEDIA OF PHILOSOPHY* 140, 140-1 (1967): "A survey of existing definitions of religion reveals many different interpretations," most of which are one-sided and exclude polytheistic or non-theistic creeds.

162. See J. A. Walkate, *The Right of Everyone to Change his Religion or Belief—Some Observations*, 30 *NETHERLANDS INT. L. REV.* 146 (1983).

163. See Abdullahi An-Na'im, *The Islamic Law of Apostasy and its Modern Applicability: The Case from the Sudan*, 16 *RELIGION* (1986).

164. See United Nations Human Rights Committee, General Comment No. 22 (48) (Article 18) para. 5, Adopted by the UN Human Rights Committee on July 20, 1993, UN Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in UN Doc. HRI/GEN/1/Rev.1 at 35 (1994), also contained in Stahnke and Martin, above n. 2, 92-3. As Boyle has observed, a "serious question arises where the Islamic *shariah* is enforced, leading to the violation of other rights, for example by the use of the death penalty for apostasy and blasphemy." Boyle and Sheen, above n. 13, 9.

165. See An-Na'im, above n. 24. Note also the position of non-Muslims or *Dhimmis* in some Islamic states. Under *shari'ah*, these minority groups may have a degree of security of the person, freedom to practice their religion, and a degree of internal community autonomy, but they are often not allowed to participate in the public affairs of the Islamic state.

166. See K. J. Partsch, *Freedom of Conscience and Expression, and Political Freedoms* in Louis Henkin (ed.), *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 211 (New York: Columbia University Press, 1981). See also Natan Lerner, *Proselytism, Change of Religion and International Human Rights*, 12 *EMORY INT. L. REV.* 477, 507-8 (1998).

167. The international standards are not definitive on this issue: see, e.g., Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1 *B. Y. U. L. Rev.* 251 (1999) (discussing the 1993 European Court of Human Rights decision in *Kokkinakis v. Greece* which sought to draw a distinction between "proper" and "improper" proselytism).

168. The 1981 Declaration is silent on this issue. The Human Rights Committee has stated in its General Comment on Article 18 that it considers that such a right can be inferred from that article "inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief": see General Comment 22 (48), above n. 164, para. 11.

169. See *Religion, Religious Minorities and Human Rights: An Introduction* at n. 42 and accompanying text.

170. General Comment No. 23 (50) on Art. 27 of the ICCPR indicates that the existence of a religious minority is a question of fact, to be determined by objective criteria, and does not depend on any political or legal determination by the state: General Comment No. 23 (50) (Article 27) para. 5.2, Adopted by the UN Human Rights Committee on 6 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994); reprinted in UN Doc. HRI/GEN/1/Rev.1 at 38 (1994); available in Stahnke and Martin, above n. 2, 98. See also Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev I (1979), reprinted as UN Pub. E.78.XIV.1 (1979).

171. This view is supported by J. G. Starke, *INTRODUCTION TO INTERNATIONAL LAW* 372 (10th ed., 1989); *see also* Dinstein, above n. 14, 157.

172. This view is supported by Francesco Capotorti, *Minorities*, 8 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 385, 390 (1985). *See also* Francesco Capotorti, *Are Minorities Entitled to Collective International Rights?* in Yoram Dinstein and M. Tabor (eds.), *The Protection of Minorities and Human Rights*, *ISRAEL YEARBOOK HUM. RTS.* 505-11 (1992).

173. United Nations Seminar, above n. 9, 21.

174. Francesco Capotorti, *Are Minorities Entitled to Collective International Rights?* in Yoram Dinstein (ed.), *THE PROTECTION OF MINORITIES AND HUMAN RIGHTS* 508-9 (1992).

175. *See* Introduction at n. 34 and accompanying text.

176. General Comment on Article 27, above n. 170, ¶ 6.2.

177. Article 8(3) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, above n. 108, provides that "[m]easures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights." The Declaration does not, however, contain any positive obligation on states to take such special measures.

178. Article 4 of the Framework Convention for the Protection of National Minorities, above n. 106, obligates states to "undertake to adopt, where necessary, adequate measures in order to promote . . . full and effective equality between persons belonging to a national minority and those belonging to the majority": Article 4(2). Such special measures are not discrimination: Article 4(3).

179. In the framework of the protection of minorities under the CSCE, participating states must "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity": CSCE Copenhagen Document, ¶ 33. This paragraph further provides that "[a]ny such measures will be in conformity with the principles of equality and non-discrimination with respect to the other citizens of the participating State concerned."

180. *See further* Tad Stahnke, chapter 3 in this volume.

181. Boyle, above n. 13, 8. Boyle notes (at 17, n. 25) that controversy over the claim by Sudan of precedence for its internal law based on *shariah* over international standards was rejected by the Human Rights Commission in 1994. The resolution of the Commission called on Sudan to bring its national law into accordance with international standards to which it was a party. The vote was 35 for with 9 against (one of which was China) and 9 abstentions.

182. M. S. McDougal, H. D. Lasswell and L. Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination*, 74 *MICH. L. REV.* 865, 874 (1975-6).

183. Theo van Boven has stated that the Krishnaswami Study had "a substantial impact on the text and outlook" of the 1981 Declaration: *see* Kevin Boyle, *The Arcot Krishnaswami Lecture: Afterword*, 13 *HUM. RTS. Q.* 450 (1991). On the question of international standards of freedom of religion or belief, *see* Dinstein, above n. 14, 147ff

(arguing that, in effect, there are four rights involved: (a) freedom of religious choice; (b) freedom of religious observance; (c) freedom of religious teaching; and (d) freedom of propagating the faith); Tazhib, above n. 23, ch. 3, 63-248; Boyle and Sheen, above n. 13.

184. Sullivan, above n. 18, 488.

185. *Ibid.* 520. See also R. S. Clark, *The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 31 CHITTY'S L. J. 23, 29 (1983) (suggesting that as more affected groups, NGOs and official organs invoke these standards, they will eventually become part of the fabric of international law and practice).

186. Little, above n. 65, 91-3.

187. For example, the Human Rights Commission lacks the ability to enforce its judgments regarding human rights violations in different countries: Little, above n. 65, 89.

188. Stephen Marks, *The United Nations and Human Rights: The Promise of Multilateral Diplomacy and Action* in Burns Weston and Stephen Marks, *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 303 (New York: Transnational Publishers, 1999).

189. Elizabeth Evatt, *Ensuring Effective Supervisory Procedures: The Need for Resources* in Alston and Crawford, above n. 96, 461.

190. Crawford notes, for example, the increasing problems of: the corrosive effects of the backlog in state reporting; resource constraints; procedural issues; problems with the communication procedures and composition of committees; and limited political support from states: James Crawford, *The UN Human Rights Treaty System: A System in Crisis?* in Alston and Crawford, above n. 96, 4-11.