

**OFFENCE TO RELIGIOUS BELIEF AND
INTERNATIONAL HUMAN RIGHTS LAW**

**THIAGO FELIPE ALVES PINTO
ST PETER'S COLLEGE**

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ABSTRACT

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THIAGO FELIPE ALVES PINTO – ST PETER’S COLLEGE

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Offence to religious belief is any form of expression deemed insulting to the religious belief of a person or a group of persons. Blasphemy and apostasy are notable examples of such offences, which are at times regarded as an affront to social and religious morals, but can also be deemed as an infringement of the law or even a violation of human rights. Despite being essentially intangible, such offences have led to prosecutions, arrests, riots, and deaths throughout history. Nevertheless, there is limited research on the legal nature of these offences, as well as little clarity on the terminology used to characterise offence to religious belief. This perplexing scenario is further aggravated by the lack of direction from international adjudicating bodies dealing with expressions deemed offensive to religious belief. Consequently, the issue in question remains highly contentious worldwide.

This thesis seeks to answer the following question: what are the normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief? To answer this question, the thesis will be divided into six chapters. The first chapter briefly scrutinises the foundations of prohibitions of offence to religious belief and proposes a re-examination of contemporary concepts related to such offences in order to test their compatibility with international human rights law. Chapters two to six examine structural and jurisprudential issues regarding offence to religious belief in international human rights law, to determine what are the normative principles that can be employed by international human rights courts and treaty bodies to resolve issues related to such offences. Therefore, this thesis addresses issues regarding offence to religious belief from a legal perspective, in order to provide greater legal certainty in such cases and a more holistic protection of human rights to every person.

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TABLE OF ABBREVIATIONS

1981 Declaration	1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
Banjul Charter	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	Committee against Torture
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CIDT	Cruel, inhuman or degrading treatment or punishment
CJEU	Court of Justice of the European Union
CMW	Committee on the Protection of the Rights of All Migrant Workers
CoE	Council of Europe
CRC Committee	Committee on the Rights of the Child
ECHR	(European) Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ECommHR	European Commission on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide

IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
OHCHR	Office of the United Nations High Commissioner for Human Rights
OAS	Organization of American States
OIC	Organization of Islamic Cooperation
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
Rabat Plan of Action	Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence
Refugee Convention	1951 Convention Relating to the Status of Refugees and the 1967 Protocol
Robben Island Guidelines	Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa
Rome Statute	Rome Statute of the International Criminal Court
Siracusa Principles	Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

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INTRODUCTION

Offence to religious belief is, simply put, any form of expression deemed offensive to the religious belief of a person, or a group of persons. In this way, offence to religious belief is designed to be an overarching expression, encompassing terms such as blasphemy and apostasy, which are at times regarded as an affront to social and religious morals, but that can also be deemed an infringement of the law or even a violation of human rights. Despite being essentially intangible, such offences have led to prosecutions, arrests, riots, and deaths throughout history. Nevertheless, there is little agreement on when and how expressions should be limited in cases related to offence to religious belief.

Some States criminalise expressions deemed offensive to religious belief, such as Pakistan¹ and Sudan², and are widely condemned for doing so.³ Other countries prefer not to limit expressions considered offensive to religious belief but are subsequently blamed for not protecting the rights of certain minority groups.⁴ This

¹ Penal Code [Pakistan] arts 295–298.

² Penal Code [Sudan] arts 125–127.

³ Respectively, UNGA, 'Summary of Stakeholders' Submissions on Pakistan. Report of the Office of the United Nations High Commissioner for Human Rights' (23 August 2017) A/HRC/WG.6/28/PAK/3, paras 11, 39, 45, and 53–56; and UNGA, 'Summary Prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21. Sudan' (19 February 2016) A/HRC/WG.6/25/SDN/3, paras 11, 24, and 51.

⁴ See eg ECOSOC, 'Report by Mr Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (13 February 2006) E/CN.4/2006/17, para 24; UNGA, 'Written Statement Submitted by North-South XXI, a Non-Governmental Organization in Special Consultative Status' (25 February 2011) A/HRC/16/NGO/87, Conclusion, para 3; and *12th Report on Islamophobia* (OIC 2019) 135–139.

paradoxical situation generates apprehension in persons accused of offending religious beliefs, resentment from those who feel they have been wronged, and in extreme cases violence—as illustrated by the 2015 attack at the office of the satirical magazine Charlie Hebdo, as well as its continuous controversies and subsequent violent acts related to the publication.⁵ These issues are not merely political or sociological in nature; they are also legal, and have impacted domestic legislation and the international human rights law framework.

This uncertain scenario has led to a myriad of perspectives on the topic, reflected in the opinions of scholars and judicial bodies. While a multiplicity of opinions should be welcomed in most areas, when legal matters are at stake, legal certainty is of paramount importance. Individuals need to have a clear idea of what is permissible and what is prohibited to regulate their conduct. This certainty is not perceived in issues regarding offence to religious belief, for two main reasons. First, laws prohibiting offence to religious belief are inherently broad. Second, legal systems are rarely consistent in the application of such norms.

The state of affairs in Europe during the last decade is illustrative in this regard. In 2009, Ireland passed a Defamation Act that punished blasphemous utterances; the Act entered into force in 2010.⁶ Then, in October 2018, a referendum was passed to

⁵ See Peter Noorlander, 'In Fear of Cartoons' (2015) 2 European Human Rights Law Review 115; Jannik Schmitt, 'The "Protests against Charlie Hebdo" in Niger: A Background Analysis' (2015) 50 Africa Spectrum 49; and Norimitsu Onishi and Constant Méheut, 'France's Hardening Defense of Cartoons of Muhammad Could Lead to "a Trap"' (*The New York Times*, 30 October 2020) <www.nytimes.com/2020/10/30/world/europe/France-Muhammad-cartoons.html> accessed 31 October 2020.

⁶ Defamation Act [Ireland] art 36.

abolish references to blasphemy in the Irish Constitution,⁷ which entered into force in January 2020.⁸ At the ECtHR, the trajectory of offence to religious belief is even more complicated. Historically, decisions by the Court have repeatedly endorsed the protection of ‘the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons.’⁹ Over the last decade, the Court appeared to change its approach, deciding in several cases against such “right”.¹⁰

Nonetheless, the ECtHR never disavowed the previous rationale used to justify prohibitions of offence to religious belief. Thus, in October 2018—one day before the Irish referendum on blasphemy—it issued a unanimous decision endorsing the protection of religious feelings.¹¹ Naturally, the timing was coincidental, but it illustrates the antagonistic views on the topic within the same region.

The ECtHR is not the only international body that has decided on issues regarding offence to religious belief. The phenomenon has led to cases being brought to the IACtHR, ACHPR, as well as several UN treaty bodies.¹² Moreover, the UN

⁷ 'Referendum on Blasphemy' (*Referendum Commission*, 2018) <www.refcom.ie/previous-referendums/referendum-on-blasphemy/> accessed 24 April 2020.

⁸ Abolition of Blasphemy Act 2019 [Ireland].

⁹ See eg *Gay News Ltd and Lemon v UK* App no 8710/79 (ECommHR, 7 May 1982) para 13; *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) para 48; and *IA v Turkey* App no 42571/98 (ECtHR, 13 September 2005) para 20.

¹⁰ *Alekseyev v Russia* Apps nos 4916/07 et al (ECtHR, 21 October 2010) para 59; and *Mariya Alekhina and Others v Russia* App no 38004/12 (ECtHR, 17 July 2018) para 268.

¹¹ *ES v Austria* App no 38450/12 (ECtHR, 25 October 2018) para 57.

¹² See eg *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile* (IACtHR, 5 February 2001) Series C No 73; *Curtis Francis Doebbler v Sudan (No 2)* Comm no 236/00 (ACHPR, 4 May 2003); *Ross v Canada* Comm no 736/1997 (Human Rights Committee, 26 October 2000) CCPR/C/70/D/736/1997; and *Abed Azizi v Switzerland* Comm no 492/2012 (CAT Committee, 27 November 2014) CAT/C/53/D/492/2012.

debated for more than a decade issues of “defamation of religions”, one of the expressions used to designate offence to religious belief.¹³ Despite opposition from most countries in the Global North, all UN resolutions on “defamation of religions” from 1999 until 2011 were successful,¹⁴ and they even received the support of some scholars and practitioners.¹⁵ Since then, there have been significant developments at the UN towards declaring the incompatibility between legislation regulating offence to religious belief and international law.¹⁶

In this perplexing scenario, it is not surprising that the issue of offence to religious belief remains contentious. According to a 2017 report from the US Commission on International Religious Freedom, more than a third of the States in the world still have “blasphemy laws”.¹⁷ While some States have repealed such laws in the last decade, namely ‘Norway, Iceland, Malta, Denmark, Canada, New Zealand, [and] Greece’,¹⁸ there has also been an increase in cases regarding offence to religious

¹³ See Chapter 1.3.1.

¹⁴ See Appendix.

¹⁵ See eg Human Rights Council, 'Report Submitted by Mr Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (12 January 2007) A/HRC/4/19; Puja Kapai and Anne S Y Cheung, 'Hanging in a Balance: Freedom of Expression and Religion' (2009) 15 Buffalo Human Rights Law Review 41; and Ahmer Bilal Soofi, 'Linkages between Religious Extremism and Freedom of Expression' (Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Bangkok, July 2011).

¹⁶ Human Rights Committee, 'General Comment No 34, Article 19: Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34, para 48; Human Rights Council, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) Rabat Plan of Action paras 19 and 25.

¹⁷ Joelle Fiss and Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring Blasphemy Laws' Compliance with Human Rights* (USCIRF 2017) 3.

¹⁸ *Freedom of Thought Report 2019: Key Countries Edition* (Humanists International 2019) 13.

belief, now under the guise of hate speech laws.¹⁹ Furthermore, domestic decisions rarely create a strong precedent, as the cases of Asia Bibi and the university lecturer Junaid Hafeez in Pakistan demonstrate.²⁰ Therefore, in order to promote sustainable change in this area, we suggest that the debate about offence to religious belief must be anchored in the international human rights law framework.

Research Question and Objectives

In light of the context described above, this thesis seeks to answer the following question: what are the normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief? To respond to this question, the thesis will first analyse traditional and conceptual notions of offence to religious belief; and based on this knowledge, it will scrutinise the international human rights law related to the topic.

The lack of legal certainty in relation to offence to religious belief does not benefit anyone. This lack of legal clarity neither satisfies proponents of more stringent legislation on offence to religious belief, nor those who seek to repeal such legislation. Furthermore, this volatile situation is likely to lead to a further increase in cases on the topic, both in domestic and international jurisdictions. The general objective of this thesis, therefore, is to provide a better understanding of the nature of the issue at hand

¹⁹ UNGA, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (5 March 2019) A/HRC/40/58, paras 4, 33, and 57.

²⁰ Compare *Asia Bibi v The State and Another* (Supreme Court) Criminal Appeal no 39-L of 2015 (Supreme Court of Pakistan, 31 October 2018); with OHCHR, 'Letter from Special Rapporteur Regarding the on-going Prosecution of Mr Junaid Hafeez' (29 October 2019) UA PAK 7/2019; and 'Pakistan Blasphemy Death Sentence for Junaid Hafeez Is "Travesty of Justice"- UN Experts' (OHCHR, 27 December 2019) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25455> accessed 24 April 2020.

and subsequently offer principled arguments to address offence to religious belief in domestic and international law.

It is argued that promoting conceptual clarity and a systemic approach to international human rights law can lead to a greater protection of the human rights of every person, as well as effective proposals to abolish laws prohibiting offence to religious belief. In this manner, the specific objectives of this thesis are the following: to provide conceptual clarity and demonstrate that a human rights grammar is sufficient and appropriate to address all the issues related to offence to religious belief; to promote greater protection for vulnerable persons by highlighting their plight and the risks they face when accused of offending religious belief; and, to reassess laws against insult to religions in international documents and domestic legislation. In this way, this thesis intends to serve academics, practitioners, judges, and legislators, who are confronted by issues related to offence to religious belief.

Literature Review

The research for this thesis started in 2014. By that time, there were only three books from renowned publishers directly related to this topic.²¹ The first book is entitled *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* by Leonard Levy.²² This book from 1993 covers a substantial area of legal history focusing mainly on blasphemy in the Western world and has remained virtually

²¹ Naturally, there were other books analysing the history of blasphemy, see eg, G D Nokes, *A History of the Crime of Blasphemy* (Sweet & Maxwell 1928); Alain Cabantous, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century* (Columbia University Press 2002); and S Brent Plate, *Blasphemy: Art That Offends* (Black Dog 2006).

²² Leonard W Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* (Knopf 1993).

unchallenged. The second book is called *Blasphemy in the Christian World* by David Nash, originally published in 2007. This book has a primarily historical perspective, starting at the Middle Ages and focusing on the religious/geographical area delimited in its title.²³ Both Levy and Nash touch on important points of contemporary international law, but neither explore the phenomenon of offence to religious belief more broadly in the contemporary world. Paul Marshall and Nina Shea's book, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*, covered this area, offering a comparative approach to contemporary events based on international law.²⁴ Nonetheless, despite the expansion to include apostasy cases, and the inclusion of accounts from Muslim-majority States, the book is mostly descriptive.

This scenario changed significantly in the last decade, as other scholars also noticed the gap in analytical research from a human rights perspective in this area. Such analysis was present in academic articles,²⁵ as well as theses and monographs investigating offence to religious belief from a human rights perspective.²⁶ Still, with

²³ David Nash, *Blasphemy in the Christian World: A History* (OUP 2007).

²⁴ Paul Marshall and Nina Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide* (OUP 2011).

²⁵ See ia Nazila Ghanea, 'Articles 19 and 20 of the ICCPR' (Expert Seminar: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, Geneva, October 2008); Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49 *Harvard International Law Journal* 249; Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26 *Netherlands Quarterly of Human Rights* 517; Lorenz Langer, 'The Rise (and Fall?) of Defamation of Religions' (2010) 35 *Yale Journal of International Law* 257; Malcolm D Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change' (2012) 1 *Oxford Journal of Law and Religion* 5; Heiner Bielefeldt, 'Freedom of Religion or Belief: A Human Right under Pressure' (2012) 1 *Oxford Journal of Law and Religion* 15; and Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 *Human Rights Quarterly* 33.

²⁶ See eg Thiago Alves Pinto, 'A Critical Assessment of the United Nations Resolutions on Combating Defamation of Religions in the Light of International Human Rights Law' (Master Thesis, Åbo Akademi University 2013), Angela Evenhuis, *Blasphemous Matter: Blasphemy, Defamation of Religion and Human Rights* (Magenta Foundation 2008).

the exception of the titles mentioned above, a more comprehensive analysis of the present topic was not easily found in books until the beginning of this research.

Since then, however, several titles related to the present topic have been published. In 2014 Lorenz Langer published *Religious Offence and Human Rights: The Implications of Defamation of Religion*.²⁷ In this book, Langer provides in-depth legal analysis on freedom of religion or belief and freedom of expression, and focuses thematically on the UN resolutions regarding defamation of religions and the controversy surrounding cartoons portraying Muhammad in Denmark (hereinafter the Danish Cartoons). Darara Gubo also published a book on similar issues in 2015.²⁸

In 2016, there was the publication of a collection of articles, edited by Paul Cliteur and Tom Herrenberg, focusing on blasphemy laws and their impact on freedom of expression.²⁹ Also in 2016, Jeroen Temperman published *Religious Hatred in International Law*, which is likely the most comprehensive analysis of incitement to religious hatred in human rights law to date.³⁰ Temperman also edited a book together with András Koltay, published in November 2017, entitled *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie*

²⁷ Lorenz Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (CUP 2014).

²⁸ Darara Gubo, *Blasphemy and Defamation of Religions in a Polarized World: How Polarized Fundamentalism Is Challenging Fundamental Human Rights* (Lexington Books 2015).

²⁹ Paul Cliteur and Tom Herrenberg (eds), *The Fall and Rise of Blasphemy Law* (Leiden University Press 2016).

³⁰ Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (CUP 2016).

Hebdo Massacre.³¹ This book is a compilation of theoretical approaches from renowned scholars on freedom of expression, combined with comprehensive studies on domestic laws regulating offence to religious belief.

The rise in publications is not unexpected, given that several infamous worldwide events regarding the subject took place in this century, such as the Danish Cartoons, the attacks at the Charlie Hebdo magazine office, and even the trials of Asia Bibi in Pakistan, received widespread media coverage. Predictably, many NGOs, think tanks, and public bodies have published reports on this area.³² These reports are mostly descriptive, yet they have raised awareness of the topic to a broader audience.

In sum, the state of the art of the research when this thesis was proposed was limited. Currently, there is significantly more awareness about the subject, and the books available are largely up to date. Two main areas, however, have remained relatively unaddressed: an examination of the terminology employed in this field and a broader systemic study on how legislation regulating offence to religious belief has impacted international human rights as a whole.

Structure of the Argument and Purpose

New bibliographical sources on issues regarding offence to religious belief are surely welcomed, as this is a difficult field to navigate alone. However, they posed an

³¹ Jeroen Temperman and András Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (CUP 2017).

³² See eg *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society* (Venice Commission, CoE 2010); Angelina E Theodorou, 'Which Countries Still Outlaw Apostasy and Blasphemy?' (*Pew Research Center*, 29 July 2016) <www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy/> accessed 24 April 2020; *Freedom of Thought Report 2019: Key Countries Edition*; and Fiss and Kestenbaum, *Respecting Rights? Measuring Blasphemy Laws' Compliance with Human Rights*.

additional challenge to make the contributions of this thesis unique. To address this point, a possible approach for this study could have been to keep a structure similar to the most recent books mentioned, updating them on some points, disagreeing about others, and providing some novel insights based on a dialectical method. This would certainly be an easier approach, as no study in this area can ever be exhaustive, yet it would not properly reflect the level of scholarship needed to make fundamental changes in how offence to religious belief should be tackled.

Consequently, the focus of the thesis shifted to examine the most underexplored topics surrounding the subject in question. Thus, after examining the literature mentioned above, three interrelated areas were found to merit a deeper investigation. First, there were few studies on the nature of offence to religious belief and the plethora of terms utilised in this area; thus, a classification of these terms was required to add clarity to the discussion. Second, a systemic approach to international human rights law which takes public international law seriously is often overlooked in studies in this area. This is often a deliberate choice, as most studies focus on apparent conflicts of norms regarding freedom of religion or belief and freedom of expression. Inevitably, this leads to a substantial gap in the scholarship in this field, notably a study on the protection of asylum seekers accused of offending religious beliefs in their country of origin. Third, there were significant developments in the area of qualified rights and incitement to religious hatred since the books mentioned above were published. These developments required a careful re-examination of the subject, focusing on recent cases regarding qualified rights. Therefore, the thesis deliberately focuses on underexplored areas to avoid duplication of knowledge and to present new perspectives on the topic in question.

The first chapter briefly explores the historical background of offence to religious belief in different religious traditions, in order to analyse the nature of the subject. This investigation leads to a definition of an operative concept of offence to religious belief, used as the foundation of a taxonomy developed to better understand the vast contemporary terminology of offence to religious belief utilised by different actors in international law. The nomenclature in question will be scrutinised with two distinct aims: to provide clarity when using such vocabulary, as well as to evaluate its compatibility with international law and suitability to address human rights violations.

The following chapters approach offence to religious belief from a systemic perspective, ie focusing on international human rights law as a whole. We argue that much of the confusion concerning offence to religious belief results from a lack of awareness regarding basic concepts of public international law and international human rights law. Thus, Chapters 2 and 3 investigate, respectively, the relationship between offence to religious belief and the right to life and the prohibition of torture. Chapter 4 utilises the normative standards provided in the previous chapters to delve into the impact of offence to religious belief in cases of *non-refoulement*. These are instances where States must act to protect individuals against the consequences derived from norms regulating offence to religious belief.

Chapter 5 provides a concise explanation about the normative principles concerning freedom of religion or belief, freedom of expression, and freedom of assembly and association. As explained above, this chapter is more compact because this is one of the areas most explored by the recent academic literature on the topic. However, the analysis of rights in Chapter 5 is essential for the scrutiny of incitement to hatred and its potential connection to offence to religious belief in Chapter 6; thus instances where the State might need to engage depending on the context of each case.

Methodology and Sources

The present study will be based on a doctrinal methodology coupled with a systemic methodology in order to support the claims of the thesis. Such a mixed methodological approach is necessary to present a holistic study that does not overlook how norms regarding offence to religious belief have affected several human rights, frequently those of vulnerable persons.

Due to the uncertainty involved in questions related to offence to religious belief, it seems appropriate to employ the doctrinal methodology.³³ This method is crucial to analyse the law ‘for consistency and coherence’ and also provides for a ‘critical appreciation of the law in terms of policy-compatibility and future development.’³⁴ Doctrinal scholarship addresses issues of consistency and coherence mostly through classification; as Stephen Smith affirms, ‘[g]aining knowledge of a subject is largely a matter of learning how to classify the subject and its constituent elements’.³⁵

Regarding critical appreciation of the law and future development, doctrinal scholarship promotes a real engagement with opposing views, something that is fundamentally lacking in the debate surrounding offence to religious belief. The doctrinal method addresses this issue by promoting a balanced academic view that genuinely considers that proponents of legislation on offence to religious belief have intelligible claims. This method demands a thorough analysis of the subject, even if

³³ Stephen A Smith, 'Taking Law Seriously' (2000) 50 University of Toronto Law Journal 241, 249.

³⁴ Martin Dixon, 'A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?' (2014) 3 Property Law Review 160, 161.

³⁵ Smith, 'Taking Law Seriously', 243.

such claims end up being incorrect.³⁶ Thus, doctrinal scholarship addresses three main issues that have plagued the debate on offence to religious belief: insufficient understanding about the nature of such offences, absence of a proper engagement with a diversity of views, and the lack of coherence in judicial decisions.

In addition to the doctrinal methodology, a systemic approach will also be employed in this thesis. We consider this method as a specific approach to doctrinal scholarship, rather than a new method altogether, as it focuses on different elements that make doctrinal scholarship possible. There is wide support for this approach in international human rights law, especially given the principle stating that human rights are ‘universal, indivisible and interdependent and interrelated.’³⁷ However, in practice, this is hardly observed, as Malcolm Evans has pointed out in relation to the UN system.³⁸ The present study will also expand its analysis to all the main regional human rights systems, in order to incorporate overlooked contributions from the Global South.

Areli Valencia is one of the few scholars who has developed a proper systemic methodology in human rights.³⁹ Valencia draws inspiration for this methodology from several authors, including Amartya Sen and Sandra Fredman.⁴⁰ Although these authors

³⁶ *ibid* 251–255.

³⁷ UNGA, 'Vienna Declaration and Programme of Action' (12 July 1993) A/CONF.157/23, para 5.

³⁸ Malcolm D Evans, 'The 2020 UN Human Rights Treaty Body Review: Strengthening or Strangling the System? [Audio]' (*University of Oxford*, 1 February 2019) <<http://podcasts.ox.ac.uk/2020-un-human-rights-treaty-body-review-strengthening-or-strangling-system>> accessed 24 April 2020, at 19:30–21 min.

³⁹ Areli Valencia, *Human Rights Trade-Offs in Times of Economic Growth: The Long-Term Capability Impacts of Extractive-Led Development* (Palgrave 2016) 39–64.

⁴⁰ Respectively, Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315; and Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

have also inspired us to investigate structural issues, the primary source for methodological inspiration has been the works of scholars in the field of public international law and international human rights law, which have also recognised the need for systemic research in questions related to law and religion—ia Nazila Ghanea, Heiner Bielefeldt, Malcolm Evans, Mark Janis, and Michael Wiener.⁴¹

We argue that a systemic methodology combines elements of interdisciplinary and comparative methods. Concerning interdisciplinarity, the term is not used in its broad sense, but relates to what has been labelled as instrumental interdisciplinarity. This method, as explained by Julie Thompson Klein, serves ‘the needs of the discipline’.⁴² This approach was required in the first chapter in order to clarify specific points of the study involving areas beyond the scope of the law, such as religious and political issues connected to offence to religious belief. We argue that this method enhances the legal analysis of the subject in question.⁴³

The thesis also applies some elements of the comparative method, which are particularly relevant, given that several jurisdictions are explored in this thesis. However, this is not an application of the comparative method *stricto sensu*. While the thesis analyses the peculiarities of each jurisdiction in depth, it does not aim to

⁴¹ See eg Mark W Janis and Carolyn Evans, *Religion and International Law* (Martinus Nijhoff 2004); Heiner Bielefeldt, *Filosofia Dos Direitos Humanos: Fundamentos de Um Ethos de Liberdade Universal* (Dankwart Bernsmüller tr, 2nd edn, UNISINOS 2005); Nazila Ghanea, Alan Stephens, and Raphael Walden (eds), *Does God Believe in Human Rights?: Essays on Religion and Human Rights* (Martinus Nijhoff 2007); Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 2008); and Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (OUP 2017).

⁴² Julie Thompson Klein, 'A Taxonomy of Interdisciplinarity' in Robert Frodeman (ed) *The Oxford Handbook of Interdisciplinarity* (OUP 2010) 23.

⁴³ Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, 635.

compare them per se.⁴⁴ International human rights systems tend to develop in tandem, as they share the same principles of public international law. This complementarity is evidenced by the high degree of judicial dialogue among international human rights bodies to formulate and interpret human rights.⁴⁵

The jurisdictional focus of the thesis is, therefore, on international human rights systems, namely the UN system, as well as the African, European, and American regional systems. The focus on international human rights law also limits the analysis of domestic jurisdictions, a feature that was intentionally avoided by this thesis. The reasons for this delimitation are threefold. First, it would be impossible to develop an in-depth study of all domestic jurisdictions affected by legislation regarding offence to religious belief in a doctoral thesis. Second, several States grapple with the question of offence to religious belief, and the thesis does not intend to rank them. Such rankings are relevant but often consequentialist, as they look at the impact of legislation on offence to religious belief, not the causes for its existence or persistence.⁴⁶ Third, often ignored but of utmost importance, ‘the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.’⁴⁷ In other words, a State cannot invoke domestic contextual particularities to avoid its international obligations.

⁴⁴ An example of a comparative human rights analysis *strictu sensu* can be found in Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Clarendon Press 1995) 229–231.

⁴⁵ See eg *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism: Articles 13 and 29 of the American Convention on Human Rights* (IACtHR, 13 November 1985) Ser A No 5, para 51.

⁴⁶ See eg Fiss and Kestenbaum, *Respecting Rights? Measuring Blasphemy Laws’ Compliance with Human Rights*.

⁴⁷ VCLT, preamble, see also arts 26, 27, 34, 46, and 49–51.

Therefore, even though some elements of the comparative method are used in this thesis, comparison is not an end in itself but a means to reach more systemic coherence in international human rights law.

The primary sources for the thesis are legally binding treaties and case law from human rights courts and treaty bodies. The thesis will also make extensive use of soft law documents, national legislation, domestic cases, reports, monographs, and articles related to offence to religious belief. The referencing style is based on OSCOLA, with punctual exceptions where the style is unclear.⁴⁸

The methodology proposed aims to shed light on areas that are not conventionally explored in studies regarding offence to religious feelings. In this manner, it is argued that despite extensive media coverage on this topic, and new books being released on the issue, there is still considerable scope to make a significant and substantial contribution to the discussion concerning offence to religious belief and international human rights law.

⁴⁸ Given OSCOLA's lack of consistency regarding reference to international sources, the thesis will also use as a guide the OSCOLA version utilised on Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*.

1 TERMINOLOGY RELATED TO OFFENCE TO RELIGIOUS BELIEF

Darrel Bock stated in a book about blasphemy in the Bible that ‘[t]he study of blasphemy is a complex undertaking since an array of terminology exists that can express the idea.’¹ Indeed, one of the main obstacles in the study of blasphemy and related offences is precisely the array of terminology that exists in this field. A closely related problem is the scope of these terms, which tend to be both fluid and overly broad. These problems lead to questions such as: are these terms related and comparable? Are they the same across different regions and religions? Do they carry the same meaning in different jurisdictions? These are primarily academic questions, but germane to the precision required both in academic studies as well as in legal cases.

Our research shows that, although there are particular ways in how such offences are enforced around the globe, there are several shared characteristics that appear to be universal in these offences. These characteristics are explored in this chapter in order to explain contemporary concepts related to the subject of this thesis. We found more than 20 expressions related to blasphemy, and therefore decided to use an overarching term entitled “offence to religious belief”.

Offence to religious belief was not intended to be a new term of art. We developed it because of the necessity to define an umbrella term to cover a range of expressions deemed offensive to the religious belief of a person, or a group of persons. The expression had to be broad, to encompass legal, religious, and moral concepts.

¹ Darrell L Bock, *Blasphemy and Exaltation in Judaism and the Final Examination of Jesus: A Philological-Historical Study of the Key Jewish Themes Impacting Mark 14:61-64* (Mohr Siebeck 1998) 30.

The term “offence” has this flexibility, as it means both a breach of a law or rule, as well as a perceived insult which does not generate any legal consequence.²

The expression “religious belief” was chosen, once again, to include as many expressions as possible and to highlight that religions are not monolithic. For instance, while some Christians could find the film the Last Temptation of Christ offensive to their beliefs,³ other Christians could consider it as a legitimate work of art. Consequently, the film could be considered offensive to some Christians, but not to Christianity in general. Although we find the new term helpful to analyse the subject in question, this does not mean support to “offence to religious belief” as a legal term.

Thus, the present chapter is essentially descriptive, aimed at providing an account of the reasons some individuals claim that offence to religious belief should be prohibited by law and to understand its relationship with international law. By descriptive, we do not mean acritical. While we describe the shared characteristics of different types of offence to religious belief, we also demonstrate the problems caused when these legal and/or religious norms are utilised. It is important to emphasise that we do not endorse the usage of the term “offence to religious belief” in international law. On the contrary, our claim is that a human rights grammar is sufficient to address any grievance related to the offences that the term encompasses.

In this manner, the present chapter describes the origins of the terminology related to offence to religious belief, as well as explains their content and usage in religious and political contexts, case law, and domestic legislation. An illustrative

² 'Offence' (*Lexico*) <www.lexico.com/definition/offence> accessed 31 October 2020.

³ See eg *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*.

example of the number of terms utilised in this area is expressed in the introduction of a collection of articles discussing offence to religious belief and artistic expressions:

Controversies over the aesthetic representation of the sacred, the exhibition of the sacred as art, and the public display of sacrilegious or blasphemous works, have ignited heated debates and have invited us to reflect on binaries like ‘artistic and religious sensibilities’, ‘tolerance and philistinism’, ‘the sacred and the profane’, ‘deification and vilification’, and to reconsider what actually amounts to blasphemy and sacrilege in the present day context of multicultural cosmopolitanism and political secularism.⁴

While such binaries may be useful within a particular context, they often blur the lines between lawful and unlawful forms of expression. Consequently, the relevance of this conceptual and taxonomic exercise is threefold. First, it helps to define the nature of such offences. Offence to religious belief is a phenomenon that has taken place in several traditions for millennia, and before making any statement about its validity in contemporary society, we must first understand its *raison d'être*.

Second, offence to religious belief—in its different iterations—is still prohibited in several jurisdictions worldwide. Investigating its usage will help to gauge the extent of the prohibitions as well as its different manifestations. Additionally, this examination will be useful to determine whether such offences are dead letter or still play an active role in different societies.

Third, by exploring the meaning and usage of such norms, we will be able to determine their compatibility with international human rights law. This analysis is essential to understand the topic, as States must adapt their legislation in accordance

⁴ Elizabeth Burns Coleman and Maria Suzette Fernandes-Dias, 'Lines in the Sand' in Elizabeth Burns Coleman and Maria Suzette Fernandes-Dias (eds), *Negotiating the Sacred II: Blasphemy and Sacrilege in the Arts* (ANU Press 2008) 5.

with the international treaties that they have voluntarily ratified, and treaty bodies may have to decide whether such offences are in line with these instruments.

1.1 Traditional Norms Related to Offence to Religious Belief

Most contemporary studies and reports on blasphemy and related offences overlook the original purpose of legislation on offence to religious belief and quickly dismiss these laws as anachronistic, without explaining why they should be regarded as such.⁵ While this is understandable given the focus of these studies, the link between the nature of offence to religious belief and its consequences is often ignored or misunderstood. However, when the essence of the transgression is overlooked, then such perceived wrongdoings might reappear in new legislation,⁶ be disguised as another legal issue,⁷ or stay dormant, waiting for new circumstances to be revitalised.⁸ This has been noted by contemporary authors who agree that there is a resurgence, or at least persistence, of offence to religious belief in a globalised world.⁹

⁵ See eg *Blasphemy* (NSW Law Reform Commission [Australia] 1994), paras 4.64–4.66; Marie McGonagle and Annabel Brody, 'The Irish Defamation Act 2009 - Too Little, Too Late?' (2010) 15 *Communications Law* 43, 43; see also Emma Graham-Harrison, 'Ireland Votes to Oust 'Medieval' Blasphemy Law' (*The Guardian*, 27 October 2018) <www.theguardian.com/world/2018/oct/27/ireland-votes-to-oust-blasphemy-ban-from-constitution> accessed 24 April 2020.

⁶ See eg Defamation Act [Ireland], arts 36 and 37. Article 36 (1) provides: 'A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding €25,000.'

⁷ A/HRC/40/58, para 33.

⁸ Ruth C Walden, *Insult Laws: An Insult to Press Freedom* (World Press Freedom Committee 2000) 17.

⁹ See eg Cliteur and Herrenberg (eds), *The Fall and Rise of Blasphemy Law*, 20; Gubo, *Blasphemy and Defamation of Religions in a Polarized World: How Polarized Fundamentalism Is*

Therefore, offence to religious belief is not only a matter of ancient law; it is an essential part of contemporary discussions about the role of religion in society, as such offences were at the core of many legal systems. Consequently, discovering their nature is fundamental to comprehend why these laws are still enforced in several States.¹⁰ Thus a brief examination of the religious traditions that enforced these norms historically is vital to understanding the role these norms play in our society and how the jurisprudence on the subject has evolved.

One of the problems of ignoring such analysis is that it leads to a consequentialist approach of the law, where the focus shifts from the nature of the offence to the violent reactions resulting from the offence. In other words, the emphasis in reported cases of offence to religious belief is placed mainly on the consequences of the perceived wrongdoing, rather than on the essence of the transgression itself. For example, there are several instances where persons accused of blasphemy or apostasy suffer terrible penalties, such as lashings¹¹ and beheadings.¹² These punishments are rightly condemned. However, such punishments are incompatible with human rights, even in cases regarding heinous crimes. Thus, the revulsion in these examples is often directed

Challenging Fundamental Human Rights, 149–152; and Jeremy Patrick, 'The Curious Persistence of Blasphemy' (2011) 23 *Florida Journal of International Law* 187.

¹⁰ Brian J Grim, 'Laws Penalizing Blasphemy, Apostasy and Defamation of Religion Are Widespread' (*Pew Research Center*, 21 November 2012) <www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/> accessed 24 April 2020.

¹¹ See eg Islamic Penal Code [Iran], art 263; and 'Saudi Blogger Receives First 50 Lashes of Sentence for "Insulting Islam"' (*The Guardian*, 10 January 2015) <www.theguardian.com/world/2015/jan/09/saudi-blogger-first-lashes-raif-badawi> accessed 24 April 2020.

¹² Marshall and Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*, 199.

towards the punishment itself, not the fact that offending religious sensitivities is still considered a crime.¹³ Conversely, when censorship or fines are applied as a result of offence to religious belief, then such penalties have not been regarded as an undue limitation to freedom of expression.¹⁴ Therefore, a consequentialist approach is insufficient to address the problem in question and does not necessarily lead to abolishing concepts of offence to religious belief present in codes or customary law.

Furthermore, norms regarding offence to religious belief have particular characteristics that can be noticed in several legal systems and religious traditions. It is, therefore, imperative to scrutinise how laws regulating offence to religious belief have developed and what their dominant features are. In order to limit the scope of this study, only traditions involved thus far in international cases will be analysed,¹⁵ namely, Judaism, Atheism, Christianity, and Islam.¹⁶

1.1.1 Blasphemy in Ancient Near Eastern and Biblical Laws

Understanding offence to religious belief in the context of Biblical Law is vital since many characteristics of offence to religious belief have been defined by the reception

¹³ In the case of Asia Bibi, for example, she does not argue against blasphemy laws directly, only that her actions did not amount to defiling the prophet. Asia Bibi, *Blasphemy: The True, Heart-Breaking Story of the Woman Sentenced to Death over a Cup of Water* (Virago Press 2011) 45.

¹⁴ See eg *Gay News Ltd and Lemon v UK*; and *ES v Austria*.

¹⁵ There have been cases related to offence against other religious traditions such as Buddhism, Paul Fuller, 'Blasphemy and Offence in Burmese Buddhism' (DVB, 14 December 2014) <<http://english.dvb.no/analysis/blasphemy-and-offence-in-burmese-buddhism-myanmar/46504>> accessed 24 April 2020; and Hinduism, Salil Tripathi, *Offence: The Hindu Case* (Seagull Books 2009).

¹⁶ Respectively, *Ross v Canada*; *Otto-Preminger-Institut v Austria*; *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*; and *Rabbae v The Netherlands* Comm no 2124/2011 (Human Rights Committee, 14 July 2016) CCPR/C/117/D/2124/2011.

of Biblical Law in different cultures.¹⁷ Most Biblical laws have, in turn, been influenced by Ancient Near Eastern laws,¹⁸ such as the Code of Ur-Nammu (ca 2100 BCE)¹⁹ or the Code of Hammurabi (ca 1750 BCE).²⁰ These codes make reference to gods in their prologue, but they do not include respect for gods in their text.²¹ Codified norms protecting the sacred appear much later, for instance, in the Middle Assyrian Laws (ca 1076 BCE).²² An example of this can be seen in the Middle Assyrian Palace Decree, paragraph 10, which states that any royal woman who ‘blasphemously swear by the name of the god[Ashur]’ shall have her throat cut.²³

Biblical laws emphasise the centrality of the Covenant between Yahweh (God) and his people (Israelites). This Covenant is sealed by blood, as described in Exodus 24:6–8. In this passage, Moses sacrifices an ox, throws half of the ox’s blood on the

¹⁷ Some examples are Oliver Cromwell, who endorsed the ‘literal enforcement of Old Testament law in capital punishment for blasphemy’ in Yvonne Sherwood, *Biblical Blaspheming: Trials of the Sacred for a Secular Age* (CUP 2012) 314; and Lord Mansfield speech regarding blasphemy in the case of *Sir Thomas Harrison (Chamberlain of London) v Allen Evans* [1767] 1 ER 1437 (HL) ‘the essential principles of revealed religion are part of the common law’.

¹⁸ See Max Weber, *Ancient Judaism* (Hans Gerth and Don Martindale trs, Collier Macmillan 1967) 62. See also Jonathan P Burnside, *God, Justice, and Society: Aspects of Law and Legality in the Bible* (OUP 2011) 5–6.

¹⁹ The Code of Ur-Nammu in Martha Tobi Roth, Harry A Hoffner, and Piotr Michalowski, *Law Collections from Mesopotamia and Asia Minor* (2nd edn, Scholars Press 1997) 15–21.

²⁰ *ibid* 76–140.

²¹ *ibid* 15 and 170, respectively. The Code of Ur-Nammu contains reference to some gods, such as Utu and Nanna; while the Code of Hammurabi also mentions gods in its prologue, for example Marduk and Shamash.

²² *ibid* 155, 190, 201–203.

²³ *ibid* 201–202. Blasphemy is also mentioned on the Middle Assyrian Laws tablet A, paragraph 2, concerning women uttering something disgraceful; as well as Middle Assyrian Laws Tablet N paragraphs 1 and 2 (man accusing another of blasphemy); and the Middle Assyrian Palace Decree paragraphs 10, 11, and 14.

altar, takes the Covenant, reads it aloud, and then sprinkles the other half over the people. Avivah Zornberg affirms that this ceremony ‘signifies the nexus, the tissue of connection between God and Israel.’²⁴ Consequently, ‘any offense against the laws of the Torah may be properly seen as an offense against God.’²⁵ This description can be defined as offence to religious belief *lato sensu*. A narrower proscription can be found in the Covenant Code (in the Book of Exodus) and the Holiness Code (in the Book of Leviticus). The passage in the Covenant Code declares: ‘Do not blaspheme God or curse the ruler of your people.’²⁶ This norm does not contain any punishment, which is only prescribed in the Holiness Code, in the narrative of the Blasphemer who cursed God and was condemned to be stoned to death by the community.²⁷

The harsh penalty in this narrative can be explained by the *lex talionis* applied in its context to atone for the crime of blasphemy. Yahweh is the central figure in forming the identity of the Jewish people and religion,²⁸ so defence of the sacred was paramount to ensure social cohesion of the people of Israel.²⁹ Nevertheless, it is

²⁴ Avivah G Zornberg, *The Particulars of Rapture: Reflections on Exodus* (Doubleday 2001) 293.

²⁵ Stephen M Passamaneck, 'The Concept of Crime in the Jewish Tradition' in Walter Jacob and Moshe Zemer (eds), *Crime and Punishment in Jewish Law: Essays and Responsa* (Berghahn 1999) 16.

²⁶ Exodus 22:28 [New International Version UK]. The verb in the original Hebrew according to the Westminster Leningrad Codex is ‘תקלל’ (‘tə·qal·lêl), which is more commonly translated to revile [Amplified Bible Version] or curse [King James Version].

²⁷ Leviticus 24:10–23.

²⁸ David Novak, *The Image of the Non-Jew in Judaism: The Idea of Noahide Law* (2nd edn, Littman Library of Jewish Civilization 2011) 55.

²⁹ Mary Douglas, *Leviticus as Literature* (OUP 2000) 207.

important to highlight that even in this context, ancient writers noticed that such norms could be misused, as indicated in the story of the Naboth's Vineyard.³⁰

1.1.2 Ancient Greek Laws on the Offence of Impiety

Biblical laws on offence to religious belief have three predominant characteristics: defence of the sacred, social cohesion, and atonement. These characteristics are also present in the Ancient Greek context, however, these laws also evolved in this context to encompass maintenance of power and protection of orthodoxy. Its development is noticed in norms prohibiting impiety (*asebeia*). The pseudographical text *On Virtues and Vices*, attributed to Aristotle, broadly defines the offence of impiety as a 'transgression in regard to gods and spirits, or even in regard to the departed and to parents and country.'³¹

Atheism (*atheos*) is also related to impiety since both wrongdoings were related to offence to the gods in Ancient Greece.³² The lack of belief in the gods was perceived as perilous, since atheism could anger the gods, thus leaving cities unprotected.³³ Hugh Bowden explains that: 'Atheism led to danger, both for the atheists themselves and those who came in contact with them, and this was why it was unacceptable.'³⁴

³⁰ 1 Kings 21. See also Dale Patrick, *Old Testament Law* (SCM Press 1986) 49.

³¹ Aristotle, *Athenian Constitution. Eudemian Ethics. Virtues and Vices* (H Rackham tr, HUP 1983) 499. See also Richard A Bauman, *Political Trials in Ancient Greece* (Routledge 1990) 127.

³² See eg Plato, *Lysis. Symposium. Gorgias*. (W R M Lamb tr, HUP 1925) 519.

³³ Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (Faber 2009) 164.

³⁴ Hugh Bowden, 'Impiety' in Esther Eidinow and Julia Kindt (eds), *The Oxford Handbook of Ancient Greek Religion* (OUP 2015) 334.

Impiety and atheism were highly political in nature and used for the maintenance of power in the Ancient Greek context. The trial of Socrates is the prime example of how political and religious charges can become intertwined in cases when someone is accused of offence to religious belief. Socrates was accused of impiety, that is, ‘corrupting the young and of not believing in the gods in whom the city believes, but in other new spiritual things.’³⁵

Additionally, in Ancient Greece, a misperception of religious doctrines was considered an error of judgement; thus, those accused of atheism or godlessness were seen as acting against ‘sound thinking’.³⁶ Since Socrates challenged the local powers and the orthodoxy of Greek religion, he was condemned to death for such a crime. Despite this being a well-known narrative, similar examples can still be observed in States that heavily punish persons accused of offending religious belief.³⁷

³⁵ Plato, *Five Dialogues: Euthyphro, Apology, Crito, Meno, Phaedo* (George M A Grube tr, 2nd edn, Hackett 2002) 28.

³⁶ Jon D Mikalson, *Greek Popular Religion in Greek Philosophy* (OUP 2010) 176.

³⁷ The case of the Saudi blogger Raif Badawi, who was accused of ‘insulting Islam’, is illustrative in this regard. The blogger was condemned for apostasy in May 2014 to ten years in prison, 1000 lashes and a fine of a million riyals, see Raif Badawi, *1000 Lashes: Because I Say What I Think* (Greystone 2015) xiii. This punishment took place in the aftermath of the attacks to the Charlie Hebdo magazine in 2015. At the time, the Saudi, Spanish, and Austrian organisation KAICIID, published a note condemning violence in the name of religion, ‘KAICIID Denounces Charlie Hebdo Attack, Condemns Violence in The Name of Religion’ (*KAICIID*, 8 January 2015) <www.kaiciid.org/news-events/news/kaiciid-denounces-charlie-hebdo-attack-condemns-violence-name-religion> accessed 24 April 2020. The statement from KAICIID was released just one day before the Saudi blogger received the first 50 lashes of his punishment for insulting Islam. See also ‘Saudi Blogger Receives First 50 Lashes of Sentence for “Insulting Islam”’.

1.1.3 Christendom, Natural Law and Protection of Orthodoxy

Offence to religious belief in the Christendom context shares the same characteristics mentioned above, ie defence of the sacred, social cohesion, maintenance of power, protection of orthodoxy, and atonement. This was expected, as Christian thought was largely based on Jewish and Greek philosophies. However, Christianity expanded these characteristics, and further developed natural law to justify their protection.

Regarding natural law, while the Bible includes notions of justice in its narratives prior to Moses, codified law does not feature in the Torah before it is explicitly given from God.³⁸ In this manner, Biblical Law is much more similar to a positive law model than the idea of natural law.³⁹ Although one can find support for natural law in the Bible, the discourse is further elaborated in Greek philosophy, which made a distinction between divine law and human law.⁴⁰ Divine law was not created by human beings but found in nature and attainable by reason. Christine Hayes explicates that Cicero (106–143) championed the Stoic view of natural law, and ‘[i]t is *his* Platonized formulation of Stoic natural law theory that spread throughout Western Europe via the church fathers.’⁴¹ John Finnis corroborates this view, as he upholds that ‘when Plato speaks of God’s law, his meaning is rather close to what a Christian theologian, such

³⁸ Rémi Brague, *The Law of God: The Philosophical History of an Idea* (University of Chicago Press 2007) 61.

³⁹ Christine Elizabeth Hayes, *What's Divine About Divine Law?: Early Perspectives* (Princeton University Press 2015) 15–24. See a contrario Matthew Levering, *Biblical Natural Law: A Theocentric and Teleological Approach* (OUP 2008) 56–68.

⁴⁰ Brague, *The Law of God: The Philosophical History of an Idea*, 22.

⁴¹ Hayes, *What's Divine About Divine Law?: Early Perspectives*, 56 (emphasis in original).

as Aquinas, means in speaking of natural law as the Eternal Law in so far as it is addressed to human practical reasonableness.’⁴²

In this way, natural law is perceived as superior to other legal understandings.⁴³ Natural law is also considered as immutable, morally right, and achievable by sound thinking.⁴⁴ Law, according to Cicero in *De Legibus*, is ‘the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite.’⁴⁵ Therefore, from this perspective, anyone who acts against “nature” automatically shows disrespect to the gods. Accordingly, atheism is also an offence to religious belief, because to deny God is to deny the source of Law. Thus, as Cicero postulated, atheists display impiety when they say that the gods do not exist, since:

there is very little difference between denying that they [the gods] exist and depriving them of any stewardship or activity, for in my eyes a person who is not active seems not to exist at all. To sum up, the existence of the gods is so crystal-clear that I regard anyone who denies it as being virtually out of his mind.⁴⁶

This point can be further illustrated by one of the passages of the Gospels as interpreted by the Fathers of the Church. This passage portrays Jesus saying: ‘Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish

⁴² John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 396.

⁴³ Up until this day, as Robert P George suggests that ‘contemporary natural law theory provides a superior way of thinking about basic problems of justice and political morality’, Robert P George, *In Defense of Natural Law* (Clarendon Press 1999) abstract.

⁴⁴ See Hayes, *What's Divine About Divine Law?: Early Perspectives*, 56–58.

⁴⁵ Cicero, *On the Republic. On the Laws* (HUP 1928) 317.

⁴⁶ Cicero, *The Nature of the Gods* (OUP 2016) 63.

them but to fulfil them.’⁴⁷ The word “Law”, in this context, is most likely referring to Mosaic Law, but the Fathers of the Church expanded this interpretation to include natural law, as the Constitutions of the Holy Apostles declare that: ‘For He [Jesus] did not take away the *law of nature*, but confirmed it.’⁴⁸

In this way, it logically follows that those who do not follow orthodoxy are insane and could subsequently be dangerous for the social cohesion of the community. Naturally, Augustine justified the persecution of heretics, not only for the sake of the Christian community as a whole but also for the benefit of the heretics themselves, as he declared: ‘[w]e have proved by experience and do still prove that it has been a blessing to many to be driven first by fear of bodily pain, in order afterward to be instructed.’⁴⁹ Aquinas likewise stated that ‘as the blasphemer intends to do harm to God's honor, absolutely speaking, he sins more grievously than the murderer.’⁵⁰

One cannot exclude God and religious dogmas from natural law.⁵¹ Consequently, offence to religious belief will necessarily require atonement for God or religion in this system, as such offences are considered an attack on the very essence of natural law. This understanding can be observed in the Edict of Thessalonica, issued

⁴⁷ Matthew 5:17 [New International Version UK]

⁴⁸ Alexander Roberts and James Donaldson, *Fathers of the Third and Fourth Centuries* (vol 7, Eerdmans 1989) 460 (emphasis added).

⁴⁹ Augustine, *Letters of St Augustine (165–203)* (Catholic University of America Press 2014) 161 (Letter 185, ch 21).

⁵⁰ Thomas Aquinas, *The Summa Theologica of St. Thomas Aquinas* (Fathers of the English Dominican Province tr, 2nd and rev edn, Burns Oates & Washbourne 1920) pt II–II, question 13, art 3.

⁵¹ As clearly demonstrated in eg Hans Kelsen, 'The Foundation of the Theory of Natural Law' in Ota Weinberger (ed) *Essays in Legal and Moral Philosophy* (Riedel 1973) 114–145; and Nicholas Bamforth and David A J Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (CUP 2008) 126–130.

by Theodosius I, Gratian, and Valentin II, which established Christianity as the Roman Empire's religion. To be more precise, the edict established the Christian interpretation adopted at the first Nicene Council as the official religion of the Empire. The emperors declared in the edict the following:

- I. We command that those persons who follow this rule shall embrace the name of Catholic Christians. The rest, however, whom We adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative, which We shall assume in accordance with the divine judgement.⁵²

Therefore, a fundamental issue often overlooked in this edict is the fact that the foundational document which instituted Christianity as the official religion of the Roman Empire also prescribed the persecution of other religious groups.⁵³ Moreover, from this moment onwards, political authorities decided to take for themselves the responsibility to protect Christian orthodoxy and enforce it by any means.⁵⁴

The Edict of Thessalonica, as well as other secular and religious norms, is included in the *Codex Theodosianus* (438 AD), which dedicates its last book to the regulation of religion. This Codex sought to promote the “right religion” in many ways.⁵⁵ At times, heretics (Jewish people, Pagans, and Christian schismatics) would be considered as a ‘contagious pestilence’ (*Quae pestis cave contagione latius emanet*

⁵² Theodosius, *The Theodosian Code and Novels: and the Sirmondian Constitutions* (Clyde Pharr tr, Princeton University Press 1952) 440.

⁵³ Evans, *Religious Liberty and International Law in Europe*, 2.

⁵⁴ David Hunt, 'Christianising the Roman Empire' in Jill Harries and Ian Wood (eds), *The Theodosian Code: Studies in the Imperial Law of Late Antiquity* (Duckworth 1993) 148.

⁵⁵ Tony Honoré, *Law in the Crisis of Empire 379–455 AD: The Theodosian Dynasty and Its Quaestors, with a Palingenesia of Laws of the Dynasty* (Clarendon Press 1998) 104.

ac profluat);⁵⁶ a feature regarding impurity also observed in the Greek and Biblical context. In other instances, the empire would attempt to force schismatics to change their beliefs by denying them their rights to association, expression, and property.⁵⁷ The strong language describing heretics demonstrates how vital the issue was to the Catholic Church and the Roman Empire, as the legislation during the Christendom Era purposefully blurred the lines between Church and Empire by compounding religious and secular domains.⁵⁸ As a result, these norms facilitated the expansion of legislation regulating offence to religious belief in Christian areas.⁵⁹

1.1.4 Islamic Interpretations of Blasphemy and Apostasy

Islamic interpretations of offence to religious belief are not monolithic, as is often assumed.⁶⁰ Like all traditions described above, there are narratives that support punishment for such offences and counter-narratives that criticise such views. Two passages from the Quran illustrate this issue. First, in Surat 2:256 one can find the

⁵⁶ Theodosius, *The Theodosian Code and Novels: and the Sirmondian Constitutions*, book 16, ch 5.44.

⁵⁷ Honoré, *Law in the Crisis of Empire 379–455 Ad: The Theodosian Dynasty and Its Quaestors, with a Palingenesia of Laws of the Dynasty*, 9. See also Theodosius, *The Theodosian Code and Novels: and the Sirmondian Constitutions*, book 16, ch 5.57.1.

⁵⁸ Hunt, 'Christianising the Roman Empire', 153–154.

⁵⁹ See further Nash, *Blasphemy in the Christian World: A History*; and David Nash, *Acts against God* (Reaktion Books 2020).

⁶⁰ Mohammad Hashim Kamali, *Freedom of Expression in Islam* (rev edn, Islamic Texts Society 2010) 212.

powerful declaration: ‘There is no compulsion in religion.’⁶¹ Second, the Quran advises in Surat 4:140 that ‘when you hear Allah’s verses being rejected or mocked, *do not sit with them* till they turn to another topic of conversation; otherwise you will be like them. *Allah will gather all the hypocrites and disbelievers in Hell.*’⁶² Thus, from a literal reading of these passages, one can deduce that Islam has endorsed some elements of freedom of religion or belief from its inception,⁶³ that Muslims are called not to sit with people while they are mocking Allah,⁶⁴ and that the punishment from Allah for mockery seems to take place only in the afterlife.⁶⁵

Nevertheless, as with any religious text, these passages have been interpreted in several different ways. Also, many terms related to offence to religious belief were gradually developed and used interchangeably, including words such as blasphemy (*sabb*) to Allah or Muhammad, apostasy (*riddah*), heresy (*zandaqah*), and disbelief (*kufir*).⁶⁶ The concept of apostasy, ie the prohibition of leaving a religion, appears to go directly against the notion of no compulsion in religion. However, apostasy started

⁶¹ All quotes from the Quran were taken from Musharraf Hussain, *The Majestic Quran: A Plain English Translation* (2nd edn, Invitation Publishing 2019).

⁶² Surat 4:140 (emphasis added).

⁶³ OHCHR, '18 Commitments on "Faith for Rights"' (29 March 2017) 18 Commitments on "Faith for Rights" commitment I.

⁶⁴ Mustafa Akyol, 'True Islam Does Not Kill Blasphemers' (*The New York Times*, 21 November 2018) <www.nytimes.com/2018/11/21/opinion/islam-blasphemy-pakistan-bibi.html> accessed 24 April 2020.

⁶⁵ Javaid Rehman, 'Freedom of Expression, Apostasy, and Blasphemy within Islam: Sharia, Criminal Justice Systems, and Modern Islamic State Practices' (2010) 79 *Criminal justice matters* 4, 4.

⁶⁶ Kamali, *Freedom of Expression in Islam*, 214.

being interpreted either similar to a natural law understanding,⁶⁷ or quasi-naturally,⁶⁸ and evolved jurisprudentially into becoming a serious crime in Sharia Law.⁶⁹ Thus some States still punish apostasy with the death penalty, mostly based on the *hadith*, that is, on reported sayings of Muhammad.⁷⁰ The *hadith* in question purportedly described Muhammad declaring, '[w]hoever changes his religion, kill him'.⁷¹

Other consequences of apostasy can affect property ownership, marriage, and inheritance.⁷² This is not surprising, as apostasy can be interpreted as being equivalent to treason, or an attack against the identity of the local community; thus disrupting the maintenance of power and social order. Once again, these characteristics are shared by the other traditions examined above.⁷³

⁶⁷ See eg Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 6.

⁶⁸ See Brague, *The Law of God: The Philosophical History of an Idea*, 162–163.

⁶⁹ See further Christine Schirrmacher, "Let There Be no Compulsion in Religion" (Sura 2:256): Apostasy from Islam as Judged by Contemporary Islamic Theologians. *Discourses on Apostasy, Religious Freedom, and Human Rights* (VKW 2016).

⁷⁰ See eg Abdullahi A An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9 Human Rights Quarterly 1, 8; and Abdullah Saeed, 'Pre-Modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and Its Punishment' in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (OUP 2012) 226–246.

⁷¹ Saeed, 'Pre-Modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and Its Punishment', 234.

⁷² *ibid* 229–231; and Schirrmacher, "Let There Be no Compulsion in Religion" (Sura 2:256): Apostasy from Islam as Judged by Contemporary Islamic Theologians. *Discourses on Apostasy, Religious Freedom, and Human Rights*, 66–67.

⁷³ See eg Saeed, 'Pre-Modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and Its Punishment', 239–242; Schirrmacher, "Let There Be no Compulsion in Religion" (Sura 2:256): Apostasy from Islam as Judged by Contemporary Islamic Theologians. *Discourses on Apostasy, Religious Freedom, and Human Rights*, 68–73; and Göran Larsson, 'Disputed, Sensitive and Indispensable Topics: The Study of Islam and Apostasy' (2018) 30 Method & Theory in the Study of Religion 201, 206–211.

Blasphemy in Islam can be defined as: ‘the reviling of God and the Prophet Muhammad ﷺ, and a contemptuous rejection of their injunctions.’⁷⁴ Blasphemy is a loose concept in every religion which embraces it. In Islam, it can refer to apostasy, or heresy (unorthodox teachings), defamation of religion, and other forms of perceived insult to sacred figures.⁷⁵ Several authors agree that blasphemy in Islam cannot merely be considered as a religious issue; it has inevitably had political motivations and implications, and the situation has not changed in many States which impose these laws.⁷⁶ Unfortunately, this can be a deadly combination, as illustrated by the trials of Asia Bibi and the assassinations of the Governor of Punjab (Salman Taseer) and the Minister for Minorities Affairs (Shahbaz Bhatti) in Pakistan.⁷⁷

1.1.5 Concept and Application

It is important to stress that no religion or system of beliefs has the monopoly of punishing those accused of offending religious beliefs. Such offences can take place in any context because they are highly flexible. As observed above, there are key

⁷⁴ Kamali, *Freedom of Expression in Islam*, 215.

⁷⁵ Ismatu Ropi, 'Islamic Religious Texts Must Be Read in Context to Understand Blasphemy' (*The Conversation*, 28 November 2016) <<https://theconversation.com/islamic-religious-texts-must-be-read-in-context-to-understand-blasphemy-68243>> accessed 24 April 2020. See also Zainal Abidin Bagir, 'Defamation of Religion Law in *Post-Reformasi* Indonesia: Is Revision Possible?' (2013) 13 *Australian Journal of Asian Law* 1, 3–4.

⁷⁶ See Intisar A Rabb, 'Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expression' in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (OUP 2012) 158–164; and Kamali, *Freedom of Expression in Islam*, 249–250.

⁷⁷ John B Bellinger III and Murad Hussain, 'Freedom of Speech: The Great Divide and the Common Ground between the United States and the Rest of the World' in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (OUP 2012) 175–176.

characteristics that form the DNA of laws regulating offence to religious belief and enable these norms to adapt and evolve in different contexts. These key characteristics are: defence of the sacred, social cohesion, maintenance of power, protection of orthodoxy, and atonement. After compiling these characteristics, we conclude that norms regulating offence to religious belief are created to defend (and seek redress for insults against) sacred matters, for the sake of orthodoxy, social order, maintenance of power, or a combination of these elements.

The contemporary norms that appear, *prima facie*, to be related to this concept are:

- Figure 1: Current terminology related to offence to religious belief

Interference with worship	Destruction of objects of worship	Offence to religious feelings	Incitement to religious hatred	Discrimination on grounds of religion or belief
Blasphemy	Defiling the sacred	Vilification of religion	Divine displeasure	Disruption of religious harmony
Defamation of religions	Insult to religion	Judeophobia	Islamophobia	Christianophobia
Sacrilege	Desecration	Profanity	Heresy	Apostasy

The examination of the concepts mentioned above will be based on the methodology proposed in the introduction, meaning that we will employ a doctrinal approach combined with some comparative and interdisciplinary elements. Stephen Smith explains that jurists ‘draw classifications in law not just for the sake of classifying but because classifying rules, cases, and so on is a large part of what

acquiring legal knowledge means. The knowledge that classification in law provides is both theoretical and practical.’⁷⁸

The theoretical clarity that the present taxonomy aims to provide is the delimitation between those concepts that could be considered in international human rights law, those that should be restricted solely to religious organisations, and those that should be avoided altogether. The practical consequence of this taxonomic exercise is that, by placing the concept of offence to religious belief in relation to the international human rights law framework, the thesis intends to provide a systemic analysis of the impact that offences to religious belief have upon human rights. This analysis may, in turn, offer normative guidelines for judicial bodies to review cases related to offence to religious belief and domestic legislation. In other words, this chapter aims to deliver a structure that can be useful for practitioners, by using a language and a set of arguments that courts are accustomed to taking into consideration when adjudicating cases concerning offence to religious belief, in all its guises.

Therefore, in order to facilitate comprehension of the plethora of terms used in this area, a non-exhaustive legal taxonomy is provided below to account for the current terminology used to describe legal and non-legal matters related to offence to religious belief. Since these terms are often mixed, we first divided them by nature (religious norms, soft law, and hard law) and subsequently by the contexts in which they predominantly occur (religious, political, domestic law, and international law).

⁷⁸ Smith, 'Taking Law Seriously', 244. See also Kelvin F K Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355, 375.

- Figure 2: Terminology related to offence to religious belief divided by categories

CURRENT TERMINOLOGY RELATED TO OFFENCE TO RELIGIOUS BELIEF						
Hard Law	International Human Rights Law Concepts	Interference with worship	Destruction of objects of worship	Offence to religious feelings	Incitement to religious hatred	Discrimination on grounds of religion or belief
	Domestic Law Concepts	Blasphemy	Defiling the sacred	Vilification of religion	Divine displeasure	Disruption of religious harmony
Soft Law	Political Concepts	Defamation of religions	Insult to religion	Judeophobia	Islamophobia	Christianophobia
Religious Norms	Religious Concepts	Sacrilege	Desecration	Profanity	Heresy	Apostasy

1.2 Religious Concepts

The expressions explored in this category are sacrilege, desecration, profanity, heresy, and apostasy. It is important to reiterate that some of the concepts in the table above can belong to more than one category, but they were placed here according to their predominant characteristics, in this case, essentially religious. For example, ‘apostasy’ is a term employed by many faiths; however, it is also a crime in some jurisdictions, and that has generated several cases in international law, as explained in Chapter 4.⁷⁹

⁷⁹ See eg *X v Republic of Korea* Comm no 1908/2009 (Human Rights Committee, 25 March 2014) CCPR/C/110/D/1908/2009, para 11.4; and *HA and HA v Norway* App no 56167/16 (ECtHR, 3 January 2017) para 35.

In this way, the terminology contained in this category is naturally similar to the previous section, but in this chapter, it will be analysed in accordance with its contemporary usage. Moreover, some of the terms examined here are no longer incorporated in norms regulating offence to religious belief; however, they are still mentioned in some documents and texts explored in this thesis.

1.2.1 Sacrilege

Sacrilege is, simply put, the violation of a sacred thing. Aquinas defined that ‘whatever pertains to irreverence for sacred things is an injury to God, and comes under the head of sacrilege.’⁸⁰ The reasoning for such a conclusion is the following:

a thing is called "sacred" through being deputed to the divine worship. Now just as a thing acquires an aspect of good through being deputed to a good end, so does a thing assume a divine character through being deputed to the divine worship, and thus a certain reverence is due to it, which reverence is referred to God.⁸¹

As a result, sacrilege is considered a special sin,⁸² and those who commit this sin might be excommunicated from a religious group. For Aquinas, that also meant that sacrilegious persons could be sentenced to capital punishment by secular authorities.⁸³

⁸⁰ Aquinas, *The Summa Theologica of St. Thomas Aquinas*, pt II–II, question 99, art 1.

⁸¹ *ibid.*

⁸² *ibid* pt II–II, question 99, art 2.

⁸³ Aquinas, *The Summa Theologica of St. Thomas Aquinas* pt II–II, question 99, art 4; on enforcement by secular authorities see eg *Burstyn v Wilson* 343 US 495 (1952).

Currently, the term is rarely employed outside religious circles, yet there are examples of its usage, as illustrated by the statement of the representative of the Russian Federation to the OSCE regarding the Pussy Riot case:

We are dealing here not with a harmless prank on the part of overgrown schoolgirls or with a stupid joke but with a *sacrilegious act* offensive to millions of believers. This act gave rise to justified indignation in Russian society among millions of orthodox faithful and followers of other confessions. What is involved here is a pre-planned act of mockery against the feelings of believing men and women and the desecration of the principal cathedral in Russia, with which important events in the history of our country are linked.⁸⁴

According to the representative, these sacrilegious acts justified the sentence of two years of imprisonment of members of the Pussy Riot collective, in order to stop divisions in society and ‘the emergence of new Anders Breiviks.’⁸⁵

1.2.2 Desecration

Desecration can be defined as a ‘violation of the sacred or hallowed character of an object; a diversion of purpose from the sacred to the profane.’⁸⁶ In this manner, desecration is fairly similar to sacrilege. As the abovementioned quote from Aquinas

⁸⁴ OSCE, ‘Statement by Mr Andrey Rudenko, Deputy Permanent Representative of the Russian Federation to the OSCE, at the 923rd Meeting of the OSCE Permanent Council’ (7 September 2012) OSCE PC.DEL/827/12 (emphasis added).

⁸⁵ *ibid.*

⁸⁶ ‘Desecration’ in Adele Berlin and Maxine Grossman (eds), *The Oxford Dictionary of the Jewish Religion* (OUP 2011) <<https://ezproxy-prd.bodleian.ox.ac.uk:2518/view/10.1093/acref/9780199730049.001.0001/acref-9780199730049>> accessed 24 April 2020.

defines, 'a thing is called "sacred" through being deputed to the divine worship'.⁸⁷ Indeed, an object, a person, or an act is only sacred for those who deem it to be so.

For example, the Bible states in Exodus 31:15: 'For six days work is to be done, but the seventh day is a day of Sabbath rest, holy to the Lord. Whoever does any work on the Sabbath day is to be put to death.'⁸⁸ Thus, in ancient Jewish law the punishment for desecration was either 'excommunication from the people of Israel (*karet*) or the death penalty (to be administered by divine intervention).'⁸⁹ Yet, desecration is not necessarily religious in nature. In the US, flag desecration has been a highly contentious issue. The US Supreme Court only determined that flag desecration was permissible in 1990,⁹⁰ and after that many amendments to the Constitution were proposed, though narrowly rejected in Congress.⁹¹

The issue of desecration was raised indirectly in two cases at the Human Rights Committee and the CAT Committee. The first case was brought against Denmark and mentioned the desecration of the Quran in military bases in the US.⁹² The second was against Canada, being related to protests following the desecration of a Sikh holy book

⁸⁷ Aquinas, *The Summa Theologica of St. Thomas Aquinas*, pt II–II, question 99, art 1.

⁸⁸ Exodus 31:15.

⁸⁹ Berlin and Grossman (eds), 'Desecration'.

⁹⁰ *United States v Eichman* 496 US 310 (1990).

⁹¹ See further Robert Justin Goldstein, *Saving Old Glory: The History of The American Flag Desecration Controversy* (Routledge 2019).

⁹² *Ahmad and Abdol-Hamid v Denmark* Comm no 1487/2006 (Human Rights Committee, 1 April 2008) CCPR/C/92/D/1487/2006, para 3.3.

in India.⁹³ Furthermore, after the infamous desecration of the Quran in the US by a pastor in 2011, a mob of demonstrators in Afghanistan invaded a UN operations centre and killed several people at the compound.⁹⁴ Therefore, despite being essentially religious, these perceived offences can have an international impact.

1.2.3 Profanity

Profanity, like sacrilege and desecration, is another term used in opposition to the sacred. Durkheim asserted that the ‘division of the world into two domains, the one containing all that is sacred, the other all that is profane, is the distinctive trait of religious thought.’⁹⁵ The word is derived from the Latin *profanus*, meaning before/outside a temple;⁹⁶ however, the modern usage of the word can be related to non-religious issues as well as obscenities.⁹⁷

In religious circles, profanity is still viewed in opposition to what is sacred. The OIC, for instance, has asserted that the Israeli occupation of Palestine has led to

⁹³ *SS v Canada* Comm No 715/2015 (CAT Committee, 9 January 2018) CAT/C/62/D/715/2015, para 3.1.

⁹⁴ 'UN Strongly Condemns Deadly Attack against Staff in Afghanistan' (*UN News*, 1 April 2011) <<https://news.un.org/en/story/2011/04/370972-un-strongly-condemns-deadly-attack-against-staff-afghanistan>> accessed 24 April 2020; see also Security Council, 'Press Statement on Afghanistan' (1 April 2011) SC/10216-AFG/368.

⁹⁵ Émile Durkheim, *The Elementary Forms of the Religious Life* (first published 1915, Joseph Ward Swain tr, Dover Publications 2008) 52. A similar analysis with a different terminology can be found in Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (first published 1966, Routledge 2002).

⁹⁶ Lutz Wiederhold, 'Profane and Sacred' in Jane D McAuliffe (ed), *Encyclopaedia of the Qur'ān* (Brill) <http://dx.doi.org/10.1163/1875-3922_q3_EQCOM_00159> accessed 24 April 2020.

⁹⁷ See eg CRC Committee, 'Combined Second, Third and Fourth Periodic Reports of States Parties - Israel' (28 August 2012) CRC/C/ISR/2–4, para 280.

the profanation of Islamic and Christian holy sites.⁹⁸ Furthermore, after the publication of the Danish Cartoons, the OIC called for States to pass legislation to prohibit profanity against the Prophet Muhammad.⁹⁹

This issue is certainly not restricted to Islam, as there are two cases that have been communicated to the ECtHR concerning censorship of expressions considered profane by members of the Orthodox Church in Russia. The first case is *Samodurov and Yerofeyev v Russia*, concerning an exhibition about works of art that were previously censored. The domestic courts considered that ‘the placement of exhibits containing expletives or profanities close to religious symbols offended religious feelings and degraded [the] human dignity of Orthodox Christians.’¹⁰⁰ The second case, *Sokolovskiy v Russia*, is about an applicant who was charged with incitement to hatred and publicly insulting religious beliefs by releasing a series of online videos, including one catching a Pokémon in a church accompanied by ‘a short music theme in which profanities were sung.’¹⁰¹

⁹⁸ 'Statement of His Excellency Professor Ekmeleddin Ihsanoglu the Secretary General of the Organization of Islamic Cooperation at the Seventh Session of the Islamic Conference of Culture Ministers' (OIC, 18 December 2011) <www.oic-oci.org/topic/?t_id=6150&ref=2573&lan=en> accessed 24 April 2020.

⁹⁹ UNGA, 'High-Level Dialogue on Interreligious and Intercultural Understanding and Cooperation for Peace' (5 October 2007) A/62/PV.19, 35.

¹⁰⁰ *Samodurov and Yerofeyev v Russia (Statement of Facts)* App no 22081/11 (ECtHR, Communicated 19 October 2017).

¹⁰¹ *Sokolovskiy v Russia (Statement of Facts)* App no 618/18 (ECtHR, Communicated 16 January 2020) para 10. The statement of facts includes links to the videos.

1.2.4 Heresy

Heresy, from the Greek *haíresis*, originally meant a choice between schools of thought.¹⁰² The term has been interpreted in many religious traditions as the opposite of correct beliefs (orthodoxy).¹⁰³ Thus, heresy is essentially a religious wrong. Nevertheless, once religious groups acquire enough power to impose their views on others, heresy may become a much more dangerous issue. This can be observed in the history of the Christian church, as well as other majoritarian religious groups. During Christendom, the punishments against heretics became the responsibility of the secular authorities.¹⁰⁴ This concept led to a dark history of persecution of people from other beliefs and those considered as Christian heretics, including prominent theologians such as Thomas Cranmer, who was burned at the stake in Oxford in 1556.¹⁰⁵

Likewise, Islamic States might also punish heretic groups. A notorious case has been Iran's treatment of members of the Bahá'í faith, as the State considers them 'heretics, deviants and destructive ideologists who ought to be exterminated.'¹⁰⁶ Consequently, although orthodoxy and heresy have been defined by different religious traditions, violence is often perpetrated in places in which the political agents either

¹⁰² Nils Grübel, 'Heresy' in Kocku von Stuckrad (ed) *The Brill Dictionary of Religion* (Brill 2006) 845–846.

¹⁰³ John Bowker, *The Concise Oxford Dictionary of World Religions* (OUP 2003) 239–240.

¹⁰⁴ See eg Philip Schaff, *History of the Christian Church. A.D. 1–311. Ante-Nicene Christianity. A.D. 100–325* (vol 2, T & T Clark 1884) 187–188.

¹⁰⁵ See Diarmaid MacCulloch, *Thomas Cranmer: A Life* (rev edn, Yale University Press 2016) ch 13.

¹⁰⁶ Friedrich W Affolter, 'The Specter of Ideological Genocide: The Bahá'ís of Iran' (2005) 1 *War Crimes, Genocide, & Crimes against Humanity* 75, 94.

enforce or allow such reactions. Politics, therefore, play an essential role in enforcing norms against heretics.¹⁰⁷ Once again, despite being essentially religious, such perceived offences have generated cases in international law, for instance *Williamson v the UK*, in which the applicant considered it ‘heresy for the Church of England to allow the ordination of women to the priesthood.’¹⁰⁸

1.2.5 Apostasy

Apostasy, as demonstrated above, has been a contentious offence in Islamic contexts.¹⁰⁹ Nevertheless, most religious traditions that achieved legal and political power have enforced penalties for such offence. As Saeed explains: ‘Once the Jewish people, the church, and the *umma* (community) had achieved legal and political power, apostasy was declared a public offence punishable by law.’¹¹⁰ Indeed, several States still enforce anti-apostasy laws.¹¹¹ Even religions that only exert power within their

¹⁰⁷ G R Evans, *A Brief History of Heresy* (Blackwell Publishing 2003) 159.

¹⁰⁸ *Williamson v UK* App no 27008/95 (ECommHR, 17 May 1995). See also the following cases related to heresy *Metodiev and Others v Bulgaria* App no 58088/08 (ECtHR, 15 June 2017) para 28; *AMH El Hojouj Jum’a et al v Libya* Comm no 1958/2010 (Human Rights Committee, 21 July 2014) CCPR/C/111/D/1958/2010, para 2.3; *X v Sweden* Comm no 1833/2008 (Human Rights Committee, 1 November 2011) CCPR/C/103/D/1833/2008, para 5.10; *ANN and Others v UK and Others* Apps nos 70412/11 et al (ECtHR, 18 December 2012) paras 1–7; and *Vraniskoski v Macedonia* App no 37973/05 (ECtHR, 26 May 2009).

¹⁰⁹ See Chapter 1.1.4.

¹¹⁰ Saeed, ‘Pre-Modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and Its Punishment’, 227.

¹¹¹ See Hossein Esmaeili, Marboe Irmgard, and Javaid Rehman, *The Rule of Law, Freedom of Expression and Islamic Law* (Hart 2017) 197.

community, such as Mormons¹¹² and Bahá'ís,¹¹³ have enforced those norms. In addition, the concept is not radically different from anti-religious policies put forward by Atheist States.¹¹⁴ In sum, apostasy norms aim to impose homogeneity of the majority of a group over the individual.¹¹⁵

As mentioned previously in this section, the punishment for defying the sacred could be death in Jewish, Christian, and Islamic traditions. Christianity and Judaism have moved away from enforcing capital punishment in cases of apostasy, but in a few Islamic States apostasy can still be punished with the death penalty by several methods, including stoning and crucifixion.¹¹⁶ Among Mormons, Bahá'ís, and members of other religious groups, the consequences for apostasy tend to be considerably milder, such as social distancing and marginalisation by the former community.¹¹⁷

¹¹² Howard M Bahr and Stan L Albrecht, 'Strangers Once More: Patterns of Disaffiliation from Mormonism' (1989) 28 *Journal for the Scientific Study of Religion* 180.

¹¹³ Moojan Momen, 'Marginality and Apostasy in the Baha'i Community' (2007) 37 *Religion* 187.

¹¹⁴ See IACHR, 'The Situation of Human Rights in Cuba - Seventh Report' (4 October 1983) OEA/Ser.L/V/II.61, ch VII; and UNGA, 'Interim Report on the Elimination of All Forms of Religious Intolerance, Prepared by Mr. Abdelfattah Amor' (23 October 1996) A/51/542, para 34, in relation to Laos.

¹¹⁵ See further Nazila Ghanea, 'Apostasy and Freedom to Change Religion or Belief' in Tore Lindholm et al (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 669–688.

¹¹⁶ See Saeed, 'Pre-Modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and Its Punishment', 227; Penal Code [Sudan], art 27; and Project on Extra-Legal Executions in Iran, 'Table of Capital Offenses in the Islamic Republic of Iran, and Their Sources in Statute Law and Islamic Law' (OHCHR, 2010) <www2.ohchr.org/english/bodies/hrc/docs/ngo/NGO_submission_ELEI_Add.1.pdf> accessed 24 April 2020, 8.

¹¹⁷ Bahr and Albrecht, 'Strangers Once More: Patterns of Disaffiliation from Mormonism', 196–197; and Momen, 'Marginality and Apostasy in the Baha'i Community', 192.

Harsh punishments can be explained by the fact that apostasy is not a mere abandonment of religion but could be interpreted as treason.¹¹⁸ Within minority religious communities, the apostate could be considered as a defector and, in this way, put the identities of members of the former religious group at risk. Nowadays, this idea would likely translate as spreading online rumours about the cultic nature of minority religious groups.¹¹⁹ In any case, this could be a matter of life and death in the past when religious groups could be vying for territory, influence, and power. Still, notwithstanding the existence of anti-apostasy laws in several countries, a better answer to apostasy by States rests in the acceptance of plurality, not the endorsement of forced compliance to orthodoxy.

1.3 Political Concepts

One of the possible reasons why there is a vast terminology on offence to religious belief is due to the fact that terms such as “heresy” and “blasphemy” have religious, popular, and legal meanings. In order to emphasise the legal nature of these norms—as well as avoid the religious connotations of these terms—some political organisations tried to develop terms which could better resonate in legal contexts. The prime example of a political concept which mixes legal and religious elements is the so-called defamation of religions, as explained below.

¹¹⁸ Saeed, 'Pre-Modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and Its Punishment', 233.

¹¹⁹ Momen, 'Marginality and Apostasy in the Baha'i Community', 189.

Additionally, this category will include terminology which has a purportedly human rights façade, meaning that it employs a nomenclature that is intended to be understood as an expression from international human rights law. Such terminology implies a connection between offence to religious belief and discrimination on grounds of religion or belief, as well as incitement to hatred based on religion or belief. However, these alleged offences are not always discriminatory, nor do they meet the threshold for incitement to hatred, and consequently should not be considered as established human rights expressions. Still, these terms are often mentioned in human rights discourse in the media, by some NGOs, and even in international organisations.¹²⁰ Therefore, controversial terms such as insult to religions, Judeophobia, Islamophobia, Christianophobia, will be analysed in this category. In summary, the terminology related to offence to religious belief in this category represents an endeavour of political groups to craft terms that resemble legal concepts, while at the same time altering their original scope of application.

1.3.1 Defamation of Religions

The concept of defamation of religions was formulated by the OIC at the UN Commission on Human Rights in 1999, and it was extensively debated at the UN until 2011.¹²¹ The OIC original intention was a draft resolution called ‘Defamation of

¹²⁰ Although it is not uncommon to find such nomenclature being used in human rights documents, for example, Human Rights Council, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Githu Muigai, on the Manifestations of Defamation of Religions, and in Particular on the Ongoing Serious Implications of Islamophobia, for the Enjoyment of All Rights by Their Followers' (12 July 2010) A/HRC/15/53.

¹²¹ This section is going to be summarised as it was explored at length in Alves Pinto, 'A Critical Assessment of the United Nations Resolutions on Combating Defamation of Religions in the

Islam’,¹²² in order to address what was perceived as manifestations of intolerance against Islam and Muslims that could be equated to anti-Semitism in the past.¹²³ According to its charter, the OIC was created, ia, ‘to protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilisations and religions.’¹²⁴ This is likely the document from which the organisation borrowed the concept of defamation of religions utilised in many UN resolutions.

In the *travaux préparatoires* of the first resolution combatting defamation of religions it is possible to observe one of the most common criticisms of the resolutions in question, which was the emphasis on defamation of Islam.¹²⁵ The representative of Germany, on behalf of other European countries, argued that the resolution was not balanced because of the focus on Islam, ‘whereas other religions had been and continued to be subjected to various forms of discrimination, intolerance and even persecution.’¹²⁶ Consequently, the initial criticism of the resolution did not seek to delegitimise the idea of defamation of religions, only to expand it to other religions,¹²⁷

Light of International Human Rights Law; and Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions*.

¹²² Commission on Human Rights, 'Draft Resolution. Defamation of Islam' (20 April 1999) E/CN.4/1999/L.40.

¹²³ Commission on Human Rights, 'Summary Record of the 61st Meeting' (19 October 1999) E/CN.4/1999/SR.61, para 1.

¹²⁴ OIC, 'Charter of the Organization of Islamic Cooperation' (14 March 2008) Charter of the Organization of Islamic Cooperation, art 1(12).

¹²⁵ E/CN.4/1999/SR.61.

¹²⁶ *ibid* para 3.

¹²⁷ Not only Germany suggested to expand the concept, but representatives of India and Japan also issued similar statements, *ibid* paras 4–6.

which resulted in an amendment to the resolution.¹²⁸ The records suggest that the discussions were intense, as the OIC was reluctant to accept the changes, thus issuing sub-amendments¹²⁹ to explain that Islam faced a unique problem and that the changes proposed by Germany would ‘defeat the purpose of the text.’¹³⁰

After much deliberation, the OIC decided it “could live with” the decision to expand the resolution to other religions.¹³¹ The draft became the Resolution 1999/82, which kept an emphasis on Islam but included other religions as well, expressing that the Commission was alarmed at instances in which ‘the print, audiovisual or electronic media or any other means is used to incite acts of violence, xenophobia or related intolerance and discrimination towards *Islam and any other religion*’.¹³² Since States were willing to compromise on the issue, the resolution was adopted without a vote.¹³³

Between 1999 and 2011, a total of 17 resolutions on defamation of religions were adopted at the Commission on Human Rights, the Human Rights Council and the General Assembly.¹³⁴ Yet, no definition of the concept was given, leaving it open

¹²⁸ Commission on Human Rights, 'Amendment to Draft Resolution E/CN.4/1999/L.40. "Stereotyping of Religions"' (22 April 1999) E/CN.4/1999/L.90.

¹²⁹ Commission on Human Rights, 'Draft. Proposed Sub-Amendments to the Amendments to Draft Resolution E/CN.4/1999/L.40 Contained in Document E/CN.4/1999/L.90' (28 April 1999) E/CN.4/1999/L.104.

¹³⁰ E/CN.4/1999/SR.61, paras 7–8.

¹³¹ *ibid* para 26.

¹³² Commission on Human Rights, 'Defamation of Religions' (30 April 1999) E/CN.4/RES/1999/82, para 3 (emphasis added).

¹³³ *ibid*.

¹³⁴ In chronological order: *ibid*; Commission on Human Rights, 'Defamation of Religions' (26 April 2000) E/CN.4/RES/2000/84; Commission on Human Rights, 'Combating Defamation of Religions as a Means to Promote Human Rights, Social Harmony and Religious and Cultural Diversity' (18 April 2001) E/CN.4/RES/2001/4; Commission on Human Rights, 'Combating Defamation of Religion' (15 April 2002) E/CN.4/RES/2002/9; Commission on Human Rights,

to interpretation.¹³⁵ The resolutions display minor differences in the titles, but nothing that substantially changed their objectives.¹³⁶

Through the years, many countries shifted their original opinion on the concept of defamation of religions; nonetheless all resolutions—both at the UN Human Rights bodies and General Assembly—were adopted.¹³⁷ UN resolutions are considered soft law, thus non-binding on States, but they are important to flesh out the scope of international human rights norms. Robert Blitt claims that such resolutions being repeatedly discussed could have ‘the binding force of customary international law.’¹³⁸ Nevertheless, this argument was based on a comparison with the UDHR, which is an

'Combating Defamation of Religions' (14 April 2003) E/CN.4/RES/2003/4; Commission on Human Rights, 'Combating Defamation of Religions' (13 April 2004) E/CN.4/RES/2004/6; Commission on Human Rights, 'Combating Defamation of Religions' (12 April 2005) E/CN.4/RES/2005/3; UNGA, 'Combating Defamation of Religions' (20 January 2006) A/RES/60/150; UNGA, 'Combating Defamation of Religions' (21 February 2007) A/RES/61/164; Human Rights Council, 'Combating Defamation of Religions' (30 March 2007) A/HRC/RES/4/9; UNGA, 'Combating Defamation of Religions' (6 March 2008) A/RES/62/154; Human Rights Council, 'Combating Defamation of Religions' (27 March 2008) A/HRC/RES/7/19; UNGA, 'Combating Defamation of Religions' (24 March 2009) A/RES/63/171; Human Rights Council, 'Combating Defamation of Religions' (26 March 2009) A/HRC/10/22; UNGA, 'Combating Defamation of Religions' (8 March 2010) A/RES/64/156; Human Rights Council, 'Combating Defamation of Religions' (15 April 2010) A/HRC/RES/13/16; and UNGA, 'Combating Defamation of Religions' (11 April 2011) A/RES/65/224.

¹³⁵ Robert C Blitt, 'Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of "Defamation of Religion"' (2010) 9 *Northwestern Journal of International Human Rights* 1, 14–15.

¹³⁶ For example, E/CN.4/RES/2001/4 is entitled 'Combating defamation of religions as a means to promote human rights, social harmony and religious and cultural diversity', while E/CN.4/RES/2002/9 is simply entitled as 'Defamation of religion'.

¹³⁷ See Appendix.

¹³⁸ Blitt, 'Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of "Defamation of Religion"', 19.

unfit analogy, as the Declaration as a whole does not have such power, and contrary to the resolutions on defamation of religions, the UDHR was largely accepted.¹³⁹

Since the present concept is purportedly related to the prohibition of defamation itself, it is important to explore its content briefly. The precise concept of defamation will inevitably vary according to jurisdiction, but it could be broadly defined as:

The publication of an untrue statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him. [...] Defamation is usually in words, but pictures, gestures, and other acts can be defamatory.¹⁴⁰

Some jurisdictions use different names for specific forms of defamation, such as libel (written and recorded statements/permanent)¹⁴¹ and slander (spoken/not permanent).¹⁴² In any case, by adding the word religion to the term, the offence was expected to protect the reputation of religious figures and beliefs, as well as individual rights, as Resolution 10/22 highlights:

Noting with concern that defamation of religions and incitement to religious hatred in general could lead to social disharmony and violations of human rights, and alarmed at the inaction of some States to combat this burgeoning trend and the resulting discriminatory practices against adherents of certain religions and, in this context, stressing the need to effectively combat defamation of all religions and incitement to religious hatred in general and against Islam and Muslims in particular.¹⁴³

¹³⁹ See Appendix.

¹⁴⁰ 'Defamation' in Jonathan Law (ed), *A Dictionary of Law* (OUP 2018) <www.oxfordreference.com/view/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-1061> accessed 24 April 2020, 179.

¹⁴¹ *ibid* 368.

¹⁴² *ibid* 179.

¹⁴³ A/HRC/10/22, preamble.

The concept of defamation of religions lost traction in international fora as support for the resolutions gradually dwindled.¹⁴⁴ Consequently, a few months after the last resolution combatting defamation of religions was adopted, the OIC decided to support Resolution 16/18,¹⁴⁵ which did not focus on defamation of religions, but on discrimination of individuals on grounds of religion or belief instead.¹⁴⁶ Nonetheless, the OIC emphasised that the previous resolutions on defamation of religions ‘continue to remain valid’.¹⁴⁷ Indeed, this discussion should not be considered closed as the same terminology continues to be used by the “Non-Aligned Movement” at the UN.¹⁴⁸ In addition, the lasting impact of the resolutions can be noted in other terms which were included in the resolutions, such as Islamophobia and the expressions analysed below.

1.3.2 Insult to Religion

According to a 2010 Study from the Venice Commission, the legal advisory body of the CoE, religious insult is an offence in nearly half of its Member States.¹⁴⁹ Although

¹⁴⁴ See Appendix.

¹⁴⁵ See Chapter 6.2.3.

¹⁴⁶ Compare the last resolution on defamation of religions at the UN, A/RES/65/224; with Human Rights Council, 'Resolution 16/18 Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons Based on Religion or Belief' (12 April 2011) A/HRC/RES/16/18, published one day after the former.

¹⁴⁷ 'Draft Resolution A/HRC/16/L.38, Zamir Akram's Speech [Webcast]' (UN, 24 March 2011) <www.un.org/webcast/unhrc/archive.asp?go=110324> accessed 24 April 2020.

¹⁴⁸ UNGA, 'Final Document of the Eighteenth Summit of Heads of State and Government of the Non-Aligned Movement' (15 November 2019) A/74/548, para 78.

¹⁴⁹ Religious insult is a criminal offence in, ia, Andorra, Cyprus, Croatia, the Czech Republic, Spain, Finland, Germany, Greece, Iceland, Italy, Lithuania, Norway, Poland, Portugal, Russian

the situation might have changed slightly since the study was drafted,¹⁵⁰ insult to religions remains a complex term even within the boundaries of the CoE, as the Venice Commission confirms that ‘there is no general definition of “religious insult”. The relevant European provisions appear to cover the different concepts (often at the same time) of “insult based on belonging to a particular religion” and “insult to religious feelings”.’¹⁵¹ An illustrative example can be found in the Austrian Criminal Code:

Whoever publicly disparages or mocks a person or a thing, respectively, being an object of worship or a dogma, a legally permitted rite, or a legally permitted institution of a church or religious society located in Austria, in a manner capable of giving rise to justified annoyance, is liable to imprisonment for a term not exceeding six months or to a fine.¹⁵²

Insult to religion in this context is comprehensive as it includes mocking a dogma and disparaging a legally permitted religious society in Austria. The landmark case of *Otto-Preminger-Institut v Austria* was based on this prohibition,¹⁵³ and still resonates in domestic decisions worldwide.¹⁵⁴ The ECtHR has decided that laws prohibiting insult to religion serve to protect the religious feelings of individuals and are

Federation, Slovak Republic, Switzerland, Turkey and Ukraine. *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, para 27.

¹⁵⁰ Temperman and Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, part VII.

¹⁵¹ *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, para 28.

¹⁵² Criminal Code [Austria] s 188. The translated version was quoted from *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, 155.

¹⁵³ *Otto-Preminger-Institut v Austria*.

¹⁵⁴ See eg *KKO:2012:58* App no R2010/1101 (Supreme Court of Finland, 24 January 2012); and *Processo no 0155164-57.2017.8.19.0001* (TJRJ, 19 July 2018) [Brazil].

compatible with the Convention. By contrast, the Venice Commission has recommended the repeal of the criminalisation of insult to religions in Europe.¹⁵⁵

Another expression used by the Venice Commission to convey insult to religions was ‘insult based on belonging to a particular religion’. This expression, however, should not be equated with the previous one, as this is an offence against persons, not an offence against the sacred. Therefore, when the insult is directed towards a person, States might interfere, as they have a positive obligation to act in cases where derogatory remarks towards a person amount to discrimination.¹⁵⁶

Insult based on belonging to a particular religion is typically included in criminal codes in sections regulating offences to religions, thus blurring the lines between offence to the sacred and to persons.¹⁵⁷ As a matter of fact, only a few States have laws prohibiting insult to religions without any further explanation of the meaning of such offences.¹⁵⁸ These prohibitions of insulting sacred matters and persons are often mixed, as Section 188 of the Austrian Criminal Code mentioned above exemplifies.¹⁵⁹ Still, the Venice Commission recommends that in both cases, criminal sanctions

¹⁵⁵ PACE, 'Freedom of Expression and Respect for Religious Beliefs' (28 June 2006) PACE Res 1510, para 3; PACE, 'Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of Their Religion' (29 June 2007) PACE Recommendation 1805, para 17.2.4; *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, para 64.

¹⁵⁶ See eg *Begheluri and Others v Georgia* App no 28490/02 (ECtHR, 7 October 2014) para 160.

¹⁵⁷ See eg Penal Code [Brazil] art 208.

¹⁵⁸ Compare Criminal Code [Nigeria] s 204; and Penal Code [Vanuatu] s 88; with Penal Code [Kenya] s 134; and Penal Code [Tuvalu] s 123.

¹⁵⁹ Criminal Code [Austria] s 188.

should not be imposed by States, as administrative sanctions or other modes of resolution appear to be more appropriate in such cases.¹⁶⁰

Even when legislations clearly address that only insult against persons based on religion or belief can be considered a punishable offence, courts may interpret it broadly. The Brazilian Penal Code, for example, prescribes in Article 208, imprisonment of up to one year or a fine, for the following offences: ‘To ridicule someone publicly, by reason of belief or religious capacity; to prevent or disrupt ceremony or practice of religious worship; to vilify an act or an object of religious worship publicly.’¹⁶¹ Thus, this article combines three separate offences, which despite being in the same section, can be judged separately.¹⁶² In order for the offence to take place, the specific intent to ridicule someone is required.¹⁶³

Notwithstanding the law in question being somewhat objective, at least in its first limb which states that only offences to persons should fall within its scope, the practice in Brazil has been highly inconsistent in this regard.¹⁶⁴ In 2013, for example, the former Brazilian Commissioner for Human Rights and Christian pastor Marcos Feliciano was preaching a service organised in a public area when he was interrupted

¹⁶⁰ *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, para 64.

¹⁶¹ ‘Escarnecer de alguém publicamente, por motivo de crença ou função religiosa; impedir ou perturbar cerimônia ou prática de culto religioso; vilipendiar publicamente ato ou objeto de culto religioso’. Penal Code [Brazil] art 208, unofficial translation.

¹⁶² Guilherme de Souza Nucci, *Código Penal Comentado* (9th rev edn, Revista dos Tribunais 2009) 865.

¹⁶³ Cesar Roberto Bitencourt, *Código Penal Comentado* (5th edn, Saraiva 2009) 790.

¹⁶⁴ There is a jurisprudential understanding in Brazil that ideological positions, even when considered offensive to some religions, should not be considered as a crime, but that is not always observed. Aldir Guedes Soriano, *Liberdade Religiosa no Direito Constitucional e Internacional* (Juarez de Oliveira 2002). See also Priscilla Regina da Silva, *Contrarreligião - Liberdade de Expressão e o Discurso de Ódio Contrarreligioso* (Juruá 2017) ch 4.

by two women kissing in the audience.¹⁶⁵ The women were kissing while sitting on the shoulders of two colleagues so that anyone in the audience could see them. The police then arrested the women and later issued a statement explaining that the couple was detained based on the Article mentioned above; ie the couple was arrested for ridiculing the pastor's beliefs (anti-LGBT+) and disrupting religious worship.¹⁶⁶

Consequently, a problem arises when amalgamating insult to religions with other offences. While the act of kissing during a religious ceremony in such a provocative manner could be regarded as disrupting worship, it is absurd to define the act of kissing as a crime for insulting the pastor's beliefs. Since this incident, several other forms of expressions were censored in Brazil, including videos parodying Biblical passages and a play portraying Jesus as a transgender person.¹⁶⁷

In summary, insult to religions should not be equated to discrimination based on grounds of religion or belief when the offence does not lead to *de facto* discrimination. In fact, any restriction in this area should always be approached with caution, as explained by the UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, 'when governments restrict freedom of expression on the grounds of "insult

¹⁶⁵ Reginaldo Pupo, 'Feliciano Manda Prender Garotas Que Se Beijaram Em Culto Evangelico' (*Estado de São Paulo*, 16 September 2013) <<http://politica.estadao.com.br/noticias/geral,feliciano-manda-prender-garotas-que-se-beijaram-em-culto-evangelico,1075384>> accessed 24 April 2020.

¹⁶⁶ *ibid.*

¹⁶⁷ See further Thiago Alves Pinto and Rodrigo Vitorino Souza Alves, 'Investigations on the Use of Limitations to Freedom of Religion or Belief in Brazil' (2020) 15 *Religion & Human Rights* 77, 92–93.

to religion”, any peaceful expression of political or religious views is subject to potential prohibition.’¹⁶⁸

1.3.3 Judeophobia

The term Judeophobia is not common,¹⁶⁹ though sometimes mentioned together with other offences to religious belief, as expressed in one of the UN resolutions on defamation of religions:

Noting with deep concern the serious instances of intolerance, discrimination and acts of violence based on religion or belief, intimidation and coercion motivated by extremism, religious or otherwise, occurring in many parts of the world, including cases motivated by *Islamophobia*, *Judeophobia* and *Christianophobia*, in addition to the negative projection of certain religions in the media and the introduction and enforcement of laws and administrative measures that specifically discriminate against and target persons with certain ethnic and religious backgrounds, particularly Muslim minorities, and that threaten to impede their full enjoyment of human rights and fundamental freedoms.¹⁷⁰

Interestingly, some resolutions on defamation of religions also used the word anti-Semitism,¹⁷¹ which indicates that the idea of the “phobias” terminology is indeed to equate new terms with anti-Semitism; however, we disagree with such a stance.¹⁷²

¹⁶⁸ UNGA, 'Interim Report of the Special Rapporteur on Freedom of Religion or Belief' (28 August 2017) A/72/365, para 28.

¹⁶⁹ One exception is *Myrskyy v Ukraine* App no 7877/03 (ECtHR, 20 May 2010).

¹⁷⁰ A/RES/65/224, preamble.

¹⁷¹ See Human Rights Council, 'Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (14 December 2007) A/HRC/RES/6/37, para 2; and UNGA, 'Combating Terrorism and Other Acts of Violence Based on Religion or Belief' (4 April 2019) A/RES/73/285, preamble.

¹⁷² See also Bielefeldt, 'Freedom of Religion or Belief: A Human Right under Pressure', 29.

The noun “phobia” can be related to both fear as well as hatred; thus, Judeophobia could mean both aversion to and hatred of the Jewish people. In this sense, Judeophobia could be a term that encompasses all forms of expressions against the Jewish people, namely anti-Semitism, anti-Judaism, and anti-Zionism. There are several etymological discussions about these terms.¹⁷³ However, for didactic purposes, we will consider these terms separately as matters of ethnicity (anti-Semitism), religion (anti-Judaism), and policy (anti-Zionism), as this seems to be the direction that the OIC took when it decided to include the term “Judeophobia” in its resolutions.

The resolutions obviously added this terminology to get more support,¹⁷⁴ nevertheless, the inclusion did not change the voting patterns of the resolutions.¹⁷⁵ As a matter of fact, even Israel voted against the resolutions despite the inclusion of anti-Semitism and Judeophobia.¹⁷⁶ Measures against anti-Semitism have been received wide support at the UN since its inception, as they primarily intended to stop discrimination on grounds of ethnicity.¹⁷⁷ In this manner, anti-Judaism and anti-Zionism could be distinguished from anti-Semitism, depending on the facts of each case. However, as demonstrated by international cases on the topic, and UN reports, it

¹⁷³ See eg Jonathan Judaken, 'Introduction: Judeophobia and Islamophobia in France before and after Charlie Hebdo and Hyper Cacher' (2018) 32 *Jewish History* 1, 3, fn 8.

¹⁷⁴ *Fourth OIC Observatory Report on Islamophobia* (OIC 2011) 31.

¹⁷⁵ See Appendix.

¹⁷⁶ *ibid.*

¹⁷⁷ See eg UNGA, '1st Special Session: 1st Committee, Verbatim Records of the 54th Meeting' (12 May 1947) A/C.1/PV.54, 254; and Nazila Ghanea, "'Phobias" and "Isms": Recognition of Difference or the Slippery Slope of Particularisms?' in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?: Essays on Religion and Human Rights* (Martinus Nijhoff 2007) 214–216.

is undeniable that some overlap can take place when these issues are involved.¹⁷⁸ In order to solve this conundrum, the best way for States and international adjudicating bodies to address anti-Semitism wherever it takes place is—as highlighted by Special Rapporteur Shaheed—to follow a human rights-based approach.¹⁷⁹

1.3.4 Islamophobia

As Ghanea highlights, Islamophobia is a relatively new term, even though discrimination against Muslims has been a problematic issue for centuries.¹⁸⁰ The term started gaining traction in the late 1990s and aimed to address anti-Muslim sentiment and negative stereotypes related to Islam.¹⁸¹ According to the OIC, ‘Islamophobia is a sentiment, an excessive fear against Islam that transforms into gestures of intolerance, as well as deliberate acts of discrimination against Muslims, insults upon Islamic sacred symbols, and event[sic] violent crimes against people with Islamic attire.’¹⁸² Consequently, as mentioned in the sections above, it is a term that implies discriminations and incitement to hatred against Islam and its followers, thus combining elements of human rights with religious norms.

¹⁷⁸ See *Ross v Canada* and UNGA, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (20 September 2019) A/74/358, paras 17–18.

¹⁷⁹ A/74/358, para 74.

¹⁸⁰ Ghanea, "'Phobias' and 'Isms': Recognition of Difference or the Slippery Slope of Particularisms?", 217–223.

¹⁸¹ See eg *Islamophobia, A Challenge for Us All* (Runnymede Trust 1997); and Tariq Modood, 'The Place of Muslims in British Secular Multiculturalism' in Nazila Ghanea (ed) *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff 2003) 242.

¹⁸² *12th Report on Islamophobia*, 4.

The former UN Special Rapporteur on Racism, Githu Muigai, divided Islamophobia into four categories: ‘(a) intolerant mentalities; (b) incitement to religious hatred; (c) religious discrimination; and (d) violence perpetrated against members of religious or belief communities’.¹⁸³ If interpreted in this manner, then “intolerant mentalities” is the only category that would not fall directly within the framework of international human rights law, but this construction is significantly narrower than the one proposed by the OIC.

In sum, we argue that this terminology is not adequate for human rights bodies or even the OIC. While the term could have some effectiveness as an advocacy concept,¹⁸⁴ international human rights bodies might dismiss legitimate claims of discrimination based on religion or belief due to a language that is not inherent to a human rights framework. Furthermore, the OIC could potentially get more international support if it stopped using this terminology, as their reports mention outstanding issues regarding systematic persecution of persons based on their religion, such as Uyghur Muslims in China or Rohingya Muslims in Myanmar.¹⁸⁵ Nonetheless, by referring to these incidents as Islamophobia, the seriousness of violations is actually

¹⁸³ Human Rights Council, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Githu Muigai, on the Manifestations of Defamation of Religions, and in Particular on the Serious Implications of Islamophobia, on the Enjoyment of All Rights by Their Followers' (1 July 2009) A/HRC/12/38, para 25.

¹⁸⁴ Joshua M Roose and Bryan Turner, 'Islamophobia, Science and the Advocacy Concept' (2019) 56 *Society* 2010, 218–220.

¹⁸⁵ See eg *12th Report on Islamophobia*, 80–91.

diminished. In any case, some scholars¹⁸⁶ and human bodies have adopted this term, including the ECtHR,¹⁸⁷ the CoE,¹⁸⁸ the UN,¹⁸⁹ and the OAS.¹⁹⁰

1.3.5 Christianophobia

Christianophobia can be defined as discrimination and intolerance against Christians, as well as Christian beliefs and practices. Ghanea explains that it is ‘a term created in the international arena in order to reflect parity of concern with the other phobias and “isms”.’¹⁹¹ Indeed, in 2004 the Vatican pressed the UN to ‘recognize “Christianophobia” as an evil equal to that of anti-Semitism and “Islamophobia.”’¹⁹²

¹⁸⁶ As illustrated by Ayhan Kaya, 'Islamophobia' in Jocelyne Cesari (ed) *The Oxford Handbook of European Islam* (OUP 2015) 749.

¹⁸⁷ See eg *M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015) para 33; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para 47; *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) para 149; *Paksas v Lithuania* App no 34932/04 (ECtHR, 6 January 2011) para 88; and *Orban and Others v France* App no 20985/05 (ECtHR, 15 January 2009) para 34.

¹⁸⁸ Thomas Hammarberg, *Human Rights in Europe: no Grounds for Complacency. Viewpoints by the Council of Europe Commissioner for Human Rights* (CoE 2011) 36–39; and PACE, 'Islam, Islamism and Islamophobia in Europe' (23 June 2010) PACE Res 1743.

¹⁸⁹ See eg UNGA, 'Freedom of Religion or Belief' (17 January 2020) A/RES/74/145, para 4; and UNGA, 'Combating Glorification of Nazism, Neo-Nazism and Other Practices That Contribute to Fuelling Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (24 January 2020) A/RES/74/136, paras 9, 27, and 37.

¹⁹⁰ Inter-American Convention against All Forms of Discrimination and Intolerance, preamble.

¹⁹¹ Ghanea, "'Phobias" and "Isms": Recognition of Difference or the Slippery Slope of Particularisms?', 217.

¹⁹² 'Around the World' (2005) 58 Church & State 22, 22.

Like Islamophobia, a few scholars,¹⁹³ and international organisations such as the UN,¹⁹⁴ CoE,¹⁹⁵ and OAS,¹⁹⁶ have at times endorsed the term.

1.4 Domestic Law Concepts

In the previous section, the terminology examined was predominantly found in soft law documents. Now we turn to expressions that have been either enshrined in domestic legislation or are part of international law which is binding on States. Therefore, the impact of the application of these offences can be more severe than the ones analysed previously. This does not mean that penalties for these offences are rigorously applied in every State, only that the norms are still in force.

One of the reasons why some terms can be unfamiliar to the reader is the fact that they do not primarily belong to the terminology of international human rights law. Nevertheless, this terminology can be employed by representatives of countries or scholars in international fora, while debating the pertinence of laws regulating expressions deemed offensive to religions. These actors will naturally use expressions that are more familiar to their contexts or their national legislations. In many cases the expression used to define offence to religious belief is blasphemy. For example, the former UN Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt,

¹⁹³ See eg Rupert Shortt, *Christianophobia: A Faith under Attack* (Rider Books 2013).

¹⁹⁴ See eg A/RES/74/145, para 4; and A/RES/74/136, paras 9 and 27.

¹⁹⁵ 'Religion and Belief' (CoE) <www.coe.int/en/web/compass/religion-and-belief> accessed 24 April 2020.

¹⁹⁶ Inter-American Convention against All Forms of Discrimination and Intolerance, preamble.

has used the term “blasphemy” to report on laws restricting freedom of expression on religious matters, as demonstrated in the paragraph below:

Some domestic criminal law provisions specifically target members of minorities or persons otherwise deviating from the predominant religious or belief tradition of the country. When manifesting their religious or belief convictions, persons belonging to minorities may run the risk of being accused of ‘blasphemy’, a charge which in some countries carries harsh sanctions, including even the death penalty.¹⁹⁷

In the instance mentioned above, the Special Rapporteur was referring to the laws in Pakistan, which do not employ the term blasphemy but instead “defiling religions”. Thus, in this context, the term “blasphemy” is understood as the umbrella term that generally accounts for several types of offence to religious belief. The current UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, has used a range of expressions, but also a similar one employed in this thesis, ie “offence to religious ideas, icons or places.”¹⁹⁸ In this manner, we will explore the different terminology related to offence to religious belief included in domestic laws.

1.4.1 Blasphemy

As mentioned above, the most common term used to describe offence to religious belief is blasphemy. The concept has been denounced at the UN at least since the seminal report of Special Rapporteur Arcot Krishnaswami published in 1960:

In all societies conflicts occur between the concepts of morality entertained by the majority and those held by minorities. These are not always resolved in a manner which meets "the just requirements of a democratic society". Such is sometimes the case, for example, with laws

¹⁹⁷ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt' (24 December 2012) A/HRC/22/51, para 53.

¹⁹⁸ A/HRC/40/58, para 23.

of blasphemy and censorship. Even to this day there are in a few countries archaic enactments on the statute books which are not applied in normal times but which can acquire strength in times of stress and be applied in such a way as to discriminate against religions or beliefs.¹⁹⁹

Since this report, however, the term only got more traction. In academic literature, most studies in the last 25 years follow the historical understanding of offence to religious belief provided by Leonard Levy in his book *Blasphemy: verbal offense against the sacred, from Moses to Salman Rushdie*. The title itself seems to indicate that blasphemy is a form of verbal offence; however, the adjective “verbal” is misleading as it seems to ignore visual and written blasphemous expressions. Levy defines blasphemy as ‘speaking evil of sacred matters’.²⁰⁰ Nevertheless, to say that the author restricts his analysis to the realm of speech is to mischaracterise his work crudely. Levy’s definition is intentionally open-ended, as he asserts that ‘[w]hat society deems to be blasphemy – a verbal offence against sacred matters – may differ with time and place, but whatever is condemned as blasphemy is always regarded as an abuse of liberty.’²⁰¹

Jeremy Patrick also chooses to use the term blasphemy to encompass different offences to religious belief. He loosely categorises three interrelated conceptions of blasphemy, namely as a religious, legal, and cultural concept.²⁰² To describe the legal concept, Patrick uses the definition given in the case of *Commonwealth v Kneeland*:

¹⁹⁹ UN, 'Study of Discrimination in the Matter of Religious Rights and Practices, by Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1960) E/CN.4/Sub.2/200/Rev.1, p 58.

²⁰⁰ Levy, *Blasphemy*, 3.

²⁰¹ *ibid* ix.

²⁰² Patrick, 'The Curious Persistence of Blasphemy', 204.

blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent creator, governor and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as “calumny” usually carries the same idea, when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God, by denying his existence, or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him, as such.²⁰³

Although a few authors have attempted to define blasphemy accurately,²⁰⁴ the biggest problem in this area is not the definition per se, but how widespread the phenomenon is. According to a 2017 report from the US Commission on International Religious Freedom, which defined the term broadly, blasphemy laws exist in:

71 countries from all regions of the world. Regionally, 25.4 percent of the laws found are from countries in the Middle East and North Africa, 25.4 percent from Asia-Pacific, 22.5 percent from Europe, 15.5 percent from Sub-Saharan Africa, and 11.2 percent from the Americas.²⁰⁵

Other organizations have launched similar reports, but given the flexible use of the word blasphemy, the number of States varies slightly.²⁰⁶ These reports tend to include legislation concerning both *de jure* and *de facto* blasphemy. In any case, one

²⁰³ *Commonwealth v Kneeland* 37 Mass 206 (1838) 213.

²⁰⁴ See eg Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions*, 19; Gubo, *Blasphemy and Defamation of Religions in a Polarized World: How Polarized Fundamentalism Is Challenging Fundamental Human Rights*, 38; and Plate, *Blasphemy: Art That Offends* 43.

²⁰⁵ Fiss and Kestenbaum, *Respecting Rights? Measuring Blasphemy Laws' Compliance with Human Rights*, 3.

²⁰⁶ See eg the *Freedom of Thought Report 2019: Key Countries Edition* 15, which found 69 States with blasphemy laws. While the Pew Research Forum found in 2011 that 94 States penalising offence to religion *lato sensu*, including 34 criminalising blasphemy *stricto sensu*, Grim, 'Laws Penalizing Blasphemy, Apostasy and Defamation of Religion Are Widespread'.

can affirm that about a third of countries in the world have legislation regarding blasphemy *lato sensu*, which we call offence to religious belief.

Blasphemy laws *stricto sensu*, have been endorsed both in common law and civil law jurisdictions. In common law countries the term blasphemy has been used without much attention to what the offence necessarily encompasses, as confirmed by a study commissioned by the British Parliament in 2003.²⁰⁷ In order to stress this point, the Committee quoted Anthony Bradney's argument that 'to say precisely what constitutes the law of blasphemy is difficult if not impossible.'²⁰⁸

The former British Blasphemy Law is a good contemporary example, not only of how vague laws regulating religious belief tend to be, but also of the difficulties in repealing such legislation. The prohibition of blasphemous libel was challenged at least three times before the ECtHR, with all attempts being unsuccessful.²⁰⁹ Also, the British Law Commission considered on several occasions abolishing the offence of blasphemous libel. In a thorough report,²¹⁰ it explained that there was no comprehensive definition of blasphemy in common law, and therefore used the definition given by the trial judge in the *Gay News* case:

Blasphemous libel is committed if there is published any writing concerning God or Christ, the Christian religion, the Bible, or some sacred subject, using words which are scurrilous, abusive or offensive and which

²⁰⁷ *Religious Offences in England and Wales: First Report* (Select Committee on Religious Offences, House of Lords [UK] 2003) appendix 3, para 1.

²⁰⁸ Anthony G D Bradney, *Religions, Rights and the Law* (Leicester University Press 1993) 82.

²⁰⁹ *Gay News Ltd and Lemon v UK*; *Choudhury v UK* App no 17439/90 (ECommHR, 5 March 1991); *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996). These cases will be further investigated in Chapter 0.

²¹⁰ *Criminal Law: Offences against Religion and Public Worship* (Law Commission [UK] 1985).

tend to vilify the Christian religion and therefore have a tendency to lead to a breach of the peace.²¹¹

Following an extensive analysis,²¹² the Commission summarised four essential characteristics of the Blasphemy Law in the UK. It noted that the law protected only Christianity and the tenets of the Church of England; that *mens rea* was not required for the commission of the offence except the intent to publish offending words; that the order of a judge needed to be obtained with the aim of preventing a publication deemed blasphemous; and that the offence was triable only on indictment.²¹³ After the analysis of several arguments, both against and in favour of a blasphemy law,²¹⁴ the Commission decided in 1985 that ‘the common law offences of blasphemy and blasphemous libel should be abolished without replacement.’²¹⁵ Nonetheless, the offence was only abolished by the Criminal Justice and Immigration Act of 2008.²¹⁶

In civil law jurisdictions, the offence is present in many criminal codes, as demonstrated by the Finnish Criminal Code. The Finnish concept of blasphemy is broader than the one previously used in the UK. It prescribes a fine, or imprisonment of up to six months, for anyone who ‘publicly blasphemes against God or, for the

²¹¹ *ibid* para 2.1.

²¹² *Working Paper on Offences against Religion and Public Worship* (Law Commission [UK] 1981).

²¹³ *Criminal Law: Offences against Religion and Public Worship*, para 2.2.

²¹⁴ *ibid* paras 2.6–2.47 .

²¹⁵ *ibid* para 2.57.

²¹⁶ Criminal Justice and Immigration Act [UK] s 79; See also Lady Hale, 'Are We a Christian Country? Religious Freedom and the Law' (Oxfordshire High Sheriff's Lecture, Oxford, October 2014) 14.

purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community.’²¹⁷ There have been calls to eliminate the offence from the criminal code, yet the legislation is still in effect,²¹⁸ being that about 15 people were found guilty of the offence since 1999.²¹⁹

There are at least two high profile cases of criminal conviction for blasphemy in Finland. The first case was that of a right-wing politician who was sentenced to two years and four months of imprisonment for incitement to religious hatred, blasphemy against Islam, and defamation.²²⁰ The second also concerns a right-wing politician, Jussi Halla-aho, who posted in his blog that Islam glorifies paedophilia, mainly referring to the relationship of the Prophet Muhammad with Aisha.²²¹ The posts did not receive much attention until Halla-aho was elected to Helsinki’s city council, when an investigation was opened in order to inspect the writings of the politician. The case went to the Finnish Supreme Court, which found Halla-aho guilty of blasphemy in conjunction with ethnic agitation.²²²

²¹⁷ Criminal Code [Finland] c 17, s 10.

²¹⁸ 'Growing Calls to Rescind Blasphemy Law' (YLE, 9 January 2015) <http://yle.fi/uutiset/growing_calls_to_rescind_blasphemy_law/7727737> accessed 24 April 2020.

²¹⁹ Tuomas Äystö, 'Religious Insult and Blasphemy in Finland' in Jeroen Temperman and András Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (CUP 2017) 317.

²²⁰ Marshall and Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide* 240.

²²¹ Jussi Halla-aho, 'Muhamettilaisen Musta Aukko' (*Scripta*, 19 May 2005) <www.halla-aho.com/scripta/muhamettilaisen_musta_aukko.html> accessed 24 April 2020.

²²² KKO:2012:58, para 41.

The Supreme Court of Finland mentioned the precedents of the ECtHR, such as the case of *Otto-Preminger v Austria*, in order to justify the limitation imposed on freedom of expression by the Finnish Blasphemy Law, as well as to assess the proportionality of the penalty (a fine of ca 400 Euros).²²³ Members of several parties celebrated the decision, despite having previously called for the repeal of blasphemy laws in Finland.²²⁴

1.4.2 Defiling the Sacred

The expression ‘defiling of religious objects’ appears in many countries that were ruled by the British Empire, especially those who follow the Indian Penal Code of 1860. Since this code was organised by British rulers, laws on offence to religion connected to this code were heavily influenced by the UK.²²⁵ The Indian Penal Code states in Article 295 (on offences relating to religion) the following:

Injuring or defiling place of worship, with intent to insult the religion of any class. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.²²⁶

²²³ ibid paras 18, 43 and 44.

²²⁴ Marshall and Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*, 228.

²²⁵ Esmaeili, Irmgard, and Rehman, *The Rule of Law, Freedom of Expression and Islamic Law*, 151–153.

²²⁶ Penal Code [India] art 295.

Countries influenced by the Indian Penal Code adapted the same terminology, for example, Bangladesh,²²⁷ Malaysia,²²⁸ Myanmar,²²⁹ and Pakistan.²³⁰ Other countries with similar laws include Cyprus,²³¹ Tanzania,²³² and Vanuatu.²³³ Defiling in this context means destruction, spoiling, vandalising places and objects of worship. The offence requires specific “intent” to insult the religion of a group of persons.

Defiling the sacred, as mentioned above, often refers to physical objects, such as places of worship or sacred symbols; it does not refer to interpretations of religious books or misusing the name of a religious figure. Some countries then extended these norms to cover orthodoxy. For instance, Section 295 of the Pakistan Penal Code is identical to Section 295 of the Indian Penal Code. However, during the government of General Zia-ul Haq (between 1977 and 1988), Pakistan decided to add protection of religious beliefs as well.²³⁴ Hence the addition of the offence of defiling holy personages (wives, family, Caliphs or companions of Muhammad),²³⁵ and defiling the

²²⁷ Penal Code [Bangladesh] art 295.

²²⁸ Penal Code [Malaysia] art 295.

²²⁹ Penal Code [Myanmar] art 295.

²³⁰ Penal Code [Pakistan] art 295.

²³¹ Criminal Code [Cyprus] art 138.

²³² Penal Code [Tanzania] art 25.

²³³ Penal Code [Vanuatu] art 88.

²³⁴ Marshall and Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*, 85.

²³⁵ Penal Code [Pakistan] art 298-A.

sacred name of the Holy Prophet.²³⁶ The punishment for the latter, prescribed by the Pakistan Penal Code is imprisonment for life or death, which is striking given that the punishment by death is only connected to crimes such as homicide²³⁷ or rape.²³⁸ Thus, the severity of the punishment indicates the level of seriousness that courts observe when judging the offence of defiling the Prophet.

The terms ‘blasphemy’ and ‘defiling religions’ are very similar, and laws regulating these offences share the same purpose, which is to defend religious belief from offensive remarks. Nonetheless, the amendments mentioned above to the Pakistan Penal Code are more than just *lex specialis*; they substantially expanded the scope of the prohibition to defile the sacred. Additionally, the amendments do not include the element of *mens rea*, which is enshrined in Article 295. Since the word “defile” alone, solely means to make something foul, or to damage the purity or appearance of something,²³⁹ any act which spoils the Quran—accidental or deliberate—could fall under the scope of Article 295-B.²⁴⁰ The same applies to the offence of defiling the Holy Prophet, as follows:

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon

²³⁶ ibid art 295-C.

²³⁷ ibid art 302.

²³⁸ ibid art 376.

²³⁹ 'Defile' in John Simpson and Edmund Weiner (eds), *Oxford English Dictionary Online* (OUP 2020) <www.oed.com/view/Entry/48862> accessed 24 April 2020.

²⁴⁰ Marshall and Shea describe a case where a Muslim who allegedly fell onto a stove while holding the Quran and damaged it, was arrested and burnt alive while waiting for trial. Marshall and Shea, *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide*, 96–97.

him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.²⁴¹

Since a mere insinuation, or indirect expression, can be regarded as defiling the Prophet, it is not surprising that there are so many cases of prosecutions under these articles in Pakistan.²⁴² Additionally, in cases of defiling the Quran and the Holy Prophet, there is a lower threshold concerning the requirement for witnesses, as observed by the Lahore High Court in the case of *Haji Bashir Ahmad v The State*:

To constitute offence under S.295-C, PPC, number of witnesses were not required and it was not necessary that such abusive language against Holy Prophet (P.B.U.H) should be made loudly in public or in a meeting or at some specific place, but statement of single witness that somebody had made utterance with the contempt of Holy Prophet (P.B.U.H) even inside the house was sufficient to award death penalty to such contemnor.²⁴³

All the elements mentioned above concerning defiling the Prophet Muhammad are present in the notorious case of Asia Bibi,²⁴⁴ which was considered under Article 295-C of the Pakistan Penal Code.²⁴⁵ In this case, Bibi was arrested because her colleagues reprehended her for drinking water from a well, which they considered impure after Bibi drank from it. Her colleagues allegedly asked her to repent and convert to Islam, to which she replied, 'I am not going to convert. I believe in my

²⁴¹ Penal Code [Pakistan] art 295-C.

²⁴² Rebecca J Dobras, 'Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws' (2009) 37 Georgia Journal of International and Comparative Law 339, 372.

²⁴³ *Haji Bashir Ahmad v The State* (Lahore High Court) 2005 YLR 985, 991.

²⁴⁴ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum' (14 February 2011) A/HRC/16/53/Add.1, paras 326–335.

²⁴⁵ *Asia Bibi v The State and Another (High Court)* Criminal Appeal no 2509/2010 (Lahore High Court, 16 October 2014) para 1.

religion and in Jesus Christ, who died on a cross for the sins of mankind. What did your Prophet Muhammad ever do to save mankind?’²⁴⁶

However, the accusation against her was that she uttered that the Prophet Muhammad ‘fell ill one month prior to his death and the insects nourished in His mouth and ear’, that he married Khadija for her money, and that the Quran was a man-made book.²⁴⁷ Still, even if these accusations were false, Bibi’s statement about the inaction of Muhammad could be considered as an insinuation indirectly defiling the Prophet.

During Asia Bibi’s appeal at the Lahore High Court, her defendant attempted to show that the witnesses were not reliable; yet, given the low threshold for witnesses in cases related to offence to the Prophet, this argument was dismissed by the High Court.²⁴⁸ Furthermore, the High Court judge explained that although the punishment ascribed to the offence of blaspheming against the Prophet is death or imprisonment for life, the latter has not been applied in cases related to Article 295-C since 1991; consequently, the only sentence provided for the offence is death.²⁴⁹

Asia Bibi appealed her death sentence, and the case was overturned by the Supreme Court of Pakistan. However, the Supreme Court did not intend to invalidate Article 295-C; on the contrary, the initial paragraphs are full of quotations from the Quran to demonstrate the importance of such legislation and the seriousness of defiling

²⁴⁶ Bibi, *Blasphemy: The True, Heart-Breaking Story of the Woman Sentenced to Death over a Cup of Water* 21.

²⁴⁷ *Asia Bibi v The State and Another (High Court)* para 3.

²⁴⁸ *ibid* para 17.

²⁴⁹ *ibid* paras 18–19.

sacred matters.²⁵⁰ The decision justified the amendments to the Penal Code, as well as showed support for the Pakistani efforts to pass the resolutions on defamation of religions at the UN and the censorship of social media material considered blasphemous.²⁵¹ Nevertheless, the Court also cautioned against the misuse of blasphemy laws, stating that:

Since 1990, 62 people have been murdered as a result of blasphemy allegations, even before their trial could be conducted in accordance with the law. Even prominent figures, who stressed the fact that the blasphemy laws have been misused by some individuals, met with serious repercussions. A latest example of misuse of this law was the murder of Mashal Khan, a student of Abdul Wali Khan University, Mardan, who in April 2017 was killed by a mob in the premises of the university merely due to an allegation that he posted blasphemous content online.²⁵²

The remainder of the judgement was based on the allegations against Asia Bibi. Since there were several contradictions in the statements provided by the prosecution, the justices did not find that their case was proven beyond reasonable doubt.²⁵³ In this manner, the argument regarding the reliability of the witnesses was finally accepted by the judges, leading the Supreme Court to find in favour of the applicant.

Consequently, the judgement alerted against the risks of misuse of blasphemy laws but did not delegitimise them. On the contrary, the judges endorsed the law and its serious consequences. The decision was mainly based on procedural requirements. Thus, even though the judgement brought justice to a falsely accused woman who was

²⁵⁰ *Asia Bibi v The State and Another (Supreme Court)* paras 1–8 (Mian Saqib Nisar, CJ).

²⁵¹ *ibid* paras 9–11 (Mian Saqib Nisar, CJ).

²⁵² *ibid* para 12 (Mian Saqib Nisar, CJ).

²⁵³ *ibid* paras 31–48 (Mian Saqib Nisar, CJ).

in custody for nearly ten years, it also reinforced the rationale posed by Pakistan to defend its laws against defiling the sacred on two fronts: religious and legal.

The trials of Asia Bibi also resulted in many casualties, as mentioned by the Supreme Court, which indirectly referred to the killings of Salman Taseer and Shahbaz Bhatti.²⁵⁴ This is another common consequence of the laws against defiling religions in Pakistan, as anyone who defends people allegedly accused of offending the Prophet or the Quran can meet the same fate as those whom they are defending.²⁵⁵ Thus, although the rationale of the judgement is not in line with international human rights law, and in our opinion sets a weak precedent in Pakistan, it is undeniable that the justices demonstrated courage in overruling the decisions of lower courts in this controversial case, as they could be targeted as well. Judge Khan Khosa summarised the case as follows:

Blasphemy is a serious offence but the insult of the appellant's religion and religious sensibilities by the complainant party and then mixing truth with falsehood in the name of the Holy Prophet Muhammad (Peace Be Upon Him) was also not short of being blasphemous. It is ironical that in the Arabic language the appellant's name Asia means 'sinful' but in the circumstances of the present case she appears to be a person, in the words of Shakespeare's King Lear, "more sinned against than sinning".²⁵⁶

²⁵⁴ ibid para 12 (Mian Saqib Nisar, CJ); see also Bibi, *Blasphemy: The True, Heart-Breaking Story of the Woman Sentenced to Death over a Cup of Water*, 93–134.

²⁵⁵ Pakistan have also admitted instances of misuse of this law at the UN; however, it maintains that the law is neutral in nature, see UNGA, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Pakistan' (6 August 2012) A/HRC/WG.6/14/PAK/1/UNGA, para 76.

²⁵⁶ *Asia Bibi v The State and Another (Supreme Court)* concurring opinion Judge Asif Saeed Khan Khosa, para 25.

1.4.3 Vilification of Religion

The term vilification derives from the adjective vile; hence the meaning of lowering the value of something with abusive acts.²⁵⁷ The 2001 Racial and Religious Tolerance Act, from the State of Victoria in Australia, employs this term in Section 8, stating that religious vilification is unlawful. Paragraph 1 of this section further explains the content of the offence, noting that '[a] person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.'²⁵⁸ The 2001 Act also contains a criminal provision for grave offences (including threats and physical harm) described in Section 25. The penalty for serious religious vilification is a fine or six months of imprisonment.²⁵⁹

A peculiar characteristic of the Act is that it mentions, in Section 9, that the person's motive is irrelevant when the offence of racial and religious vilification takes place.²⁶⁰ This provision is similar to Article 4(a) of the ICERD,²⁶¹ which states that the 'dissemination of ideas based on racial superiority' shall be punishable by law.²⁶² In

²⁵⁷ 'Vilification' in John Simpson and Edmund Weiner (eds), *Oxford English Dictionary Online* (OUP 2020) <www.oed.com/view/Entry/48862> accessed 24 April 2020.

²⁵⁸ Racial and Religious Tolerance Act [Australia/Victoria] s 8, para 1.

²⁵⁹ *ibid* s 25.

²⁶⁰ *ibid* s 9, para 1.

²⁶¹ Australia ratified the ICERD in 1975. 'Status: International Convention on the Elimination of All Forms of Racial Discrimination' (UNTS, 20 May 2015) <https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4#EndDec> accessed 24 April 2020.

²⁶² ICERD, art 4(a).

this regard, the Act has incorporated Article 4(a) of the ICERD in Section 7, which declares ‘racial vilification unlawful.’²⁶³

Nonetheless, the Act in question goes beyond the racial provision and expands the scope of the prohibition to encompass the offence of religious vilification.²⁶⁴ Although there are exceptions provided for public and private conduct, such as artistic work and debate for religious purpose,²⁶⁵ the consequence of not requiring intent concerning ‘religious vilification’ is a substantial expansion of the prohibition in Section 8. This fact alone generates substantial legal uncertainty in cases related to offence to religious belief, as Section 9 disregards any difference between vilification based on racial and religious grounds.

The vocabulary employed in this passage plays a crucial role in this matter. To lower the value of ethnicity based on abusive language should undoubtedly be prohibited, as this means to belittle a person based on an unchangeable characteristic. Nonetheless, to ridicule a religious belief does not necessarily mean to depreciate a person. Granted that, as stated by Patrick Thornberry:

For many communities addressed by CERD, there are no clear lines between culture or tradition and religion, and efforts to separate out culture from religion could result in grafting a ‘structure’ on to a community which is artificial and inadequately responsive to community self-perception.²⁶⁶

²⁶³ Racial and Religious Tolerance Act [Australia/Victoria] s 7.

²⁶⁴ *ibid* s 9, para 1.

²⁶⁵ *ibid* ss 11–12.

²⁶⁶ Patrick Thornberry, ‘Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)’ (Expert Seminar: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, Geneva, October 2008) 20.

The question of personal choice regarding religious belief is highly contested by legal scholars, being that some consider that religious vilification could be considered within the scope of the ICERD.²⁶⁷ Moreover, it could also be inferred that Australia should prohibit incitement to religious hatred based on its obligations under Article 20(2) of the ICCPR; however, Australia has placed a reservation on this Article, and is therefore not bound by it.²⁶⁸

The validity of the 2001 Act and the scope of Section 8 was challenged in the case of *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc*.²⁶⁹ This case concerned certain remarks made by a Christian pastor in a seminar about the religious beliefs of Muslims, organised by the Catch the Fire Church. Several observations made at the seminar were considered offensive to Muslims who decided to file a case against the church. The case was first debated at the Victorian Civil and Administrative Tribunal, where the Tribunal set the test for religious vilification as that which 'an ordinary reasonable reader, who is not malevolently inclined or free from susceptibility to prejudice, would be inclined to hatred by the publication or conduct.'²⁷⁰ The pastor opposed this decision, stating that the test for incitement should require proof that someone was actually incited to hate a person from another religious

²⁶⁷ See Stephanie E Berry, 'Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination - Square Peg in a Round Hole?' (2011) 11 Human Rights Law Review 423.

²⁶⁸ See 'Status: International Covenant on Civil and Political Rights' (UNTS, 20 May 2015) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec> accessed 24 April 2020.

²⁶⁹ *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc* App no 3751/2005 (Supreme Court of Victoria, 14 December 2006). See also Lawrence McNamara, 'Catch the Fire Ministries v Islamic Council of Victoria: Religious Vilification Laws in the Victorian Court of Appeal' (2008) SSRN <<http://ssrn.com/abstract=1022397>> accessed 24 April 2020.

²⁷⁰ *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc*, para 8.

group, meaning that a distinction should be drawn ‘between an attack on a person’s or group of persons’ religious beliefs and an attack on persons who adhere to those religious beliefs.’²⁷¹ The Tribunal stated that Section 8 of the Act:

does not prohibit statements about religious beliefs *per se* or even statements which are critical or destructive of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons. The proscription is limited to that which *incites* hatred or other relevant emotion and s.8 must be applied so as to give it that effect.²⁷²

Still, the Tribunal considered that the statements of the pastor should be regarded as contravening Section 8 of the 2001 Act for inciting his followers to hate Muslims. The statements considered as vilifying include: ‘the Qur’an promotes violence and killing,’²⁷³ and ‘Muslims intend to take over Australia and declare it an Islamic nation.’²⁷⁴ The Tribunal also punished the pastor for mocking Islamic beliefs.²⁷⁵

These remarks could indeed be portrayed as provocative and possibly as inciting Christians to hate Muslims. However, all these summaries were taken out of context and misrepresented by the Tribunal. Since this is a decision about fundamental rights (freedom of religion or belief, freedom of expression and freedom from discrimination), the facts should be carefully analysed.²⁷⁶ For example, the Tribunal

²⁷¹ ibid paras 9 and 11.

²⁷² ibid para 15.

²⁷³ ibid para 25 (1).

²⁷⁴ ibid para 25 (10).

²⁷⁵ ibid para 26.

²⁷⁶ Although this case is being decided in another jurisdiction, the principle set by Lord Bingham, that ‘any judgment on the proportionality of a public authority’s interference with a protected Convention [human] right is likely to call for a careful and accurate evaluation of the facts’,

affirmed that the pastor stated that the Qur'an promotes violence and killing, when he had only specified that the topic of his seminar was about the concept of Holy War in Islam.²⁷⁷ Additionally, the pastor did not say that Muslims intended to take over Australia, he quoted a letter to a magazine in which the Australian Chief Mufti wrote that he expected Muslims to be a majority in Australia in the future.²⁷⁸ Concerning ridiculing Muslims' beliefs, the judge at the Court of Appeal decided that the pastor's 'plea to love Muslims and to "minister" to them comes across as sincere enough as do the sounds of his audience's reaction to it.'²⁷⁹

Therefore, although some of the comments professed by the pastor could reasonably be considered offensive to Muslims, they were not unlawful. To punish the pastor, in this case, would mean to punish him for holding lawful religious beliefs and expressing them in good faith.²⁸⁰ Therefore the Court of Appeal took the view that the statements of the pastor did not fall within Section 8 of the 2001 Act, but it also stressed that 'the effect of attacking a person's religious beliefs may in some circumstances incite hatred, or at least contempt or severe ridicule, of those persons.'²⁸¹

The fact that the Islamic Council of Victoria and the judges at the Tribunal did not differentiate between criticism of religious people and criticism of religious belief

would have been useful for the Tribunal analysis in the present case. See *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, Lord Bingham opinion, para 3.

²⁷⁷ *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc*, para 38.

²⁷⁸ *ibid* para 48.

²⁷⁹ *ibid* para 63.

²⁸⁰ Racial and Religious Tolerance Act [Australia/Victoria] s 11.

²⁸¹ *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc*, para 175.

should not be overlooked. It points to a somewhat confusing law, which has a noble purpose but does not offer legal certainty. That is why religious vilification laws are inherently problematic; they blur the line between criticism of belief and incitement to hatred, causing misunderstanding about the limits of the law and protected rights. The lengthy explanation given by the Court of Appeal regarding criticism of religious beliefs in Section 8 is proof that the 2001 Act is defective.²⁸²

Furthermore, religious vilification and similar laws lead many to analyse the ‘offensiveness’ of the expression instead of the actual consequences of the speech. The Tribunal performed this analysis and even called ‘specialists’ to help to decide whether the content of the seminar was accurate and balanced;²⁸³ a common mistake in debates in this area.²⁸⁴ The Court of Appeal remarkably elucidates this issue:

about the religious beliefs of Muslims were accurate or inaccurate or balanced or unbalanced was incapable of yielding an answer to the question of whether the statements incited hatred or other relevant emotion. Statements about the religious beliefs of a group of persons could be completely false and utterly unbalanced and yet do nothing to incite hatred of those who adhere to those beliefs. At the same time, statements about the religious beliefs of a group of persons could be wholly true and completely balanced and yet be almost certain to incite hatred of the group because of those beliefs. In any event, who is to say what is accurate or balanced about religious beliefs?²⁸⁵

This decision of the Court of Appeal of Victoria offers a great contrast to those of the ECtHR, which has been deciding in favour of the protection of religious feelings

²⁸² ibid paras 171–177.

²⁸³ ibid para 29.

²⁸⁴ See David Brooks, 'I Am Not Charlie Hebdo' (*New York Times*, 8 January 2015) <www.nytimes.com/2015/01/09/opinion/david-brooks-i-am-not-charlie-hebdo.html> accessed 24 April 2020.

²⁸⁵ *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc*, para 36.

of religious groups in similar cases.²⁸⁶ Despite having a more precarious legislation to judge upon, the Court of Appeal did not construct any protection for the feelings of religious groups; on the contrary, it firmly declared that despite the statements of the pastor being considered hurtful by some, ‘the affront to the feelings of the Muslim witnesses was largely if not wholly irrelevant.’²⁸⁷

There are other countries with similar legislation to the 2001 Act, for example, Cyprus,²⁸⁸ Jordan,²⁸⁹ and Eritrea²⁹⁰ (which includes the prohibition of vilification of humanitarian and religious beliefs).²⁹¹ In any case, even flawed legislation can be corrected by applying sound legal reasoning to the law, as the decision mentioned above of the Court of Appeal demonstrated by narrowing the interpretation of an overly wide act. By doing so, the Court focused directly on the law at hand, and indirectly on human rights law, thus dissipating discussions which carry less weight in a secular court, as Judge Nettle concluded:

I do not doubt that some Muslims may have regarded Pastor Scot’s observations on the meaning of the Koran as deeply offensive, and perhaps been outraged by the fact that things to that effect should be said in a public place; even if the place were no more public than a Catch the Fire Ministries Hall in suburban Surrey Hills and the effect were limited to an

²⁸⁶ See Chapter 5.1.4.

²⁸⁷ *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc*, para 76.

²⁸⁸ Criminal Code [Cyprus] art 142, para 1.

²⁸⁹ Article 38 of the 2007 Press and Publications Law, as written in *Introduction to News Media Law and Policy in Jordan* (Jordan Media Strengthening Program, IREX 2011) 32.

²⁹⁰ Eritrea Press Proclamation 90/1996 c V, s 12, para 1.

²⁹¹ The inclusion of humanitarian beliefs was considered an interesting addition by the International Humanist and Ethical Union, which points out that despite such inclusion the law can actually work against those with humanitarian beliefs. *Freedom of Thought Report 2014: A Global Report on Discrimination against Humanists, Atheists, and the Non-Religious; Their Human Rights and Legal Status* (International Humanist and Ethical Union 2014) 33.

audience largely comprised of born-again Christian fundamentalists. I dare say too that there may well be people who, although not Muslims, would think it a far better thing if people like Pastor Scot kept his ideas about the Koran and Islam, and for that matter Judaism and Christianity, to himself and left others to do likewise. It is at least arguable that the world would be a happier place if he were bound to do so. But that is not the law.²⁹²

1.4.4 Divine Displeasure

Divine displeasure is considered a form of threat in the Indian Penal Code. It defines the offence as an:

Act caused by inducing person to believe that he will be rendered an object of the Divine displeasure.—Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.²⁹³

In general, for a threat of force to be considered unlawful, it must be feasible and illegal. For instance, the threat of striking someone with a meteor would not be feasible, and the threat of imprisonment for criminal acts is not unlawful. Thus, an abstract threat would not comply with the criminal law principle of *nulla poena sine lege certa*. Nevertheless, the Indian Penal Code presupposes that Divine displeasure should be considered as a real threat in Section 508, as well as Section 171C(2)(b). Admittedly, some could regard such “threats” as a matter of psychological abuse or

²⁹² *Catch the Fire Ministries Inc and Others v Islamic Council of Victoria Inc*, para 80.

²⁹³ Penal Code [India] s 508.

emotional coercion, yet even such matters would be excessively open to qualify as a criminal offence.

Even more problematic is the fact that some states in India have passed anti-conversion laws, which include the definition above in the concept of force. The former Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, explained that:

these laws stipulate that “no person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion”. The term “force” is defined to “include a show of force or a threat for injury of any kind including threat of divine displeasure or social excommunication”.²⁹⁴

While improper proselytism should be prohibited,²⁹⁵ many religious traditions believe that those who do not follow their faith cause displeasure to the divine. Therefore, such legislation could lead to a prohibition of conversion and debate about religious beliefs altogether, thus standing in clear opposition to freedom of religion or belief.²⁹⁶

1.4.5 Disruption of Religious Harmony

Religious harmony is an aim that many States pursue and have either enshrined in domestic legislation or used as a justification to limit freedom of religion or belief and freedom of expression. One example of domestic law is the Singapore Penal Code,

²⁹⁴ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir. Mission to India' (26 January 2009) A/HRC/10/8/Add.3, para 11.

²⁹⁵ See eg *Larissis and Others v Greece* Apps nos 23372/94 et al (ECtHR, 24 February 1998).

²⁹⁶ See eg Bielefeldt, Ghanaea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 87–89.

which prohibits “[p]romoting enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony”, stating that whoever:

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, knowingly promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or racial groups; or

(b) commits any act which he knows is prejudicial to the maintenance of harmony between different religious or racial groups and which disturbs or is likely to disturb the public tranquility,

shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.²⁹⁷

Additionally, the Maintenance of Religious Harmony Act can generate a restraining order for people that violate the Act, and subsequently lead to ‘conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 2 years or to both’ for those violating the restraining order.²⁹⁸ Two rather unusual elements can be observed in this Act. First, there is the use of broad terms such as “ill-will” and “subversive activities”.²⁹⁹ Second, there is the inclusion of criticism of political figures and the government in an Act aimed at maintaining “religious harmony”.³⁰⁰

The case of *Public Prosecutor v Amos Yee Pang Sang* highlighted both of these issues. In this widely reported case, Amos Yee, at the time a 16 years-old boy, made several offensive remarks towards Christians and the founding prime minister of Singapore. As a result, Amos Yee was sentenced to three weeks of imprisonment for

²⁹⁷ Penal Code [Singapore] s 298A.

²⁹⁸ Maintenance of Religious Harmony Act [Singapore] s 16(1).

²⁹⁹ *ibid* s 8(1)(a) and (c).

³⁰⁰ *ibid* s 8(1)(b) and (d).

committing “acts prejudicial to the maintenance of harmony”.³⁰¹ This charge refers to a video posted on YouTube by Amos Yee entitled “Lee Kuan Yew is finally dead”, in which the teenager stated sarcastically that Lee Kuan Yew and Jesus were similar:

They are both power hungry and malicious, but deceive others into thinking that they are compassionate and kind. Their impact and legacy will ultimately not last as more and more people find out that they’re full of bull. And Lee Kuan Yew’s followers are completely delusional and ignorant and have absolutely no sound logic or knowledge about him that is grounded in reality, which Lee Kuan Yew very easily manipulates, similar to the Christian knowledge of the Bible and the work of a multitude of priests.³⁰²

The judge considered that these statements were deliberate offences to the religious feeling of Christians, which the author did not deny.³⁰³ Also, some scholars have justified the sentence, given the unique religious and political context in Singapore.³⁰⁴

This case illustrates many of the problems in this area. It portrays a harsh penalty for a teenager who allegedly committed a speech offence, while at the same time, it highlights that the expressions involved might indeed be upsetting to believers. Such reprobation is likely the reason why the OIC endorsed the idea of harmony in the

³⁰¹ *Public Prosecutor v Amos Yee Pang Sang* [2015] SGDC 215, para 1.

³⁰² *ibid* para 27.

³⁰³ *ibid* paras 31–53.

³⁰⁴ See eg George Baylon Radics and Yee Suan Poon, 'Amos Yee, Free Speech, and Maintaining Religious Harmony in Singapore' (2016) 12 *University of Pennsylvania Asian Law Review* 186.

resolutions combatting defamation of religions,³⁰⁵ a term that does not appear in Resolution 16/18 but does in some subsequent resolutions on the topic.³⁰⁶

The main criticism of the term “harmony” is that it suggests a lower threshold of limitation to some human rights. For instance, religious harmony is not a legitimate aim to limit freedom of religion or belief, freedom of expression, or freedom of assembly and association; yet States still impose such restrictions on human rights.³⁰⁷ To complicate things further, courts have generally accepted the argument of religious harmony to justify limitations to qualified rights, as it may be connected to the legitimate aim of public order—although we find the analogy wanting.³⁰⁸ As Bielefeldt asserted, ‘the amalgamation of freedom of religion or belief with political projects of “inter-religious harmony” may marginalize the human rights of dissenters, critics or other people who might disturb a superficial harmony’.³⁰⁹ Thus, a human rights approach to the topic seems to be, once again, a better solution to protect the human rights of every person in a diverse society.³¹⁰

³⁰⁵ See eg E/CN.4/RES/2001/4.

³⁰⁶ See eg UNGA, 'Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence against Persons, Based on Religion or Belief' (27 March 2012) A/RES/66/167.

³⁰⁷ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion and Belief' (28 February 2018) A/HRC/37/49, para 72.

³⁰⁸ See eg *Appel-Irrgang and Others v Germany* App no 45216/07 (ECtHR, 6 October 2009); *Refah Partisi (The Welfare Party) and Others v Turkey* Apps nos 41340/98 et al (ECtHR, 13 February 2003) para 58; *Gromada Ukrayinskoyi Greko-Katolytskoyi Tserkvy Sela Korshiv v Ukraine* App no 9557/04 (ECtHR, 3 May 2016) para 37; and *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000) para 84.

³⁰⁹ Bielefeldt, 'Freedom of Religion or Belief: A Human Right under Pressure', 28.

³¹⁰ See also Javier Martínez-Torrón, 'Freedom of Expression Versus Freedom of Religion in the European Court of Human Rights' in András Sajó (ed) *Censorial Sensitivities: Free Speech and Religion in A Fundamentalist World* (Eleven International Publishing 2007) 269.

1.5 Towards a Better Terminology

The late Peter Birks stated that '[t]axonomy changes nothing, but it promotes understanding.'³¹¹ Birks regarded taxonomy as a map. While some people can navigate this complex terrain without a map, many may get lost without it.³¹² Therefore, the analogy is pertinent in this context, yet this should be considered as the first draft of a map. It may be improved with more data, but we believe that at least a sketch can help the reader to navigate this labyrinthine area.

This chapter had three specific aims announced in its introduction: defining the nature of offence to religious belief, investigating the scope and applications of such offences, and examining the compatibility of such concepts with human rights law. Concerning the first aim, we found five interrelated characteristics pertaining to the nature of offence to religious belief in different traditions, namely: defence of the sacred, social cohesion, maintenance of power, protection of orthodoxy, and atonement. These characteristics helped to delimit the second aim and circumscribe the terminology utilised in the area related to offence to religious belief, as well as the scope of application of such norms. In this regard, we found that the prohibition of offence to religious belief is widespread and are present in States from all continents. By clarifying the meaning and usage of such norms, we will be able to achieve the third objective, which is to determine whether the terminology explored is compatible with international human rights law.

³¹¹ Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *Western Australian Law Review* 1, 3.

³¹² *ibid* 7.

If these terms are compatible, then we should investigate which benefits they can add to human rights adjudication. If they are not compatible, then we can analyse their impact on individual rights. In order to perform such analysis, we will look into specific human rights in the next chapters to better understand the role that such offences play in international human rights law. However, a few preliminary conclusions can be drawn from this exercise alone, which can be seen in the updated table below, regarding the nomenclature related to offence to religious belief.

- Figure 3: Improved categorisation of the terminology related to offence to religious belief

IMPROVED CATEGORISATION OF THE TERMINOLOGY RELATED TO OFFENCE TO RELIGIOUS BELIEF				
International Human Rights Law (Protect against)	Destruction of objects of worship	Interference with worship	Incitement to religious hatred	Discrimination on grounds of religion or belief
International Human Rights Law (Repeal)	Offence to religious feelings			
Domestic Law (Decriminalise / Repeal)	Vilification of religion		Disruption of religious harmony	
Political concepts (Avoid / Repeal)	Defamation of religions			
	Insult to religion	Judeophobia	Islamophobia	Christianophobia
Religious norms (Repeal / Allow autonomy)	Blasphemy	Defiling the sacred	Divine displeasure	Apostasy
	Sacrilege	Desecration	Profanity	Heresy

1.5.1 Religious Norms and Autonomy

Norms regulating offence to religious belief were developed in societies in which religion played a central role, however they have rarely been purely religious in nature. The exhortation in Exodus, ‘Do not blaspheme God or curse the ruler of your

people’,³¹³ illustrates this point well. Although distinct traditions drew different lines separating divine law from human law, in practice this division has always been blurred. With the decreasing power of organised religion in some societies, one could expect the separation line to be better defined, but that never happened. Religious norms now deal mostly with secular issues, and secular courts took up the adjudication of religious issues.³¹⁴

The concept of autonomy of religious organisations may offer a solution to fix this issue. Julian Rivers affirms that ‘autonomy is not merely the aggregate of several individual liberties, but is the power of a community for self-government under its own law.’³¹⁵ This should not be taken out of context, as Rivers draws this concept directly from respected scholars and the case law of the ECtHR.³¹⁶ Indeed, the Court has repeatedly endorsed the principle of autonomy of religious organisations as follows:

religious associations are free to determine at their own discretion the manner in which new members are admitted and existing members excluded. The internal structure of a religious organisation and the regulations governing its membership must be seen as a means by which such organisations are able to express their beliefs and maintain their religious traditions.³¹⁷

³¹³ Exodus 22:28.

³¹⁴ Compare Mark Hill, *Ecclesiastical Law* (4th edn, OUP 2018), where none of the terms explored in Chapter 1.2 is prominent in the book; with Mark Hill and Russell Sandberg, ‘The Right to Blasphemy’ in Jeroen Temperman and András Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (CUP 2017) 117–120, which explores secular forms of blasphemy.

³¹⁵ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010) 334.

³¹⁶ *ibid* 334–335 quoting W Cole Durham Jr, ‘The Right to Autonomy in Religious Affairs: A Comparative View’ in Gerhard Robbers (ed) *Church Autonomy: A Comparative Survey* (P Lang 2001); and *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) para 62.

³¹⁷ *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007) para 150.

Such autonomy should be respected because ‘[t]he autonomous existence of religious communities is indispensable for pluralism in a democratic society.’³¹⁸ Obviously, this autonomy is not unlimited. The State must observe the principle of neutrality,³¹⁹ yet it may intervene if religious organisations violate human rights.³²⁰

In sum, acts which are religious in nature, such as blasphemy and apostasy, should be circumscribed to the religious sphere whenever possible. Religious organisations are best placed to make decisions about doctrines and membership. They can also create regulations to forbid some forms of offence within their communities, as long as they are complying with the rule of law. Nevertheless, such disciplinary acts should not lead to any form of violence, as is the case in some instances of apostasy.³²¹ Unfortunately, severe punishments for these offences are still enforced by States, which has led to a substantial amount of cases in international human rights law.³²²

1.5.2 Unhelpful Political Concepts

Religious autonomy can be helpful in some cases of offence to religious belief, but only in intra-religious issues. On inter-religious matters, the autonomy of religious associations plays a much more limited role. The political expressions explored in this

³¹⁸ *Fernández Martínez v Spain* App no 56030/07 (ECtHR, 12 June 2014) para 126.

³¹⁹ See also Rivers, *The Law of Organized Religions: Between Establishment and Secularism*, 340–343.

³²⁰ *Fernández Martínez v Spain*, paras 131–150.

³²¹ Human Rights Council, 'Report of the Independent Expert on the Situation of Human Rights in the Sudan, Mashood A Baderin' (4 September 2014) A/HRC/27/69, paras 43–45

³²² See Chapter 3.2.2.

chapter focused mostly on inter-religious issues. However, their application and usage are unsatisfactory in many ways, as a closer look at these terms reveals that they are intrinsically problematic, especially in legal discussions.

First of all, as Bielefeldt cautioned, political expressions related to offence to religious belief tend to be selective, and in this manner, might diminish the importance of addressing discrimination based on religion or belief for everyone.³²³ Secondly, these terms should be avoided in human rights documents, as Ghanea opined that: ‘the evolution of new language merely detracts from the essential and shared experience of racial and/or religious discrimination, which, though well-established, remains an area highly neglected by recalcitrant governments.’³²⁴ Thirdly, as Malcolm Evans admonishes: ‘[t]hese agendas all run the risk of being self-defeating by being self-serving, particularly if they are the only agendas that are being pursued.’³²⁵ Consequently, although it is understandable that some organisations have their mandate to protect particular groups, and have informed the public at large of the discrimination that the group they represent endures,³²⁶ the particularistic language of “phobias” mentioned above should be avoided by international organisations³²⁷ and

³²³ Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', 35–36.

³²⁴ Ghanea, "'Phobias" and "Isms": Recognition of Difference or the Slippery Slope of Particularisms?', 232.

³²⁵ Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change', 13.

³²⁶ See eg *12th Report on Islamophobia; Freedom of Thought Report 2019: Key Countries Edition*; Helene Fisher, Elizabeth Lane Miller, and Eva Mayer, *2020 Gender-Specific Religious Persecution* (Open Doors International 2020); and *The Bahá'í Question Revisited: Persecution and Resilience in Iran* (Bahá'í International Community 2016).

³²⁷ See eg A/RES/74/136; and PACE Res 1743.

States.³²⁸ Fourthly, the terminology mentioned in this chapter is often vague, thus open to being manipulated by whoever defines these new jargons. This could, in turn, lead to a lower threshold for limitations to human rights.

The conclusion after the performed analysis is that political concepts related to offence to religious belief are unclear, and do not help courts in deciding cases involving offence to religious belief. It would be best if these terms are avoided by politicians, courts, and even organisations advocating for the protection of members of certain religious groups. The international human rights law terminology is accessible to all and fully capable of addressing issues of discrimination based on religion or belief.

1.5.3 Decriminalise Offence to Religious Belief

International human rights law offers the best guidance for States to reformulate their domestic laws. However, most international human rights law is derived from treaties, and consent is paramount for a State to be bound by these instruments. Several States with laws prohibiting offence to religious belief have not ratified key international human rights treaties, such as Malaysia, Myanmar, and Saudi Arabia.

The fact that these States have not ratified treaties, such as the ICCPR, does not mean they are not bound by international law. Customary international law and general principles of law still apply to these States.³²⁹ For example, the prohibition of torture

³²⁸ See eg Philip Mounstephen, *Bishop of Truro's Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians: Final Report and Recommendations* (The Independent Review of FCO Support for Persecuted Christians, FCO [UK] 2019).

³²⁹ Statute of the International Court of Justice of the International Court of Justice, art 38(b)(c).

is a peremptory norm (*jus cogens*).³³⁰ Therefore torture should never take place in cases of perceived offence to religious belief, or any other instance, for that matter.

Furthermore, these States must also respect the general principles of law recognised by civilised nations. One of the principles of criminal law that States need to observe is the principle of *nulla poena sine lege certa*. This principle asserts that criminal law should be precise and well-defined, otherwise individuals will not know what constitutes a crime.³³¹ The offences mentioned in this chapter are typically broad and fluid. Consequently, they do not comply with the principle of certainty in criminal law and should be removed from criminal statutes. As a result, States should decriminalise laws prohibiting offence to religious belief.

1.5.4 Repeal Offence to Religious Belief

Most States have ratified international human rights treaties, meaning that they have agreed on a comprehensive list of rights which they need to provide for and protect. Since States have—by their own volition—decided to ratify international human rights treaties, they naturally need to observe these treaties in good faith.³³² This is done in accordance with the principle of *pacta sunt servanda*, which requires States to adapt and reform their domestic legislation in line with the treaties they ratify.

³³⁰ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP 2008) 1332.

³³¹ Claus Kreß, 'Nulla Poena Nullum Crimen Sine Lege', *Max Planck Encyclopedia of Public International Law* (OUP 2010) <<https://ezproxy-prd.bodleian.ox.ac.uk:3405/view/10.1093/law:epil/9780199231690/law-9780199231690-e854?rskey=LYdmcw&result=1&prd=MPIL>> accessed 24 April 2020, para 29; see also *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) para 52.

³³² See VCLT, art 26.

One of the standard features of human rights treaties is that States should not limit rights to a greater extent than provided for by the treaties.³³³ Laws regulating offence to religious belief often do precisely that. Therefore, States should demonstrate that their domestic legislation does not have prohibitions related to offence to religious belief, and make sure that their legislative framework is fully compatible with the treaties they have ratified.³³⁴ In case States have norms prohibiting offence to religious belief, they should repeal those norms.

In relation to States that have ratified the ICCPR, General Comment 34 of the Human Rights Committee ascertains that: ‘Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant.’³³⁵ The Rabat Plan of Action, elaborated by several scholars in this field, is even stronger in its call that ‘States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.’³³⁶

These documents will be discussed in depth in the following chapters,³³⁷ but it is essential to emphasise that the Rabat Plan of Action has dealt with many of the issues raised by advocates of the resolutions combatting defamation of religions. It

³³³ See eg ICCPR, art 5(1)(2); ECHR, art 18; and ACHR, art 29(a).

³³⁴ Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 4.

³³⁵ CCPR/C/GC/34, para 48.

³³⁶ See also Rabat Plan of Action, para 25.

³³⁷ See Chapter 6.2.3.

acknowledges the concerns of States urging for the protection of minority religious groups. The Rabat Plan of Action also addresses situations regarding incitement to hatred which could lead to prosecutions, and suggests a comprehensive test to define the proportionality of the measures to restrict such offences.³³⁸ The document also declares that criminal sanctions related to unlawful forms of expression should always be the *ultima ratio*.³³⁹ Although a few scholars consider that offence to religious belief could be legitimately restricted based on human rights treaties,³⁴⁰ most experts in this field support the repeal of laws regulating offence to religious belief.³⁴¹

1.5.5 International Human Rights Law Concepts

International human rights law concepts have not been mentioned yet because they will be meticulously explored in the next chapters. That said, five concepts were mentioned at the beginning of this chapter because they tend to be mixed with other forms of offence to religious belief. They are interference with worship, destruction of objects of worship, offence to religious feelings, incitement to religious hatred, and discrimination on grounds of religion or belief.

³³⁸ Rabat Plan of Action, para 29.

³³⁹ *ibid* para 34.

³⁴⁰ See eg Kapai and Cheung, 'Hanging in a Balance: Freedom of Expression and Religion'; and Neville Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law' (2020) 35 *Journal of Law and Religion* 33.

³⁴¹ See eg Temperman and Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*; and A/HRC/40/58, para 23; and Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief (Advance Version)' (27 February 2020) A/HRC/43/48, para 77(viii).

Interference with worship, destruction of objects of worship, incitement to religious hatred, and discrimination on grounds of religion or belief, constitute an interference with the right to freedom of religion or belief.³⁴² Consequently, these actions might also lead to a violation of other rights, such as the right to private life, freedom of assembly and association, and freedom from discrimination.

As a result, the outlier in this section, and the only term that could be defined solely as offence to religious belief, is the offence to religious feelings. The protection of religious feelings will be further explored in Chapter 5, but we argue beforehand that this protection is unnecessary and detrimental to the protection of freedom of religion or belief. The protection of religious feelings is unnecessary because much of the material considered offensive to religious belief is not forced on believers, and certainly does not restrict their right to freedom of religion or belief.³⁴³ It is detrimental to freedom of religion or belief because it restricts the rights of individuals to manifest their beliefs when they go against the beliefs of members of other religious groups.³⁴⁴ As Asma Jahangir stated, '[f]reedom of religion primarily confers a right to act in accordance with one's religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.'³⁴⁵ Therefore, we argue that the expression "offence to religious feelings" should be repealed.

³⁴² See Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, ch 1.3, 2.1, and 4.1.

³⁴³ See eg *Gay News Ltd and Lemon v UK*, and *Wingrove v UK*.

³⁴⁴ Jeroen Temperman, 'Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech' (2011) 3 *Brigham Young University Law Review* 729, 730.

³⁴⁵ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, Further to Human Rights

In sum, offence to religious belief is largely incompatible with international human rights law. Such offences have undeniably had a negative impact on several human rights, including the right to life, prohibition of torture, prohibition of *refoulement*, right to private life, freedom of religion or belief, freedom of expression, freedom of assembly and association, and prohibition of discrimination.

It is important to note that if offence to religious belief can be connected to a human right, then human rights bodies should investigate the issue. In most cases, only the context will define whether violations of human rights take place. For example, while desecration of a widely available religious text does not violate anyone's freedom of religion or belief, the desecration of religious buildings is unquestionably an interference with the rights of individuals to worship in that place. In this manner, notwithstanding the importance of using appropriate human rights terminology in adjudication, it is the facts, not the language employed, that should determine the outcome of each case. This does not mean that the terminology criticised in this chapter should be used in international cases, but that the human rights framework is fully capable of addressing any potential violation related to offence to religious belief.

This preliminary analysis will help us to move to the core of the research question of the thesis, that is, to determine the normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief. Naturally, in actual cases brought to courts, several articles are claimed; thus any dissociation of rights is merely artificial. However, the scope of protection of these rights can differ substantially.

Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance' (20 September 2006) A/HRC/2/3, para 37.

Consequently, we have decided to focus on the rights in question, rather than portraying these cases chronologically or dividing them by jurisdiction. As mentioned in the introduction, chapters 2, 3, and 4 related to instances where the State must act to protect individuals against the consequences derived from norms regulating offence to religious belief. Chapters 5 and 6 regard instances where the State might need to get involved, but the question is primarily on how they could get involved. This approach further emphasises the doctrinal and systemic methodology applied in this study, now focusing on aspects directly related to international human rights law. We argue that this methodology is essential to deliver a principled analysis of the topic, thereby providing a substantive normative framework for future cases.

2 OFFENCE TO RELIGIOUS BELIEF RELATED TO THE RIGHT TO LIFE

2.1 UN Framework

The right to life is the most fundamental human right for any person. As Manfred Novak explains, ‘without effective guarantee of this right, all other rights of the human being would be devoid of meaning.’¹ For this reason, the right to life is present in all major human rights treaties, and it is placed in a prominent position in these treaties.² Article 6(1) of the ICCPR provides that ‘[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’³ It is important to note that the right to life is qualified as inherent, an expression which is rarely used in relation to specific rights. The expression ‘inherent dignity of the human person’ appears in the preamble of some human rights documents, but it does so as a general principle, meaning that all human rights ‘derive from the inherent dignity of the human person.’⁴ Consequently, to characterise a particular right as inherent is a bold statement. As explained by Elizabeth Wicks, the right to life ‘comes from our nature as human beings and not from the laws of any particular state.’⁵

¹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 121.

² Christian Tomuschat, 'The Right to Life – Legal and Political Foundations' in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Brill 2010) 5.

³ ICCPR, art 6(1).

⁴ *ibid* preamble; See further Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press 2009) 17–54.

⁵ Elizabeth Wicks, *The Right to Life and Conflicting Interests* (OUP 2010) 41.

Article 6(1) of the ICCPR also provides that the right to life ‘shall be protected by law.’⁶ This sentence means that States have a positive obligation to protect the right to life. Additionally, such duty to protect also applies on the horizontal level, ie the State is also responsible for protecting persons against non-State actors.⁷ Thus, understanding the broad scope of the right to life is highly relevant in contexts that have witnessed killings of persons accused of offence to religious belief.⁸ Naturally, not all deaths by third parties will be considered a violation of the right to life. A level of discretion is afforded to the State in these instances. However, if in a particular case there is negligence on the part of the State, and a causal link between the inaction of the State and a casualty is proven, then there might be a violation of the right to life.⁹

The third sentence concerning the right to life in the Covenant expresses that ‘no one shall be arbitrarily deprived of his life.’¹⁰ The adverb ‘arbitrarily’ in this sentence indicates that the right to life is not absolute.¹¹ Indeed, the paragraphs following Article 6(1) in the Covenant set out the conditions in which deprivation of life shall not be considered arbitrary. Thus, even though the right to life is not absolute, the ICCPR

⁶ ICCPR, art 6(1).

⁷ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 122–124.

⁸ See the case of Mashal Khan, who was accused of committing blasphemy and subsequently killed at his university, OHCHR, 'Mashal Khan - Joint Letter of Allegation' (5 May 2017) AL PAK 2/2017.

⁹ Some examples of positive obligation of the right to life at the ECtHR include *Osman v UK* App no 23452/94 (ECtHR, 28 October 1998) para 115; and *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) paras 128–130.

¹⁰ ICCPR, art 6(1).

¹¹ Wicks, *The Right to Life and Conflicting Interests*, 42.

imposes a high threshold for States which intend to interfere with this right.¹²

Therefore, the text of the ICCPR did not require States to abolish the death penalty;

instead, its application was allowed under strict conditions set in Article 6(2) of the

Covenant, which provides that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.¹³

Is the use of the death penalty ever justified against persons who cause offences to religious belief? Most would correctly point out that such offences do not reach the threshold imposed by Article 6(2) of the ICCPR.¹⁴ However, merely stating that offence to religious belief is not a serious crime may not be sufficient to rationalise the repeal of such punishment in States which impose the death penalty for these offences, as they certainly consider such offences as egregious crimes. For example, Pakistan punishes with death, crimes such as waging war against the State, giving false evidence with intent to procure conviction of a capital offence, rape, and use of derogatory

¹² Human Rights Committee, 'General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) CCPR/C/GC/36, para 10.

¹³ ICCPR, art 6(2).

¹⁴ See eg Fiss and Kestenbaum, *Respecting Rights? Measuring Blasphemy Laws' Compliance with Human Rights*, 10.

remarks in respect of the Holy Prophet.¹⁵ Moreover, as mentioned in the first chapter, offences to religious belief have been deemed extremely serious throughout history.¹⁶

Therefore, a more persuasive legal argument might be required in order to curb this practice in places where the death penalty is still enforced for people accused of offending religious beliefs. Consequently, in order to verify compliance with Article 6(2), one must better understand the requirements of the article in question in light of some basic principles of international law. Three principles of law will be used to briefly explain this point: *pacta sunt servanda*, legality, and proportionality.

2.1.1 The Principle of *Pacta Sunt Servanda*

Currently, at least five countries officially impose the death penalty for some types of offences to religious beliefs: Pakistan, Iran, Mauritania, Sudan, and Brunei.¹⁷ All these countries, except Brunei, have ratified the ICCPR.¹⁸ Ratification, simply put, is the act of a State which establishes ‘its consent to be bound by a treaty.’¹⁹ Naturally, if a State has voluntarily decided to be bound by a treaty, it must also observe the treaty.²⁰ This statement represents what the VCLT defines as *pacta sunt servanda*: ‘Every treaty in

¹⁵ Respectively, Penal Code [Pakistan], arts 121, 194, 376, and 295-C.

¹⁶ See Chapter 1.1.

¹⁷ Respectively, Penal Code [Pakistan] art 295-C; Islamic Penal Code [Iran] art 262; Penal Code [Mauritania] art 306; Penal Code [Sudan] art 126; and Syariah Penal Code [Brunei] arts 221 and 222. See also Kirsten Lavery, *Legislation Factsheet Blasphemy* (USCIRF 2018).

¹⁸ See 'Status: International Covenant on Civil and Political Rights'.

¹⁹ VCLT, art 2(b).

²⁰ Hans Kelsen, *Principles of International Law* (2d edn, Holt, Rinehart and Winston 1966) 456.

force is binding upon the parties to it and must be performed by them in good faith.’²¹

James Crawford further explains that:

One of the central canons of the customary international law of treaties is the rule *pacta sunt servanda*, that is, the notion that states must comply with their obligations in good faith. No case has yet arisen in which an international court or tribunal repudiated the rule or challenged its validity.²²

The principle of *pacta sunt servanda* precedes the development of international law, as it is a foundational principle of contracts, which simply states that agreements must be observed. The VCLT spells out some of the consequences of such a principle, for instance, that a State Party to a treaty ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’²³ Subsequently, the principle of *pacta sunt servanda* requires States to enact domestic laws, or adapt current laws, in order to observe the treaties that they have ratified.²⁴ This logic may appear redundant, but as it will be demonstrated in the cases below, it is rather common to see States justifying their lack of compliance with international treaties due to domestic laws, religious traditions, cultural practices, or a distorted view of national sovereignty.²⁵

²¹ VCLT, art 26.

²² James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 434.

²³ VCLT, art 27.

²⁴ Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 372.

²⁵ See eg Başak Cali, Nazila Ghanea, and Benjamin Jones, 'Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council' (2016) 38 *Human Rights Quarterly* 21, 40–45. On further questions regarding the authority of international law see Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015).

In any case, States are well aware of the level of commitment required when ratifying international treaties, which is evidenced by the fact that even though the States in question ratified the ICCPR, they chose not to ratify its Second Protocol concerning the abolition of the death penalty.²⁶ In this manner, could the States that have ratified the ICCPR but not its Second Protocol, prescribe the death penalty for offence to religious belief, since they clearly believe that such offences are serious crime? Certainly not. If the decision of what is considered a ‘most serious crime’ would merely depend on the individual interpretation of each State, then Article 6(2) would be utterly ineffective.

Another international rule based on the principle of *pacta sunt servanda* is that States shall interpret the text of the treaties ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’²⁷ As a result, States cannot take the expression “most serious crimes” out of the context of the Covenant. Since this is an international treaty, what is considered “most serious crime” should at least be recognised internationally as such. The Human Rights Committee declares in General Comment 36 that ‘[t]he term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing.’²⁸ In this manner, the prescription of the death penalty for offence to religious belief is contrary to the ICCPR.

²⁶ Second Optional Protocol to the ICCPR.

²⁷ VCLT, art 31(1).

²⁸ CCPR/C/GC/36, para 35.

2.1.2 The Principle of Legality

Article 6(2) of the ICCPR states that the ‘sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime’.²⁹ This phrase reflects the principle of legality. Since the death sentence must be related to a most serious crime, the specific principle mentioned in the above provision would be *nulla poena sine lege*, meaning that there is no crime without a law. The expression above is also related to the principle of non-retroactivity of the law, enshrined in most treaties.³⁰

The principle of legality is further elaborated as requiring laws to be clear and precise in order to allow natural and legal persons to regulate their conduct. Thus, a development of this principle in criminal law is the requirement of *nulla poena sine lege certa et stricta*, as explained by Judge Pinto de Albuquerque below:

In order to avoid legal uncertainty and comply with the other facet of the principle of legality, that is to say the principle of specificity (*nullum crimen sine lege certa et stricta*), close scrutiny of the relevant State practice is required: only when the general principles of law reflect the treaty and domestic practices of a relevant number of States can they be recognised as expressing the will of the community of civilised nations to criminalise a particular form of conduct.³¹

Consequently, even though the States mentioned earlier have laws in place prescribing the death penalty for offence to religious belief, such crimes are often vague, thus not compliant with the principle of specificity in criminal law. This

²⁹ ICCPR, art 6(2).

³⁰ See eg VCLT, art 28; and ICCPR, art 15.

³¹ *Maktouf and Damjanović v Bosnia and Herzegovina* Apps nos 2312/08 and 34179/08 (ECtHR, 18 July 2013) concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, para 10.

conclusion is reiterated by General Comment 36, which states that the imposition of the death penalty should not ‘be based on vaguely defined criminal provisions, whose application to the convicted individual would depend on subjective or discretionary considerations, the application of which is not reasonably foreseeable.’³²

2.1.3 The Principle of Proportionality

The Human Rights Committee affirms that the application of the death penalty may be in accordance with the ICCPR, but its interpretation must be “narrowly construed”.³³ This expression refers to the principle of proportionality, meaning that the death penalty must correlate with the gravity of the crime and take into consideration other human rights.

Concerning the gravity of the crime, as mentioned above, General Comment 36 defines ‘most serious crimes’ as those involving intentional killing.³⁴ Other serious crimes, such as sexual offences, abduction, and armed robbery, are not considered severe enough to meet this threshold.³⁵ The Committee is even more emphatic about the prohibition of the death penalty to offences to religious belief,³⁶ as it upholds that:

under no circumstances can the death penalty ever be applied as a sanction against conduct whose very criminalization violates the Covenant,

³² CCPR/C/GC/36, para 38.

³³ *ibid* para 33.

³⁴ *ibid* para 35.

³⁵ *ibid*.

³⁶ Human Rights Committee, 'Concluding Observations on the Initial Report of Mauritania' (21 November 2013) CCPR/C/MRT/CO/1, para 21.

including adultery, *homosexuality*, *apostasy*, establishing political opposition groups, or offending a head of state.³⁷

Another expression of the principle of proportionality in Article 6(2), is that it includes the requirement that the death penalty must not be ‘contrary to the provisions of the present Covenant.’³⁸ Once again, the death penalty should never be applied to offences to religious belief, as such penalties would be inherently disproportionate and would inevitably violate other provisions of the ICCPR.³⁹

The arguments posited above could be regarded as an excessive epistemological exercise; nevertheless, they are necessary. States which still apply the death penalty for offence to religious belief seem to require a more comprehensive legal reasoning to stop such practice. In this manner, we presented arguments based on general principles of law which are undisputed by the States in question. Consequently, it would be impossible for States to justify the death penalty in cases concerning offence to religious belief, as these norms do not fulfil the criteria set in Article 6(2) of the ICCPR. Therefore, Member States of the ICCPR which have laws prescribing the death penalty for offence to religious beliefs should amend their legislation to comply with the treaty.

³⁷ CCPR/C/GC/36, para 36 (emphasis added).

³⁸ ICCPR, art 6(2).

³⁹ See *ibid* arts 7, 18, 19, 21, 22, 26, and 27.

2.2 Regional Framework

Despite the Human Rights Committee calling the exception of the death penalty ‘anomalous’,⁴⁰ all other major regional human rights treaties allow for such punishment. The right to life in the American Convention on Human Rights has the same structure as the ICCPR, with a few additional limitations. The ACHR defines that the right to life must be protected by law from the moment of conception, but also presents an exception to this right concerning the death penalty.⁴¹ It also restricts the imposition of the death penalty for the most serious crimes, and it clearly prohibits States which have abolished the death penalty to reinstate the punishment.⁴²

The ACHR also prescribes further limitations to the imposition of the death penalty, prohibiting the punishment to persons under 18 and over 70 years of age, as well as in cases of ‘political offences or related common crimes.’⁴³ However, the ACHR does not specify that the prohibition should be in accordance with other rights present in its text. This omission, however, does not mean that the Convention ignores proportionality altogether. In fact, the ACHR unambiguously establishes that the death penalty should be applied only for the most serious crimes and not for common crimes or political offences.⁴⁴ The Banjul Charter is silent about the death penalty, although

⁴⁰ CCPR/C/GC/36, para 33.

⁴¹ ACHR, art 4.

⁴² *ibid* arts 4(2)–4(3).

⁴³ *ibid* arts 4(4) and (5).

⁴⁴ *ibid* arts 4(2) and 4(4); see also Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 77.

it also declares that no one may be ‘arbitrarily deprived’ of the right to life.⁴⁵ There is no indication that the imposition of the death penalty for offence to religious belief could ever be justified in these jurisdictions.

The European Convention on Human Rights was drafted 15 years before the ICCPR, so it is no surprise that it also presents an exception to the right to life regarding the imposition of capital punishment.⁴⁶ The ECtHR has addressed this issue directly, explaining that:

Sixty years ago, when the Convention was drafted, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life, so that Article 2 § 1 provides that “[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. However, as recorded in the explanatory report to Protocol No. 13, there has subsequently been an evolution towards the complete de facto and de jure abolition of the death penalty within the member States of the Council of Europe.⁴⁷

Indeed, the CoE has enacted two protocols aiming to abolish the death penalty. Protocol No 6 to the Convention, from 1983, abolished the death penalty except for certain acts committed in time of war.⁴⁸ Protocol No 13, from 2002, expands the abolition of the death penalty to all circumstances. This Protocol was ratified by all but three States: Armenia, Azerbaijan, and Russia.⁴⁹

⁴⁵ Banjul Charter, art 4.

⁴⁶ ECHR, art 2(1).

⁴⁷ *Al-Saadoon and Mufdhi v UK* App no 61498/08 (ECtHR, 2 March 2010) para 116.

⁴⁸ ECHR Protocol No 6, arts 1 and 2.

⁴⁹ ECHR Protocol no 13. For the status of ratifications see 'Chart of Signatures and Ratifications of Treaty 187' (COE, 15 February 2019) <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=FDhgMAsv> accessed 24 April 2020.

Nevertheless, even though there are several cases concerning offence to religious belief taking place within the CoE, the main issue regarding the death penalty for the Member States is extraterritorial. In other words:

Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.⁵⁰

This prohibition is very expansive, as it encompasses even States which have not ratified the Protocols to the ECHR mentioned above.⁵¹ This argument has been raised by persons who are forced to return to States where they may face the death penalty or torture for offence to religious belief. The approach of Member States has not been consistent in this area; therefore, this issue will be explored further in Chapter 4.

In conclusion, the normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief related to the right to life are the principles of international law, especially *pacta sunt servanda*, legality, and proportionality. Additionally, the Human Rights Committee General Comment 36 provides an objective guide to interpret the scope of the right to life and explicitly prohibits the application of the death penalty in cases regarding offence to religious belief.⁵²

⁵⁰ *Al-Saadoon and Mufdhi v UK*, para 123.

⁵¹ *AL (XW) v Russia* App no 44095/14 (ECtHR, 29 October 2015) para 64.

⁵² CCPR/C/GC/36, para 36.

3 OFFENCE TO RELIGIOUS BELIEF RELATED TO THE PROHIBITION OF TORTURE, AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

3.1 International Framework

As mentioned in the previous chapter, the right to life is the most fundamental right, yet there are exceptions to this right. While States have a duty to protect the right to life, they can also justify an infringement of the said right. The right to be free from torture is, on the other hand, absolute. Alan Gewirth explains that: '[a] right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed, and it must be fulfilled without any exceptions.'¹ Nigel Rodley further defined the prohibition of torture as unqualified, non-derogable, a norm of customary international law and a rule of *jus cogens*.²

Although most scholars agree with the notion that the prohibition of torture is absolute,³ some disagree. Those who disagree with the absoluteness of the right tend to base their claims on a consequentialist or pragmatic view of rights. For consequentialists, certain rights are only apparently absolute, as they result from a prior proportionality analysis which hardly envisions a situation where an exception would

¹ Alan Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1, 2.

² Nigel S Rodley, 'Integrity of the Person' in Daniel Moeckli et al (eds), *International Human Rights Law* (2nd edn, OUP 2014) 176–177.

³ See eg Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP 2010); and Natasa Mavronicola, 'What Is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723.

take place.⁴ Pragmatists contend that the prohibition of torture should not be absolute in extreme situations—such as the ticking bomb scenario—⁵ or argue that courts have been lenient with State officers who have committed torture.⁶

There is no indication that human rights instruments follow these arguments, as there are no exceptions regarding the prohibition of torture.⁷ For instance, Article 3 of the ECHR provides that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ Additionally, Article 15(2) forbids derogation from the prohibition of torture in time of war or other public emergency threatening the life of a nation. Other international treaties have more detailed provisions, for example, Article 7 of the ICCPR adds to the prohibition of torture the sentence ‘[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ Other regional human rights treaties directly relate the prohibition of torture to the protection of human dignity and integrity.⁸ Furthermore, although the

⁴ See further Grégoire Webber, 'Proportionality and Absolute Rights' in Vicki C Jackson and Mark V Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 80–83.

⁵ Alan Dershowitz, 'Tortured Reasoning' in Sanford Levinson (ed) *Torture: A Collection* (OUP 2004) 184–198.

⁶ Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 15 *Human Rights Law Review* 101, 101–137.

⁷ Human Rights Committee, 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) HRI/GEN/1/Rev.1 30, para 3.

⁸ See also ACHR, art 5(1) and (2); Banjul Charter, art 5.

case law of human rights bodies is not always coherent regarding the consequences of the use of torture, they never deviated from the absoluteness of its prohibition.⁹

A more troubling issue is, however, the meaning of “torture, and other cruel, inhuman or degrading treatment or punishment”. General human rights treaties do not explain what this expression actually entails. The scope of rights is often provided by human rights bodies which monitor the implementation of these treaties. Fortunately, the CAT provides specialised guidance on this subject, as it states that:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁰

This definition has proven to be controversial, mainly due to the last sentence regarding lawful sanctions.¹¹ It raises the question of whether States that have authorised corporal punishments for criminal acts can apply this penalty without infringing Article 1 of the CAT.¹² For example, when the CAT Committee inquired from the Saudi government about ‘corporal punishments by judicial and administrative

⁹ Natasa Mavronicola, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17 Human Rights Law Review 479.

¹⁰ CAT, art 1(1).

¹¹ Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, 79–84.

¹² *ibid* 81.

authorities, including, in particular, flogging and amputation of limbs’,¹³ the Saudi representative declared that it was not within the mandate of the Committee to ‘impugn the 1,400-year-old religious beliefs of Saudi Arabia.’¹⁴ Additionally, Saudi Arabia argued that ‘[t]he Koran set out specific sanctions such as amputation, flogging (whipping) and stoning for certain crimes. These sanctions emanated from God, were the law of the land and, therefore, permitted by the lawful sanctions clause in Article 1 CAT’.¹⁵ Although this argument appears to fulfil prima facie the legality criterion, it is manifestly incorrect. Such claims directly violate the principles of law established in the previous section,¹⁶ and are also in direct contradiction to the rules of interpretations of international treaties, as further explained in the section below.

3.1.1 Rules of Interpretation

In order to clarify these issues, it might be helpful to apply the general rules of interpretation of international treaties, namely Articles 31 and 32 of the VCLT. The general rule established by the VCLT regarding the interpretation of treaties is that: ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

¹³ CAT Committee, 'Conclusions and Recommendations of the Committee against Torture: Saudi Arabia' (12 June 2002) CAT/C/CR/28/5, para 4 (b).

¹⁴ CAT Committee, 'Summary Record of the First Part of the 525th Meeting' (23 May 2002) CAT/C/SR.525, para 8.

¹⁵ Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, 81. As reiterated by the Saudi government in CAT Committee, 'Concluding Observations on the Second Periodic Report of Saudi Arabia' (8 June 2016) CAT/C/SAU/CO/2, paras 165–166.

¹⁶ See Chapters 2.1.1–2.1.3.

purpose.’¹⁷ It seems reasonable to conclude that the term ‘lawful sanctions’ included in Article 1(1) of the CAT would refer to deprivation of liberty which is not arbitrary. Nigel Rodley defended that “lawful sanctions” in this context ‘necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community,’ which do not include corporal punishments.¹⁸ However, Saudi Arabia seems to suggest that corporal punishment could be equated to deprivation of liberty, as it explained that such punishments were:

administered under full medical, judicial and administrative supervision, full account being taken of the health status of the person concerned. No deaths had ever been recorded in connection with corporal punishment. Corporal punishment was intended as a deterrent: under Shariah law, it should not be administered if there was any doubt about the guilt of the individual or the evidence in the case. The aim was not to punish but to rehabilitate and to protect society.¹⁹

Nevertheless, even if corporal punishments prescribed by law would be regarded as fulfilling the criterion of the “ordinary meaning” of lawful sanction, it would be difficult to sustain that a treaty against degrading treatment would allow such punishments. Thus, in light of the general rule of interpretation of treaties, the explanation given by Saudi Arabia is not compliant with Article 1(1) of the CAT, as it goes directly against the “object and purpose” of the treaty.²⁰

Nowak explains that the general and primary manner in which understanding of a provision can be achieved is through ‘the textual, contextual, systematic and

¹⁷ VCLT, art 31(1).

¹⁸ Commission on Human Rights, 'Report of the Special Rapporteur, Nigel S Rodley' (10 January 1997) E/CN.4/1997/7, para 8.

¹⁹ CAT Committee, 'Summary Record of the First Part of the 519th Meeting' (17 May 2002) CAT/C/SR.519, para 24.

²⁰ See VCLT, art 31(1); and CAT, art 1(1).

teleological interpretation, whereby, in addition to the treaty wording, consideration is also given to the Preamble.²¹ Article 31(2) of the VCLT states that the preamble forms part of the context for the purpose of the interpretation of a treaty.²² The preamble of the CAT states the desire ‘to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.’²³ This aim cannot be achieved by allowing States to impose corporal punishments.

Additionally, Article 31(3)(c) of the VCLT establishes that ‘[a]ny relevant rules of international law applicable in the relations between the parties’²⁴ should be taken into account while interpreting a treaty. Once again, there is no rule of international law that can corroborate Saudi Arabia’s understanding that corporal punishment does not fall within the concept of torture provided by the CAT.

Finally, if any interpretation based on Article 31 of the VCLT leads to an ambiguous or obscure meaning, or to a ‘result which is manifestly absurd or unreasonable’, recourse to supplementary means of interpretation is available in accordance with Article 32 of the same Convention.²⁵ These means include, but are not limited to, *travaux préparatoires* of treaties and opinions from Special

²¹ Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, 11.

²² See VCLT, art 31(2).

²³ CAT, preamble.

²⁴ VCLT, art 31(3)(c). The ECtHR follows this interpretation in, *ia*, *Al-Adsani v UK* App no 35763/97 (ECtHR, 21 November 2001) para 55; and *Muršić v Croatia* App No 7334/13 (ECtHR, 20 October 2016) partly dissenting opinion of Judge Pinto de Albuquerque, paras 10–12.

²⁵ VCLT, art 32.

Rapporteurs.²⁶ This issue of corporal punishment in the context of Sharia Law has been taken seriously by the UN Special Rapporteurs on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, who have pointed out that there is divergence among Islamic scholars on the topic and that the overwhelming majority of countries that follow Sharia Law do not impose corporal punishment.²⁷

The case of Raif Badawi, a Saudi blogger accused of offence to religious belief is illustrative in this regard.²⁸ The CAT Committee took notice of the harsh sentence imposed on the blogger ‘of 1,000 lashes, as well as 10 years’ imprisonment and a fine’ due to his ‘arrest and conviction on charges of “insulting Islam”.’²⁹ However, when the CAT Committee inquired about this case from Saudi Arabia, the State simply repeated that ‘(t)he punishments provided for under the Islamic Shariah do not fall under the definition of torture as understood by article 1 of the Convention.’³⁰ In this manner, a deeper look into principles of law and rules of interpretation could break the impasse between the CAT recommendations and the incorrect Saudi responses, as

²⁶ Yves le Bouthillier, 'Interpretation of Treaties, Art.32 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 852–853.

²⁷ See eg E/CN.4/1997/7, paras 3–11; and UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' (30 August 2005) A/60/316, paras 18–28.

²⁸ CAT/C/SAU/CO/2, paras 12–13. See also, Badawi, *1000 Lashes: Because I Say What I Think*, xxviii.

²⁹ CAT Committee, 'List of Issues in Relation to the Second Periodic Report of Saudi Arabia' (5 January 2016) CAT/C/SAU/Q/2/Add.1, para 2.

³⁰ CAT Committee, 'Replies of the Kingdom of Saudi Arabia to the List of Issues in Consideration of Its Second Periodic Report' (12 February 2016) CAT/C/SAU/Q/2/Add.2, para 6.

demonstrated by the jurisprudence of the Inter-American Court of Human Rights,³¹ thus leading to full implementation of the CAT into domestic criminal law.

3.2 The Evolving Concepts of Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1 of the CAT provides a comprehensive theoretical definition of torture at the international level, and is a definition of a criminal law offence of torture which is to be used in domestic law.³² The inclusion of cruel, inhuman or degrading treatment or punishment (CIDT) is provided in Article 16 of the CAT, but no explanation is given about the meaning of the expression in the Convention. Consequently, the evolving jurisprudence of treaty monitoring bodies and other human rights mechanisms at the UN have fleshed out which practices are considered torture or CIDT.³³ These concepts are often cross-fertilised among different systems.³⁴

Regional human rights systems have also developed conventions to specifically prevent torture, namely the European Convention for the Prevention of Torture,³⁵ the

³¹ See *Caesar v Trinidad and Tobago* (IACtHR, 11 March 2005) Serie C No 123, Separate Opinion of Judge García Ramírez, paras 21–28; Concurring opinion of Judge Jackman; and Separate Opinion of Judge Cançado Trindade, paras 85–92.

³² CAT, Art 4.

³³ See eg ECOSOC, 'Report of the Special Rapporteur on the Question of Torture, Manfred Nowak' (23 December 2005) E/CN.4/2006/6, paras 34–41.

³⁴ See eg *Al-Adsani v UK*, para 60.

³⁵ European Convention for the Prevention of Torture.

Inter-American Convention to Prevent and Punish Torture,³⁶ and the Robben Island Guidelines of the African system.³⁷ However, in regional human rights systems, it is often the jurisprudence of the courts that gives substance to the meaning of torture in each context. The list of practices falling under these categories are numerous; therefore, we will focus mostly on those related to offence to religious belief.

The terms “torture and other cruel, inhuman or degrading treatment or punishment” indicate a gradation of concepts. These concepts can be distinguished by the intensity of suffering,³⁸ or, as Nowak conversely suggests, based on ‘the *purpose* of the conduct, the *intention* of the perpetrator and the *powerlessness* of the victim.’³⁹ The ECtHR has focused mostly on the former,⁴⁰ while the UN has preferred the latter approach.⁴¹ Since not all forms of treatment or punishment fall within this scope of the

³⁶ Inter-American Convention to Prevent and Punish Torture.

³⁷ ACHPR, 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (23 October 2002) Robben Island Guidelines.

³⁸ Aisling Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights* (CoE 2002) 11.

³⁹ Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, 558 (emphasis in original).

⁴⁰ William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 176. See also Diego Rodríguez Pinzón and Claudia Martín, *The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System: A Handbook for Victims and Their Advocates* (World Organisation Against Torture 2006) 107.

⁴¹ Human Rights Council, 'Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention, Manfred Nowak' (5 February 2010) A/HRC/13/39/Add.5, paras 187–188.

prohibition of torture and CIDT, a minimum level of severity is always required for further analysis of the right in question.⁴²

The assessment of this level is relative, as the ECtHR has explained that ‘it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’⁴³ This assessment is constantly evolving.⁴⁴ For example, what the Court considered in the past as degrading treatment, could be now considered as torture, given that there is an increasingly high standard of protection in this area.⁴⁵

While it is essential for courts to apply the most appropriate term in decisions, especially to define reparations for the victims, it is irrelevant for matters concerning the absoluteness of the right. Therefore, if the action reaches the minimum level required to be considered as torture or CIDT, then its prohibition is absolute.⁴⁶ If courts decide that a particular action does not meet the threshold for the application of torture, then the right to private life could be triggered instead.⁴⁷ This point is illustrated in the ECtHR case of *López Ostra v Spain*, in which the applicant argued that a waste-treatment plant near his home affected him and the health of those living in his

⁴² Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*, 10–11.

⁴³ *Ireland v UK* App no 5310/71 (ECtHR, 18 January 1978) para 162.

⁴⁴ Schabas, *The European Convention on Human Rights: A Commentary*, 176.

⁴⁵ *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999) para 101.

⁴⁶ See eg Mavronicola, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer', 486–487.

⁴⁷ Schabas, *The European Convention on Human Rights: A Commentary*, 172.

district.⁴⁸ The Court found that although the situation was difficult for the applicant, it did not amount to degrading treatment, but was a violation of the right to private life.⁴⁹

3.2.1 Judicial Corporal Punishments

Judicial corporal punishments are considered torture or CIDT in several jurisdictions. The ECtHR decided in 1978 that the UK violated Article 3 of the ECHR (in this case degrading treatment) by allowing a court to sentence a 15-year-old boy to receive three strokes with a birch rod.⁵⁰ The IACtHR also found a violation of the prohibition to torture in *Caesar v Trinidad and Tobago*, a case concerning the flogging of a prisoner who was accused of attempted rape.⁵¹ The IACtHR further stated that a State Party to the ACHR ‘is under an obligation *erga omnes* to abstain from imposing corporal punishment, as well as to prevent its administration, for constituting, in any circumstance, a cruel, inhuman or degrading treatment or punishment’,⁵² and asserted that corporal punishment is ‘universally stigmatized as cruel, inhuman, and degrading.’⁵³

⁴⁸ *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994) paras 7–22.

⁴⁹ *ibid* paras 57–60.

⁵⁰ *Tyrer v UK* App no 5856/72 (ECtHR, 25 April 1978) paras 9, 10, and 35.

⁵¹ *Caesar v Trinidad and Tobago*, paras 73 and 94.

⁵² *ibid* para 70. See also Rodríguez Pinzón and Martín, *The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System*, 111–112.

⁵³ *Caesar v Trinidad and Tobago*, para 74.

States that impose judicial corporal punishments on persons accused of committing offence to religious belief include Saudi Arabia,⁵⁴ and Sudan, which has a specific provision in its penal code establishing up to forty lashes to those who insult beliefs.⁵⁵ The ACHPR found in *Curtis Francis Doebbler v Sudan (No 2)* that judicially mandated lashings to punish students who committed acts against the public order, ie against ‘the person's religion or the custom of the country where the act takes place,’⁵⁶ should be considered a violation of the prohibition of torture.⁵⁷ In this case, the offence in question was comprised of girls wearing trousers and talking with boys during a picnic.⁵⁸ The ACHPR also requested Sudan to abolish the penalty of lashes.⁵⁹

3.2.2 Torture, CIDT, and Deprivation of Liberty

Certain conditions of detention and excessive use of force by the police have also been considered a violation of the prohibition of torture or CIDT. As mentioned above, deprivation of liberty—when not arbitrary—is not necessarily a violation of the prohibition of torture or CIDT, in accordance with the CAT. However, ‘the infliction

⁵⁴ Fiss and Kestenbaum, *Respecting Rights? Measuring Blasphemy Laws’ Compliance with Human Rights*, 25–26.

⁵⁵ Penal Code [Sudan] art 125.

⁵⁶ *ibid* art 152.

⁵⁷ *Curtis Francis Doebbler v Sudan (No 2)* paras 42–44. See also Frans Viljoen and Anselm Chidi Odinkalu, *The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and Their Advocates* (World Organisation Against Torture 2006) 47–48.

⁵⁸ *Curtis Francis Doebbler v Sudan (No 2)* para 3.

⁵⁹ *ibid* Holding.

of injury, unnecessary suffering or damage to health which results in the deterioration of physical, psychological, or moral integrity may constitute cruel treatment.’⁶⁰ For these reasons, the IACtHR has considered that incommunicado detentions, as well as unhygienic and overcrowded cells, are a violation of CIDT.⁶¹ The African Commission also found the same in relation to journalists who were arrested for publishing political articles and then placed in detention in degrading conditions while chained to the floor.⁶² In 2015, the ECtHR decided, based on a comparative analysis of the concept of dignity,⁶³ that the fact that police officers slapped two applicants in their faces had reached the minimum level of severity to be considered as degrading treatment.⁶⁴

A more contentious issue is the question of whether the imposition of the death penalty in itself could be considered a violation of the prohibition of torture or CIDT. The answer is inconclusive as there is no consensus in the area, but several scholars and States have indicated that the death penalty is a form of torture and, as such, should be abolished, especially in cases of ‘apostasy, blasphemy, adultery and consensual same-sex relations.’⁶⁵ As seen in the previous section, the death penalty was not abolished in human rights treaties, but it must observe certain conditions in order not

⁶⁰ Rodríguez Pinzón and Martín, *The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System*, 122.

⁶¹ *Suárez-Rosero v Ecuador* (IACtHR, 12 November 1997) Series C No 35, paras 88–92.

⁶² *Media Rights Agenda (on behalf of Niran Malaolu) v Nigeria* Comm no 224/98 (ACHPR, 6 November 2000), paras 67–72.

⁶³ *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015) paras 45–47.

⁶⁴ *ibid* paras 111–113.

⁶⁵ Human Rights Council, ‘The Question of the Death Penalty’ (5 October 2017) A/HRC/RES/36/17, preamble and para 6; See also Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, 565–566.

to be considered arbitrary. Nevertheless, the imposition of the death penalty by itself might be considered as torture or CIDT in at least three instances: the death row phenomenon, mandatory death sentences, and methods of execution.⁶⁶

All these issues could be observed with victims of laws concerning offence to religious belief. First, the death row phenomenon is a concept which refers to ‘a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death.’⁶⁷ Therefore, a prolonged death row sentence, like the one in the case of Asia Bibi, who spent eight years on death row,⁶⁸ could be considered as CIDT.⁶⁹ Second, mandatory death sentences, like the ones imposed by the Sudanese Penal Code for apostasy,⁷⁰ could be regarded as torture because they do not consider the personal circumstances of the case,⁷¹ as clearly demonstrated in the case of Meriam Ibrahim described below. Third, the Human Rights Committee has stated that some methods of execution, such as the use of gas chambers, is a violation of the prohibition of torture; however, it has allowed other methods, such as lethal injections.⁷² In Sudan and Iran, where offence to religious

⁶⁶ See further Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Question of the Death Penalty' (4 July 2017) A/HRC/36/27, paras 34–46.

⁶⁷ UNGA, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 2012) A/67/279, para 42.

⁶⁸ *Asia Bibi v The State and Another (Supreme Court)*.

⁶⁹ See eg *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989) para 81ff, and *William Andrews v US* App no 11139 (IACHR, 6 December 1996) Report No 57/96, para 178.

⁷⁰ Penal Code [Sudan] art 126.

⁷¹ See *Desmond McKenzie and Others v Jamaica* Apps nos 12023 et al (IACHR, 13 April 2000) Report No 41/00, paras 172–239.

⁷² See *mutatis mutandis Kindler v Canada* Comm no 470/1991 (Human Rights Committee, 30 July 1993) CCPR/C/48/D/470/1991, paras 9.7, 15.3, and 16; *Chitat Ng v Canada* Comm no 469/1991

belief can be punished with the death penalty, stoning or crucifixion are prescribed methods of execution.⁷³ These punishments have been repeatedly condemned by the Human Rights Committee as torture.⁷⁴

Three cases related to offence to religious belief illustrate how deprivation of liberty can be regarded as torture or CIDT. First, there is the Sudanese case of Meriam Ibrahim, a Christian woman sentenced to death and 100 lashes for apostasy while pregnant. UN experts stated that ‘the imposition and enforcement of the death penalty on pregnant women or recent mothers is inherently cruel and leads to a violation of the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.’⁷⁵ Due to international pressure, Ibrahim was released after giving birth to her daughter in prison while shackled to the floor.⁷⁶ In response to repeated

(Human Rights Committee, 5 November 1993) CCPR/C/49/D/469/1991, para 16.4; and *Judge v Canada* Comm no 829/1998 (Human Rights Committee, 13 August 2003) CCPR/C/78/D/829/1998, para 10.9. See further Sarah Joseph, Katie Mitchell, Linda Gyorki, and Carin Benninger-Budel, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (World Organisation Against Torture 2006) 177.

⁷³ Penal Code [Sudan] art 27; and Project on Extra-Legal Executions in Iran, ‘Table of Capital Offenses in the Islamic Republic of Iran, and Their Sources in Statute Law and Islamic Law’, 8.

⁷⁴ Human Rights Committee, ‘Concluding Observations of the Human Rights Committee, Iran’ (29 November 2011) CCPR/C/IRN/CO/3, paras 12 and 23; and Human Rights Committee, ‘Concluding Observations on the Fifth Periodic Report of the Sudan’ (19 November 2018) CCPR/C/SDN/CO/5, paras 29–30; and CCPR/C/GC/36, para 40.

⁷⁵ ‘Sudan: UN Rights Experts Condemn Death Sentence against Pregnant Mother for Apostasy and Adultery’ (UN, 19 May 2014) <<https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14618>> accessed 24 April 2020. The ACHR also prohibits the imposition of capital punishment for pregnant women in art 4(5).

⁷⁶ Meriam Ibrahim and Maeve Shearlaw, ‘Meriam Ibrahim on Her Escape from Death Row – ‘the World Gave Me Hope’’ (*The Guardian*, 2 February 2015) <www.theguardian.com/world/2015/feb/02/meriam-ibrahim-pregnant-death-row-sudan-your-questions> accessed 24 April 2020.

criticisms of its apostasy laws,⁷⁷ Sudan affirmed that it had registered only four cases of apostasy, and in all cases the charges were dismissed.⁷⁸ Still, this argument does not make such laws less threatening to members of minority religious groups or atheists.⁷⁹

The second case is *FH v Greece*, involving a convert to Christianity from Iran, who claimed to be arrested in his home country for apostasy. The applicant stated that he managed to flee to Europe, but was arrested when he arrived in Greece, and subsequently placed in a detention centre. The Court found a violation of Article 3, ie prohibition of degrading treatment, due to the conditions of the detention centre.⁸⁰

The third case is *Mariya Alekhina and Others v Russia*, the case involving the imprisonment of three members of the Pussy Riot Collective. The group wrote songs criticising the relationship between the Russian Orthodox Church and President Putin, the most relevant for the case being “Punk Prayer – Virgin Mary, Drive Putin Away”.

A translation of the lyrics is provided in the case, as follows:

Virgin Mary, Mother of God, drive Putin away
Drive Putin away, drive Putin away
Black robe, golden epaulettes
Parishioners crawl to bow
The phantom of liberty is in heaven
Gay pride sent to Siberia in chains
The head of the KGB, their chief saint,

⁷⁷ Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of the Sudan' (19 August 2014) CCPR/C/SDN/CO/4; UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez, Addendum' (5 March 2015) A/HRC/28/68/Add.1, paras 491–496; and CCPR/C/SDN/CO/5, paras 29–36 and 49–50.

⁷⁸ Human Rights Committee, 'List of Issues in Relation to the Fifth Periodic Report of the Sudan' (13 August 2018) CCPR/C/SDN/Q/5/Add.1, para 44.

⁷⁹ It is important to note that Sudan has stated that it will change its apostasy laws, see eg Abdi Latif Dahir, 'Sudan Will Scrap Alcohol and Apostasy Laws, and End Flogging' (*The New York Times*, 23 July 2020) <<https://www.nytimes.com/2020/07/13/world/africa/sudan-fgm-alcohol-flogging.html>> accessed 24 July 2020.

⁸⁰ See *FH v Greece* App no 78456/11 (ECtHR, 31 July 2014).

Leads protesters to prison under escort
 So as not to offend His Holiness
 Women must give birth and love
 Shit, shit, holy shit!
 Shit, shit, holy shit!
 Virgin Mary, Mother of God, become a feminist
 Become a feminist, become a feminist
 The Church's praise of rotten dictators
 The cross-bearer procession of black limousines
 A teacher-preacher will meet you at school
 Go to class - bring him cash!
 Patriarch Gundyaev believes in Putin
 Bitch, better believe in God instead
 The girdle of the Virgin can't replace rallies
 Mary, Mother of God, is with us in protest!
 Virgin Mary, Mother of God, drive Putin away
 Drive Putin away, drive Putin away.⁸¹

In February 2012, members of Pussy Riot started performing this song from the altar of Christ the Saviour Cathedral in Moscow but were quickly interrupted by security guards.⁸² A video of the event was uploaded to YouTube.⁸³ Regarding the institution of criminal proceedings, several people accused the group of 'insulting the feelings of members of the church', both due to the unauthorised performance in the church and the content of the lyrics.⁸⁴ The three applicants were then arrested and 'charged with the aggravated offence of hooliganism motivated by religious hatred.'⁸⁵

During the hearings, the applicants were held in an 'enclosed dock with glass walls and a tight-fitting door, commonly known as an "aquarium",' with low

⁸¹ *Mariya Alekhina and Others v Russia* para 11.

⁸² *ibid* para 13.

⁸³ *ibid* paras 14 and 16.

⁸⁴ *ibid* paras 11, 17 and 19.

⁸⁵ *ibid* para 20.

ventilation and surrounded by several armed police officers and a guard dog.⁸⁶ The applicants claimed that these conditions were inhuman and degrading.⁸⁷

The District Court ‘found the three applicants guilty under Article 213 § 2 of the Russian Criminal Code of hooliganism for reasons of religious hatred and enmity and for reasons of hatred towards a particular social group,’ and sentenced them to two years in prison.⁸⁸ These findings were based on a number of witnesses who were either present during the protest or watched it online and confirmed that they had been offended by the applicants’ actions.⁸⁹ The group later appealed to the Moscow Court, which upheld the sentence for the first and second applicants, but decided to suspend the sentence for the third.⁹⁰ In December 2013 and January 2014, the applicants were granted amnesty by the State after serving almost two years of imprisonment.⁹¹

The case in question raises several issues regarding the validity of laws prohibiting offence to religious belief and their impact on freedom of expression, but it also led to a claim of inhuman and degrading treatment due to the conditions related to the trial, as described above.⁹² The ECtHR found that the treatment of the applicants

⁸⁶ ibid para 32.

⁸⁷ ibid paras 36–47.

⁸⁸ ibid para 48.

⁸⁹ ibid para 49.

⁹⁰ ibid para 57.

⁹¹ ibid paras 58–59.

⁹² ibid para 123.

indeed violated Article 3 of the Convention,⁹³ thus reiterating that ‘it prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour.’⁹⁴

While the severity of the prison sentence was clearly disproportionate to the performance of the group inside the church, the Court indirectly highlighted two issues that are often overlooked in cases concerning offence to religious belief. First, questions regarding the limits of freedom of expression, as well as freedom of religion or belief, are naturally at the heart of cases regarding offence to religious belief. However, in these cases, there is often a potential violation of several human rights. In the present case, the ECtHR found a violation of the prohibition of torture, the right to a trial within a reasonable time, the right to a fair hearing, and the right to defend oneself through legal assistance.⁹⁵ Admittedly, these issues were not a direct result of the alleged offence to religious belief. Yet, it would be unwise to ignore the impact that the legal procedures triggered by the alleged offences caused to the applicants. After all, if these offences were not criminalised, as suggested in Chapter 1, then the applicants would not have to endure such a torturous procedure.

Second, the fact that people still suffer inhuman and degrading treatment in the 21st century for matters related to offence to religious belief, reinforces the claim of this thesis that such offences are not only an issue of the past. This issue still affects many in our contemporary society, the world over, as the case concerning the members of the Pussy Riot collective from 2018 well illustrates.

⁹³ ibid paras 134–150.

⁹⁴ ibid para 140.

⁹⁵ ibid paras 139, 150, 159, and 172, respectively.

In sum, the normative underpinnings that human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief related to the prohibition of torture and CIDT can be found in human rights treaties, and more specifically, the CAT. These treaties should be read in light of the principles of international law and rules of treaty interpretation. Furthermore, the jurisprudence of international and regional treaty bodies has been uncompromising regarding the absoluteness of the prohibition of torture or CIDT, and it can serve as a guide for future decisions on the subject.

4 OFFENCE TO RELIGIOUS BELIEF RELATED TO *NON-REFOULEMENT*

According to the Refugee Convention, individuals who have a well-founded fear of being persecuted on grounds of religion may apply for asylum in other countries.¹ If the request for asylum is rejected, persons can be returned to their country of origin.² In cases concerning offence to religious belief, some applicants have correctly argued that such a return could lead to a violation of the prohibition of torture, as well as their right to life. States shall not return individuals to countries where they might face such risks. This obligation imposed on States is called *non-refoulement*.

Several courts and monitoring bodies have dealt with the issue of offence to religious belief and *non-refoulement*. The outcomes are varied and therefore, focusing only on one jurisdiction would not benefit the analysis of this complex phenomenon. Some jurisdictions have only received a few cases, and these will not be explored in depth in this thesis. For example, the CRC Committee adopted views in a case of *non-refoulement* concerning a family from Afghanistan which applied for asylum in Denmark, based on the fact that they had converted to Christianity and claiming that their son could be persecuted for their beliefs if deported.³ The conversion could lead to a case of apostasy in Afghanistan, but the CRC Committee accepted the arguments presented by Denmark that the parents' conversion was not regarded as genuine, even

¹ Refugee Convention, art 1(A)(2).

² This is naturally based on the longstanding principle of sovereignty, see Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (7th edn, T & JW Johnson 1849) book I, ss 229–230; Lassa Oppenheim, *International Law: A Treatise* (2d edn, Longmans, Green and Co 1912) paras 314 and 331; and *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) para 73.

³ *ZY and JY v Denmark* Comm no 7/2016 (CRC Committee, 31 May 2018) CRC/C/78/D/7/2016, paras 2.1–2.6.

though they were all baptised in the Christian faith.⁴ Accordingly, the communication was considered inadmissible.⁵ It is difficult to know what facts the applicants actually submitted to the CRC Committee, but if this were indeed regarded as a matter of apostasy in the country of origin, the conversion being genuine or not would be irrelevant.⁶ As demonstrated in the first chapter, apostasy is mostly about identity, consequently leaving a particular faith can be enough to qualify this as an offence to religious belief for many groups.⁷ However, this issue is often disregarded by courts and treaty bodies, as demonstrated below.

It is essential to clarify that not all asylum cases concerning conversion would necessarily lead to charges of apostasy; some are based on potential persecution on grounds of religious belief, which is broader than the topic of this thesis.⁸ Cases concerning *non-refoulement* solely based on a religious affiliation that is not considered as an offence to religious belief will not be examined either.⁹ The focus will only be on those cases in which affiliation to a particular religion is considered, by default, as offending the religion of other groups, such as Ahmadiyya in Pakistan¹⁰

⁴ ibid para 8.12.

⁵ ibid para 8.13.

⁶ See Chapter 1.2.5.

⁷ Schirmacher, "*Let There Be no Compulsion in Religion*" (Sura 2:256): *Apostasy from Islam as Judged by Contemporary Islamic Theologians. Discourses on Apostasy, Religious Freedom, and Human Rights*, 51–52.

⁸ See eg *MC v Denmark* Comm no 56/2013 (CEDAW Committee, 9 November 2015) CEDAW/C/62/D/56/2013, paras 5 and 9.4.

⁹ For instance a case concerning a family of Sikhs from Afghanistan: *Singh and Others v Belgium* App no 33210/11 (ECtHR, 2 October 2012).

¹⁰ Penal Code [Pakistan] art 298–C.

or Bahá'ís in Iran.¹¹ We argue that if the applicants claim and give evidence that they are likely to be persecuted for leaving their former religious beliefs, or if their religious beliefs or sexual identity can be considered as offensive to other religious groups,¹² then adjudicating bodies should be much more careful when analysing such cases.

4.1 The Principle of *Non-Refoulement*

As seen above, there are only a few cases in international law related to offence to religious belief directly associated with the right to life and the prohibition of torture. Asia Bibi, Meriam Ibrahim, and members of the Pussy Riot collective had legal battles which were reported extensively due to the gravity of the punishments they endured.¹³ The international coverage of such cases often leads to a positive outcome for the victims, yet they sometimes mask the problem in question because of two interrelated reasons. First, the focus of the cases is shifted from the cause—offence to religious belief—to the punishment. This point was thoroughly examined in Chapter 1. Second, the degree of punishment in the cases mentioned above was measured *ex post facto*, ie the individuals who had already suffered torture or CIDT. So, from a consequentialist perspective, it is easy to observe the lack of proportionality between the offence (often critical expressions) and subsequent punishment (torture, imprisonment, and death).

¹¹ Nazila Ghanea, *Human Rights, the UN and the Bahá'ís in Iran* (Martinus Nijhoff 2003).

¹² See eg *GI v Denmark* Comm no 625/2014 (CAT Committee, 10 August 2017) CAT/C/61/D/625/2014.

¹³ See *Asia Bibi v The State and Another (Supreme Court)*; Ibrahim and Shearlaw, 'Meriam Ibrahim on Her Escape from Death Row – 'the World Gave Me Hope''; and *Mariya Alekhina and Others v Russia*.

However, what about cases in which persons are forced to return to a State where their actions might be considered as an offence to religious belief, and they might face torture or death upon return because of that? From a consequentialist point of view, these cases could be less relevant than the ones mentioned in the previous paragraph, as in such cases, there is only a potential risk of torture for persons being returned but no actual physical harm. This approach could explain why this topic remains largely unexplored, yet this is not an approach based on international human rights law.

In international human rights law, these cases should be discussed in relation to the principle of *non-refoulement*. The CAT spells out the principle in the following manner, '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'¹⁴ Accordingly, since the prohibition of torture is absolute, to return someone who might face torture elsewhere is also absolutely prohibited.¹⁵ However, the simplicity of the principle is not reflected in the jurisprudence of international courts and treaty bodies, as demonstrated in the following sections. The remaining question then is, why do these bodies struggle with cases of *non-refoulement* and offence to religious belief? Is it because they do not understand the nature of offence to religious belief or its terminology, as set out in Chapter 1? Or is it because the human rights normative framework is not clear, and States do not feel entirely responsible for the consequences of returning individuals

¹⁴ CAT, art 3(1).

¹⁵ CAT Committee, 'General Comment No 4 on the Implementation of Article 3 of the Convention in the Context of Article 22' (4 September 2018) CAT/C/GC/4, para 9.

who might be accused of offence to religious belief? In this sub-chapter, we will seek to respond to the latter question.

4.1.1 Normative Framework

In cases concerning offence to religious belief and *non-refoulement*, applicants often argue that they may face persecution due to their religion, beliefs, or membership of a particular group. The texts of international treaties prohibit *refoulement* on these grounds. Article 33(1) of the Refugee Convention declares that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁶

Guy Goodwin-Gill and Jane McAdam summarise the principle of *non-refoulement* in relation to the Refugee Convention, stating that ‘no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture.’¹⁷ The CAT, as mentioned above, provides a broader interpretation of the principle of *non-refoulement*, not limiting it to refugees nor adding specific grounds, but focusing on the risk of torture.¹⁸

The American Convention on Human Rights has a provision similar to the Refugee Convention, although not limited to refugees either.¹⁹ The Inter-American

¹⁶ Refugee Convention, art 33(1).

¹⁷ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 201.

¹⁸ CAT, art 3(1).

¹⁹ ACHR, art 22(8).

Convention to Prevent and Punish Torture is similar to the CAT, but it provides an even broader scope of protection as it explicitly includes the prohibition of *refoulement* in cases of CIDT and trial by ‘special or ad hoc courts in the requesting state.’²⁰ The Robben Island Guidelines, likewise, clearly prohibit *refoulement*.²¹

In addition, all the other major human rights treaties prohibit torture, as shown in the last section. These treaties do not provide specific prohibitions of *refoulement* per se, but the prohibition of torture has been interpreted as encompassing the principle of *non-refoulement*.²² The ICCPR has been interpreted in this manner by the Human Rights Committee, thus prohibiting *refoulement* in cases of torture, CIDT, and more recently to States which impose the death penalty.²³ The Banjul Charter prescribes the right to seek asylum under Article 12(3), and the principle of *non-refoulement* is interpreted based on this article read in conjunction with the prohibition of torture.²⁴

The ECtHR has been at the forefront of developing the content of the principle of *non-refoulement* in international law. It does so mostly based on readings of the prohibition of torture. In the landmark case of *Soering v UK*, the Court did not allow the extradition of a prisoner to the US, concluding that the ‘death row phenomenon’ would lead to torture, therefore the extradition itself would give rise to a breach of the

²⁰ Inter-American Convention to Prevent and Punish Torture, art 13.

²¹ Robben Island Guidelines, art 15.

²² Goodwin-Gill and McAdam, *The Refugee in International Law*, 208–209.

²³ See eg HRI/GEN/1/Rev.1 30, para 9; CCPR/C/21/Rev.1/Add.13, para 12; and CCPR/C/GC/36, para 31.

²⁴ Viljoen and Odinkalu, *The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and Their Advocates*, 53.

prohibition of torture.²⁵ As a matter of comparison, this case was decided in 1989; the Human Rights Committee only changed its jurisprudence regarding extradition to States which impose the death penalty in 2002.²⁶ Thus, in the European system of human rights, the protection against *refoulement* has always been—in theory—robust; as Judge Pinto de Albuquerque defended, ‘the obligation of non-refoulement is an absolute obligation of all States.’²⁷ Likewise, Cathryn Costello and Michelle Foster argue that in addition to *non-refoulement* being a norm of customary international law, it could also be recognised as *jus cogens*, thus reinforcing refugee protection.²⁸

Not all forms of “return” by States are proscribed. For a return to be prohibited, the applicant must demonstrate that there is a risk of torture or CIDT upon return caused by a public entity or private person.²⁹ The problem in this area is that evidence of the risk of physical harm might be difficult to gather.³⁰ States have also tried to circumvent the prohibition of *refoulement* by seeking diplomatic assurances that the returnee will not face torture or CIDT in the State of destination.³¹ Diplomatic

²⁵ *Soering v UK*, para 111.

²⁶ Compare *ibid*; with *Judge v Canada*.

²⁷ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) concurring opinion of Judge Pinto de Albuquerque (emphasis in original).

²⁸ Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) 46 *Netherlands Yearbook of International Law* 273, 323.

²⁹ *Hirsi Jamaa and Others v Italy*.

³⁰ See also Uğur Erdal and Hasan Bakirci, *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook* (World Organisation Against Torture 2006) 121–124.

³¹ *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012) paras 197–202.

assurances can be successful, but they are rightly criticised by experts in the area as they might be used ‘as a loophole to undermine the principle of non-refoulement’.³²

4.1.2 State Responsibility and *Non-Refoulement*

State Responsibility is a crucial issue in this area; as Miles Jackson explains, if a State is prohibited from committing or allowing torture, ‘so it should be with complicity in torture.’³³ Jackson frames this explanation based on the Articles on Responsibility of States for Internationally Wrongful Acts, in particular Article 16.³⁴ Simply put, ‘a State cannot do by another what it cannot do by itself.’³⁵

A violation of the principle of *non-refoulement*, however, does not require the victim to suffer torture upon return. As Jackson rightly states, ‘a breach of the *non-refoulement* obligation does not require the commission of wrongdoing by another actor’.³⁶ Treaty bodies do not always follow the legal rationale posed by Jackson,³⁷ but this in no manner invalidates the reasoning proposed. Jackson’s argument about State responsibility is shared by other renowned scholars. For example, Goodwin-Gill has

³² CAT/C/GC/4, para 20.

³³ Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 EJIL 817, 822. See also *El-Masri v The Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) paras 215–233.

³⁴ International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) A/56/83, Annex.

³⁵ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (10 August 2001) A/56/10, art 16, para 6.

³⁶ Miles Jackson, *Complicity in International Law* (OUP 2015) 7–8, fn 22.

³⁷ See eg *Dar v Norway* Comm no 249/2004 (CAT Committee, 11 May 2007) CAT/C/38/D/249/2004.

defended that '[t]he fact that the harm caused by State action may be inflicted outside the territory of the actor, or in an area identified by municipal law as an international zone, in no way diminishes the responsibility of the State.'³⁸ This assertion is complemented by Crawford and Hyndman, who further elaborated on the responsibility of States in cases regarding *non-refoulement*, explicating that:

more than one State may share joint responsibility for decisions which result in the *refoulement* of a refugee. The general regime of responsibility in international law is analogous to joint and several responsibility: where two States act unlawfully together, each is responsible for its part in the wrongful conduct, irrespective of whether the other State is prepared to accept its responsibility, or is amenable to the jurisdiction of the Court or other body concerned.³⁹

Consequently, it follows that if torture takes place after a person is unduly returned to another country, then the returning State would violate both the principle of *non-refoulement* and be complicit in the act of torture.

Despite the reasons given above, cases concerning offence to religious belief and *non-refoulement* are still largely ignored. As elucidated in this section, this is not due to a lack of normative framework, nor to a lesser responsibility of returning States. One could assume that the shortage of studies in this area is related to the number of cases concerning *non-refoulement* related to offence to religious belief being negligible. However, this is not the case. As a matter of fact, the number of such cases is similar to international cases of offence to religious belief related to qualified rights.

³⁸ Guy S Goodwin-Gill, *The Principle of Non-Refoulement'. Its Standing and Scope in International Law* (OHCHR 1993) 71.

³⁹ James Crawford and Patricia Hyndman, 'Three Heresies in the Application of the Refugee Convention' (1989) 1 *International Journal of Refugee Law* 155, 171.

4.2 Offence to Religious Belief and *Non-Refoulement* at the Committee against Torture

As mentioned above, the CAT prohibits *non-refoulement* in Article 3(1), which provides that: ‘No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’⁴⁰ Paragraph 2 of the same Article further states that:

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.⁴¹

The CAT Committee, one of the treaty bodies monitoring the CAT, can receive communications from individuals in States which made a declaration under Article 22 of the CAT.⁴² The CAT Committee clarified in its General Comment 4 that it primarily assesses the communications based on the parties’ submissions, but it is not restricted to them, as it may also consult other relevant documents.⁴³ Furthermore, the Committee has also commented that:

[it] will assess ‘substantial grounds’ and consider the risk of torture as foreseeable, personal, present and real when the existence of facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of the complainant’s deportation. Indications of personal risk may include, but are not limited to the complainant’s: [...] (e) *sexual orientation and gender identity*; [...]

⁴⁰ CAT, art 3(1).

⁴¹ *ibid*, art 3(2).

⁴² *ibid* art 22.

⁴³ CAT/C/GC/4, para 44.

(j) *religious affiliation*; (k) *violations of the right to freedom of thought, conscience and religion, including violations related to the prohibition of conversion to a religion that is different from the religion proclaimed as State religion and where such a conversion is prohibited and punished in law and in practice.*⁴⁴

As a result, the CAT Committee is a suitable body to address questions regarding *non-refoulement* and offence to religious belief related to sexual orientation, religious affiliation, and apostasy. Hitherto, only two States of origin have been debated in decisions of the CAT Committee on this topic: Pakistan and Iran.

4.2.1 Cases regarding Returns to Pakistan

One of the first cases concerning offence to religious belief regarding return to Pakistan at the CAT Committee was *ZE v Switzerland*. The claimant alleged that, if returned, he would be prosecuted for blasphemy in accordance with Article 295-C of the Pakistan Penal Code.⁴⁵ The information provided by the complainant was somewhat inconsistent, as he claimed to be an active Christian, but also served as President of the Muslim Students Federation while in Pakistan.⁴⁶ The CAT Committee decided that the author did not substantiate his claims that he could suffer ill-treatment in Pakistan, so it did not find a violation of Article 3 of the CAT.⁴⁷

⁴⁴ *ibid* para 45 (emphasis added).

⁴⁵ *ZE v Switzerland* Comm no 222/2002 (CAT Committee, 3 May 2005) CAT/C/34/D/222/2002, paras 3.2–3.3.

⁴⁶ *ibid* paras 2.1–2.2.

⁴⁷ *ibid* paras 6.8–6.9, and 7.

The decision of the CAT Committee on *ZE v Switzerland* was based mainly on the individual arguments posed by the claimant, thus not delving deeper into questions regarding offence to religious belief in Pakistan. Nevertheless, in subsequent decisions concerning the removal of individuals to Pakistan based on offence to religious belief, the CAT Committee approached the topic more carefully. In *Dar v Norway*, the complainant was an Ahmadi, that is, a member of a religious minority group called the Ahmadiyya. Ahmadis consider themselves Muslims, but most mainstream Muslims do not consider Ahmadis as such. The Pakistan Penal Code prohibits them from referring to themselves as Muslims, as described below:

Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.⁴⁸

Dar v Norway illustrates the challenges faced by States in cases related to offence to religious belief and *non-refoulement*. In this case, the claimant raised critical issues concerning the discrimination of Ahmadis in Pakistan and the dangerous environment for those accused of blasphemy; however, there were several issues regarding whether the case was legitimate or not.⁴⁹ In the end, the CAT Committee considered the issue of *non-refoulement* moot because Norway deported the claimant before the decision of the Committee on interim measures and later rectified the issue

⁴⁸ Penal Code [Pakistan] art 298-C. This provision resembles the Edict of Thessalonica, as described in Chapter 1.1.3.

⁴⁹ *Dar v Norway*, paras 14–15.5.

by reversing its decision.⁵⁰ The reasoning is inconsistent with the definition of State responsibility mentioned above, ie Norway had in fact violated the principle of *non-refoulement* by deporting the applicant to Pakistan.⁵¹ However, the CAT Committee decided to approach the question teleologically, thus overlooking the violation committed by Norway.

The level of substantiation of claims seems to be the most common problem for alleged victims of *refoulement*. In Pakistan, one of the main reasons for fear of torture is not necessarily State actors, but the extrajudicial killings of alleged blasphemers. These killings can be caused by ‘extremist’ groups, which are much more difficult to prove than potential torture involving State agents.⁵² The CAT Committee has also opined in regard to violence perpetrated by non-State actors, declaring that:

States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter.⁵³

Apostasy is another issue in which the CAT Committee avoided a deeper discussion in its jurisprudence, as evidence in *Y v Canada*. This case concerned an applicant who converted from Sunni Islam to Shia Islam and claimed to have suffered

⁵⁰ ibid paras 16.5 and 17.

⁵¹ See Chapter 4.1.

⁵² See eg *Dar v Norway*, paras 2.5 and 10.5.

⁵³ CAT/C/GC/4, para 30.

torture before fleeing Pakistan.⁵⁴ The CAT Committee, however, found the case inadmissible due to the non-exhaustion of domestic remedies, thus avoiding the merits of the question.⁵⁵

Conversely, in *ZAH v Canada*, the CAT Committee provided a rationale for protecting persons being returned to States where they might face persecution from non-State actors, despite finding the case inadmissible. The case concerned a claimant who allegedly was declared a blasphemer and a *kafir* (non-believer) by an “extremist” group.⁵⁶ The CAT Committee found the case inadmissible for lack of substantiation that the applicant was at risk of torture if returned to Pakistan.⁵⁷ Nonetheless, it also reiterated its statement provided in General Comment 2 that ‘the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity.’⁵⁸

Indeed, the impunity in cases concerning blasphemy has led to more violence against persons accused of the offence in Pakistan.⁵⁹ The cases concerning removals

⁵⁴ *Y v Canada* Comm no 512/2012 (CAT Committee, 28 July 2015) CAT/C/55/D/512/2012, paras 2.1–2.21.

⁵⁵ *ibid* paras 7.1–7.4.

⁵⁶ *ZAH v Canada* Comm no 687/2015 (CAT Committee, 11 August 2017) CAT/C/61/D/687/2015, paras 2.2–2.7.

⁵⁷ *ibid* para 7.7.

⁵⁸ CAT Committee, 'General Comment No 2: Implementation of Article 2 by States Parties' (24 January 2008) CAT/C/GC/2, para 18.

⁵⁹ Human Rights Council, 'Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 - Pakistan' (26 July 2012) A/HRC/WG.6/14/PAK/3, para 49.

to Pakistan due to offence to religious belief are indeed complex; perhaps that is the reason why the CAT Committee mostly followed the arguments posed by the States.⁶⁰ Nonetheless, the CAT Committee could have taken Article 3(2) of the CAT into account to elucidate their reasoning further.

The only case in which the CAT Committee found a violation, in cases regarding returns to Pakistan related to offence to religious belief, was *GI v Denmark*, in which the applicant claimed he could be persecuted due to blasphemy laws in Pakistan. However, in this case, the decision of the CAT Committee was based on the prior torture allegedly suffered by the claimant due to his religious beliefs rather than direct issues regarding blasphemy.⁶¹

4.2.2 Cases regarding Returns to Iran

In relation to removals to Iran, the CAT Committee has been more rigorous in its deliberations concerning the negative impact of laws prohibiting offence to religious belief for applicants. In *X v Switzerland*, the Committee took into consideration the agnostic and atheistic beliefs of a claimant from Iran, and the fact that such beliefs could be considered as apostasy in Iran.⁶² Consequently, the Committee decided that the complainant's deportation to Iran would constitute a violation of the principle of *non-refoulement*, as the State Party did not address his arguments:

⁶⁰ See *ZE v Switzerland*; *Y v Canada*; and *ZAH v Canada*.

⁶¹ See *GI v Denmark*, paras 2.1, 4.12, 6.8, and 8.8.

⁶² The applicant did not consider his agnostic and atheistic beliefs as mutually exclusive, as demonstrated in *X v Switzerland* Comm no 470/2011 (CAT Committee, 24 November 2014) CAT/C/53/D/470/2011, paras 3.3, 5.8, 7.4, 7.6, and 7.8.

regarding the death sentence that he might face if he were returned to the Islamic Republic of Iran, for his adoption of atheistic and agnostic views, which might be interpreted by the Iranian authorities as abandonment of Islam [...] thus significantly increasing the risk of him being arrested, tortured and sentenced to death, if he were returned.⁶³

In *Abed Azizi v Switzerland*, decided in the same session of the Committee as the previous case, the author also claimed to have changed his religious beliefs, in this case being converted and baptised into Christianity while in Switzerland.⁶⁴ The change in religious affiliation was dismissed by Switzerland, which argued that ‘conversion to Christianity abroad would not expose the complainant to a risk of persecution in the Islamic Republic of Iran, unless he had practised Christianity actively and visibly.’⁶⁵ The CAT Committee did not accept the arguments of the State, and its response not only pointed out the flawed logic of Switzerland’s argument—which revealed a major misunderstanding of the right to freedom of religion or belief—but it also substantiated its decision based on several reports from Special Rapporteurs.⁶⁶

Nonetheless, the jurisprudence of the CAT Committee is not consistent in cases regarding returns to Iran, as demonstrated in the case of *HRES v Switzerland*. In this case the applicant claimed to be atheist and gay, thus being at risk of suffering torture if returned to Iran.⁶⁷ Both expressions of atheism and homosexuality could be

⁶³ *ibid* para 7.8.

⁶⁴ *Abed Azizi v Switzerland*, paras 2.5, 3.2(d), 5.1, and 5.6.

⁶⁵ *ibid* para 4.10.

⁶⁶ *ibid* paras 8.5–8.8, which makes reference to *ia* Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran' (18 March 2014) A/HRC/25/61; and UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran ' (27 August 2014) A/69/356.

⁶⁷ *HRES v Switzerland* Comm no 783/2016 (CAT Committee, 1 October 2018) CAT/C/64/D/783/2016, para 3.1.

perceived as offence to religious belief in Iran and subsequently punished. Nevertheless, the CAT Committee did not accept the arguments of the author, observing that he did not claim ‘that the Iranian authorities were aware of his sexual orientation, atheism and political opinions, or that he would express his homosexuality in the public sphere.’⁶⁸ Consequently, the Committee decided that he did not provide ‘proof that his homosexuality, atheism, political opinions or activities are of such significance as to attract the interest of the authorities of his country of origin.’⁶⁹

It is difficult to understand the rationale of the CAT Committee in these cases, as it appears to be very subjective in deciding whether the authors have substantiated their claims adequately. These cases are easily comparable, as they concern the same State of origin and returning State. They all concern offence to religious belief, two of them being about atheists. Furthermore, the CAT Committee indicated that Iran was not a State Party to the CAT, therefore the claimants ‘would be deprived of the legal option of recourse to the Committee for protection of any kind.’⁷⁰ However, the outcomes of the cases are distinct.

In conclusion, the CAT Committee is aware of the risks deriving from offence to religious belief in cases of *refoulement*, as manifestly expressed in its General Comment 4.⁷¹ Nevertheless, the Committee did not find any violation directly related to offence to religious belief in cases regarding returns to Pakistan, and it was not

⁶⁸ ibid para 8.11.

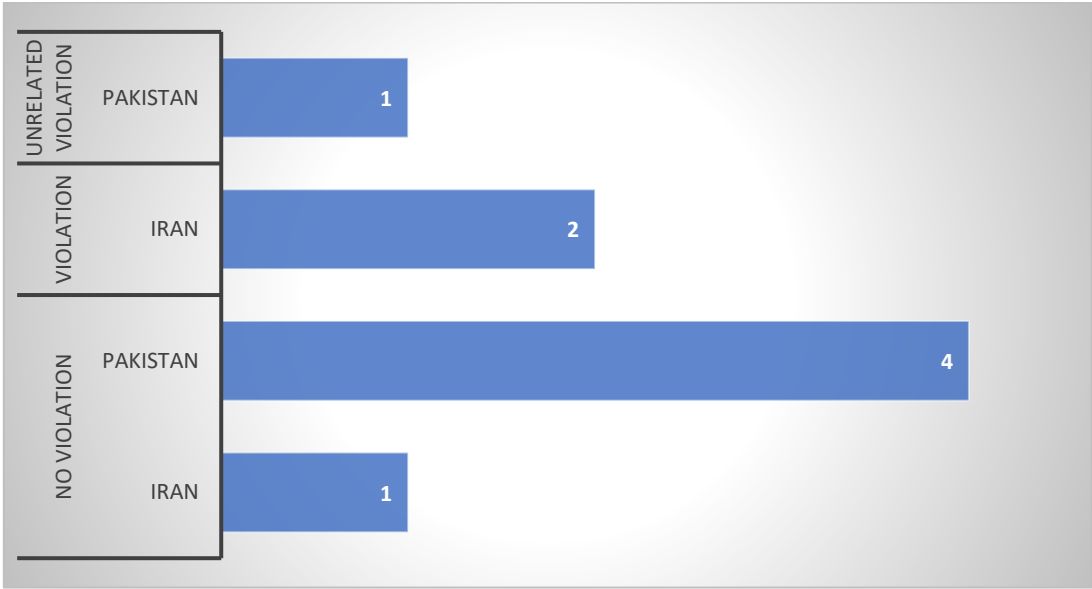
⁶⁹ ibid para 8.14.

⁷⁰ See ibid para 8.3; *Abed Azizi v Switzerland*, para 8.8; and *X v Switzerland*, para 7.9.

⁷¹ CAT/C/GC/4, para 45.

consistent in cases regarding returns to Iran. Thus, despite the CAT Committee being an ‘important avenue for advocacy and case-related interventions,’⁷² the protection in cases concerning offence to religious belief and the principle of *non-refoulement* has been in most cases only theoretical. Yet, the exceptions to this assertion, such as the decision of the Committee in *X v Switzerland*, demonstrate that treaty bodies can provide well-substantiated decisions based on the *corpus juris* produced by other human rights bodies and UN Special Procedures.

- Chart 1: CAT Committee – Decisions regarding *non-refoulement* related to offence to religious belief by year and State of origin



⁷² Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 537.

4.3 Offence to Religious Belief and *Non-Refoulement* at the Human Rights Committee

The Human Rights Committee is the treaty body monitoring the implementation of the ICCPR. It can receive communications from individuals that fall under the jurisdiction of States that have ratified the Optional Protocol to the International Covenant on Civil and Political Rights.⁷³ The Human Rights Committee can issue General Comments, in accordance with Article 40(4) of the ICCPR, that inform the manner in which the Committee interprets the rights of the Covenant. As mentioned above, the ICCPR does not contain any specific provision on *non-refoulement*, but General Comment 31 of the Human Rights Committee elucidates that:

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁷⁴

In this manner, persons in States Parties to the Optional Protocol of the ICCPR, who are at risk of being removed, can bring communications to the Human Rights Committee after exhausting ‘all available domestic remedies.’⁷⁵

The Human Rights Committee has at least 17 cases of *non-refoulement* based on offences to religious belief. Similarly to the CAT Committee, most cases regard

⁷³ Optional Protocol to the ICCPR, para 1.

⁷⁴ CCPR/C/21/Rev.1/Add.13, para 12.

⁷⁵ Optional Protocol to the ICCPR, para 2.

removals to Iran⁷⁶ and Pakistan.⁷⁷ However, the Human Rights Committee has also dealt with several cases related to countries in which non-State actors would impose a *de facto* prohibition and subsequent punishment for the said offences; these include Afghanistan,⁷⁸ Egypt,⁷⁹ Senegal,⁸⁰ Somalia,⁸¹ and Malaysia.⁸² All these cases are relatively recent, as the earliest decision dates from 2011,⁸³ which demonstrates that this is a new and rapidly expanding body of jurisprudence. Similar to the previous sub-chapter, this section will be divided into the States of origin, in order to evaluate whether the Human Rights Committee would be more rigorous with particular States, as the CAT Committee apparently was.

⁷⁶ See eg *X v Republic of Korea*; and *KH v Denmark* Comm no 2423/2014 (Human Rights Committee, 16 July 2018) CCPR/C/123/D/2423/2014.

⁷⁷ See eg *Shakeel v Canada* Comm no 1881/2009 (Human Rights Committee, 24 July 2013) CCPR/C/108/D/1881/2009; and *A and B v Denmark* Comm no 2291/2013 (Human Rights Committee, 13 July 2016) CCPR/C/117/D/2291/2013.

⁷⁸ See eg *X v Sweden*; *X v Norway* Comm no 2474/2014 (Human Rights Committee, 5 November 2015) CCPR/C/115/D/2474/2014; *MJK v Denmark* Comm no 2338/2014 (Human Rights Committee, 28 March 2017) CCPR/C/119/D/2338/2014; *KS and MS v Denmark* Comm no 2594/2015 (Human Rights Committee, 7 November 2017) CCPR/C/121/D/2594/2015; and *SAH v Denmark* Comm no 2419/2014 (Human Rights Committee, 8 November 2017) CCPR/C/121/D/2419/2014.

⁷⁹ See eg *WK v Canada* Comm no 2292/2013 (Human Rights Committee, 27 March 2018) CCPR/C/122/D/2292/2013.

⁸⁰ See eg *BL v Australia* Comm no 2053/2011 (Human Rights Committee, 16 October 2014) CCPR/C/112/D/2053/2011.

⁸¹ See eg *Warsame v Canada* Comm no 1959/2010 (Human Rights Committee, 21 July 2011) CCPR/C/102/D/1959/2010.

⁸² See eg *MZBM v Denmark* Comm no 2593/2015 (Human Rights Committee, 20 March 2017) CCPR/C/119/D/2593/2015.

⁸³ *Warsame v Canada*.

4.3.1 Cases regarding Returns to Iran

There are four cases concerning returns to Iran, all regarding new converts to Christianity who claimed that they would be at risk of torture or death if returned to their home country.⁸⁴ The Human Rights Committee confirmed that conversion would be considered apostasy in Iran, an offence ‘which has reportedly led to a number of arbitrary arrests, imprisonment in solitary confinement, torture, convictions and even executions.’⁸⁵ Nonetheless, only two of the four cases concerning removals to Iran were considered by the Committee as a potential violation of *non-refoulement* if the authors were returned to their country of origin.⁸⁶

In *X v Republic of Korea*, the State argued that the claimant’s beliefs ‘lacked credibility’ because his conversion only took place after departure from his country of origin—ie *sur place*—and after his asylum application was rejected.⁸⁷ However, after his conversion, the applicant obtained a Bachelor’s degree in theology and was working in his church as a Bible teacher.⁸⁸ The Committee therefore decided that expulsion to Iran would violate Article 6(1) (right to life) and Article 7 (prohibition of torture) of the ICCPR because ‘the State party has failed to give due consideration to

⁸⁴ *X v Republic of Korea*, paras 2.1, 2.4, and 3.1; *VR and NR v Denmark* Comm no 2745/2016 (Human Rights Committee, 14 July 2016) CCPR/C/117/D/2745/2016, paras 2.3 and 3; *Jamshidian v Belarus* Comm no 2471/2014 (Human Rights Committee, 8 November 2017) CCPR/C/121/D/2471/2014, paras 2.6 and 3.4; and *KH v Denmark*, paras 2.4 and 3.1.

⁸⁵ *X v Republic of Korea*, para 11.4; partially based on CCPR/C/IRN/CO/3, para 23.

⁸⁶ Claimants were successful in *X v Republic of Korea*, para 12; *KH v Denmark*, para 9. In *Jamshidian v Belarus*, para 8.5, the Committee found that the claim in relation to the conversion was not substantiated, although it later found in favour of the author based on separate issues.

⁸⁷ *X v Republic of Korea*, para 11.2.

⁸⁸ *ibid* para 8.4.

the personal risk faced by the author in the Islamic Republic of Iran not only as a Christian convert but also as a theologian with a conspicuous evangelist profile.’⁸⁹ While this decision was positive for the applicant, the qualification of the author by the Committee, “not only as Christian but also as a theologian and conspicuous evangelist”, sets a very high threshold for *sur place* conversion in subsequent cases.

Denmark used the same argument as the Republic of Korea in *VR and NR v Denmark*, stating that the applicants only converted after a negative decision of the Immigration Service and that their ‘knowledge about Christianity was only general and superficial.’⁹⁰ This affirmation is likely to be correct, as most new converts only have a general and superficial knowledge of their new beliefs; that is the very definition of a neophyte in any subject. It is expected that a young couple of asylum seekers and their newborn baby would not have acquired an extensive knowledge of Christianity while living in a refugee camp. Thus, the account provided by the applicants seems plausible, as they told that:

[w]hile in a ‘refugee camp’, in April 2012, they became interested in Christianity. They found solace and peace in prayers and singing psalms. On an unspecified date, the authors were transferred to a ‘refugee camp’ in Vipperød. They could not go to church there as they lacked the financial means to cover the cost of travel. After they were transferred to a ‘refugee camp’ in Jelling (Jutland), they went to a church almost every Sunday. The authors were baptized in June 2014.⁹¹

Furthermore, the authors' claims regarding their conversion go beyond genuineness, as they acknowledged that “the mere formal conversion in itself

⁸⁹ *ibid* paras 11.4–11.5.

⁹⁰ *VR and NR v Denmark*, para 2.5.

⁹¹ *ibid* para 2.3.

constitutes a high risk for the authors” to be tortured or severely harassed’ in Iran.⁹² Indeed, as noted earlier,⁹³ whether or not the conversion was genuine, the reality is that the authors still faced a risk of harassment upon return. The Human Rights Committee then quoted General Comment 31,⁹⁴ as mentioned at the beginning of this section, and it stated that it did not underestimate the concerns with the human rights situation in Iran;⁹⁵ yet it decided in favour of the State because:

the authors have not convincingly identified any irregularity in the decision-making process in the framework of their asylum proceedings in the State party or sufficiently substantiated why the decisions of the State party’s authorities were clearly arbitrary or manifestly erroneous, or amounted to a denial of justice.⁹⁶

The question posed to the Committee, however, was whether Denmark would violate Articles 6, 7, and 18 (freedom of religion or belief) of the ICCPR by removing the applicants. The question submitted to the Committee was not about Article 14 of the Covenant (fair trial). Consequently, the Committee did not engage with the questions submitted to it. It plainly evaded such questions and decided the case inadmissible. In other words, the applicants did not complain about the procedure but the content of the domestic decision. Thus, if the Committee would apply this same argument in the case of *X v Republic of Korea*, the outcome of the latter case could have been reversed.

⁹² ibid para 3.

⁹³ Chapter 1.2.5.

⁹⁴ CCPR/C/21/Rev.1/Add.13, para 12.

⁹⁵ *VR and NR v Denmark* paras 4.4 and 4.6.

⁹⁶ ibid para 4.5.

The other two cases regarding returns to Iran illustrate the Human Rights Committee's lack of consistency in deciding these cases. In *Jamshidian v Belarus*, the author arrived in Belarus in 1993, met his future wife and had three children, then converted to Christianity in 2002.⁹⁷ He got arrested for fraud in 2005 and was deported to Iran in 2009; then he got married in 2011 and was allowed to return to Belarus.⁹⁸ In 2012 he went to visit his sick mother in Iran, and later that year, after the author's return to Belarus, his mother and brother were found killed in Iran.⁹⁹ Iran then issued an international arrest warrant against the applicant for the murder of his mother and brother.¹⁰⁰ The applicant claimed that expulsion to Iran would violate Articles 6, 7, 14(1) and (2), 17(1), 18, and 23 of the Covenant.¹⁰¹

According to the author, both murder and conversion to another religion than Islam (apostasy) are capital offences in Iran and those convicted of these crimes are likely to suffer torture.¹⁰² The Human Rights Committee dismissed the application on grounds of his conversion, observing that 'the author has not provided supporting documents demonstrating that the Iranian authorities are aware of his conversion.'¹⁰³

⁹⁷ *Jamshidian v Belarus*, para 2.1.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid* para 2.2.

¹⁰¹ *ibid* paras 3.1, and 3.3–3.4.

¹⁰² *ibid* paras 2.6 and 7.6.

¹⁰³ *ibid* para 8.5. This criterion is found in UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' (January 1992) HCR/IP/4/Eng/REV.1, para 96.

Nevertheless, it decided that ‘article 7 of the Covenant and the principle of non-refoulement arising therefrom are absolute in nature and that no one should be excluded from its protection, even if that person poses a risk to national security.’¹⁰⁴ Yet, this decision is not entirely satisfactory as the following question remains: if even persons who pose a risk to national security should not be excluded from the principle of *non-refoulement*, why not protect equally those who do not pose such a risk, but are themselves at risk due to their beliefs?

This question remains unanswered, but the Human Rights Committee has demonstrated the willingness to reconsider some of its positions, as is illustrated, albeit reluctantly, by some members of the Committee, in *KH v Denmark*. This case is very similar to *VR and NR v Denmark*, as the author also converted to Christianity and was baptised after a negative decision of the Immigration Service.¹⁰⁵ Denmark also dismissed the conversion, stating that it was ‘a means to obtain asylum rather than being genuinely motivated by a new faith.’¹⁰⁶ The applicant defended his conversion and exposed the absurdity of measuring genuineness of conversions, insisting that:

whether or not he showed an interest in Christianity before or after the first decision by the Danish Immigration Service cannot be used as a factor in assessing his religious convictions. Since he was in great personal pain, he sought help from other sources, a process which is well known to many converts. Therefore, the majority of the Board members should have not held this against him. Had he wanted to fake his religious convictions, he could have declared that he was a converted Christian when entering

¹⁰⁴ *Jamshidian v Belarus*, para 9.5.

¹⁰⁵ *KH v Denmark*, para 2.4.

¹⁰⁶ *ibid* para 2.6.

Denmark. The author therefore asks how one is “allowed” to develop one’s personal faith without being accused of lying.¹⁰⁷

Denmark replied with several feeble arguments, including that the ‘author’s conversion was not the result of a natural development within him’, that ‘the author requested letters of support for his asylum claim from pastors immediately before the hearing at the Refugee Appeals Board’, and that it is ‘common knowledge among asylum seekers and other parties within the field of asylum that information on conversion is a ground for asylum.’¹⁰⁸ The most relevant argument posed by Denmark was in line with the UNHCR “Guidelines on international protection: religion-based refugee claims” which states in paragraph 34 that:

where individuals convert after their departure from the country of origin, this may have the effect of creating a *sur place* claim. In such situations, particular credibility concerns tend to arise and a rigorous and in-depth examination of the circumstances and genuineness of the conversion will be necessary.¹⁰⁹

However, the subsequent paragraphs from these guidelines declare that even if the conversion ‘is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required.’¹¹⁰ In this case, the Committee decided to follow these guidelines fully, as it decided that:

regardless of the sincerity of the conversion, there are substantial grounds for believing that such conversion may have serious adverse consequences in the country of origin so as to create a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. Therefore, even

¹⁰⁷ ibid para 3.5.

¹⁰⁸ ibid paras 4.10, 4.13, and 4.15.

¹⁰⁹ ibid para 4.9.

¹¹⁰ UNHCR, ‘Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees’ (28 April 2004) HCR/GIP/04/06, para 36.

when it is found that the reported conversion is not sincere, the authorities should proceed to assess whether, in the circumstances of the case, the asylum seeker's behaviour and activities in connection with, or to justify, his or her conversion, such as attending a church, being baptized or participating in proselytizing activities, could have serious adverse consequences in the country of origin so as to put him or her at risk of irreparable harm.¹¹¹

The Committee substantiated this finding based on several State agencies' reports which were not argued by the parties,¹¹² a move which was criticised by the dissenting opinions of Committee members Christof Heyns, Marcia VJ Kran and Yuval Shany.¹¹³ While it is true that the Committee should instead cite—for the sake of consistency—its own findings,¹¹⁴ its jurisprudence,¹¹⁵ or even other UN documents like the CAT Committee did in *Abed Azizi v Switzerland*,¹¹⁶ such references would hardly qualify as *ultra petita* (at least for judges from inquisitorial systems) as they concerned the subject in question.

The dissenting members of the Committee further asserted that the information found in the State agencies' reports 'appears to support the position that practising Christianity in public by converts from Islam could result in harassment and even persecution', but that the author did not establish 'whether he intends to or is likely to

¹¹¹ *KH v Denmark*, para 8.5.

¹¹² *ibid* para 8.7, fn 31.

¹¹³ *ibid* individual opinion of Committee Members Christof Heyns, Marcia VJ Kran and Yuval Shany (dissenting) para 3.

¹¹⁴ CCPR/C/IRN/CO/3, para 23.

¹¹⁵ *X v Republic of Korea*.

¹¹⁶ *Abed Azizi v Switzerland*, para 8.7.

publicly practise Christianity upon his return.’¹¹⁷ This is a recurrent argument of States, for instance in *X v Republic of Korea* the State argued that ‘it is uncommon that religious conversion itself leads to penal persecution in the Islamic Republic of Iran, unless the person actively engages in proselytism.’¹¹⁸ We contend that this argument is deeply flawed, as it represents a misunderstanding of the right to freedom of religion or belief and of persecution based on religious grounds. Once again, a human rights-based understanding is provided by the UNHCR guidelines, which establish that:

Applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution. Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions.¹¹⁹

These four cases are easy to compare, as they all relate to returns to Iran and are based on *sur place* conversions. Still, the Human Rights Committee found in favour of the applicants due to their claims based on offence to religious belief in only half of the cases analysed.¹²⁰ This finding is troublesome, as even in easily comparable cases, the Committee has struggled to be consistent in its views.

¹¹⁷ *KH v Denmark*, individual opinion of Committee Members Christof Heyns, Marcia VJ Kran and Yuval Shany (dissenting) para 4.

¹¹⁸ *X v Republic of Korea*, para 6.2.

¹¹⁹ HCR/GIP/04/06, para 13.

¹²⁰ *X v Republic of Korea*; and *KH v Denmark*.

4.3.2 Cases regarding Returns to Pakistan

As noted previously, Pakistan is notorious for imposing harsh punishments on persons accused of offending religious beliefs. However, some applicants in cases of *non-refoulement* also claim that there is a risk of suffering violence from non-State actors, as demonstrated in the cases submitted to the CAT Committee.¹²¹ There are four cases concerning returns to Pakistan that help to shed some light on the decision-making procedures of the Human Rights Committee regarding violence perpetrated by both State and non-State actors.

The cases in question are much more factually diverse than the ones concerning returns to Iran. However, the first case analysed here, *Shakeel v Canada*, demonstrates that the facts are not of paramount importance for the Human Rights Committee when deciding whether to authorise returns. Shakeel was a Christian pastor in Pakistan who fled to Canada after alleging constant harassment from Muslims and the kidnapping of his wife and daughter.¹²² The author also mentioned that his brother was beaten to death by unknown individuals and that a fatwa was issued against him for blasphemy, further illustrating his case with NGO reports on the offence.¹²³

Nevertheless, Canada demonstrated that the author's account was riddled with contradictions. For instance, during his stay in Canada, the author had returned to Pakistan to obtain a divorce from his wife, to which the applicant replied: 'Whether

¹²¹ See Chapter 4.2.1.

¹²² *Shakeel v Canada*, paras 2.1–2.6.

¹²³ *ibid* paras 2.9, and 3.1–3.3.

his wife left him, or was kidnapped, does not seem entirely material to the case.’¹²⁴ The Committee, however, found that ‘notwithstanding the inconsistencies highlighted by the State Party, insufficient attention was given to the author’s allegations about the real risk he might face if deported to his country of origin.’¹²⁵ Consequently, this decision corroborates the assertion that facts are not always pivotal in finding a potential violation of the principle of *non-refoulement*. This postulation can be further observed in *RG v Denmark* and *A and B v Denmark*, more recent cases concerning the same subject matter. In both cases, the former regarding Christians and the latter Ahmadis, the facts are seemingly more consistent than those of *Shakeel v Canada*, yet the Committee found no violation in these cases.¹²⁶

Another point of contention is that seven members of the Human Rights Committee disagreed with the decision of *Shakeel v Canada*, mostly due to the inconsistencies of the facts and ‘the view that the Committee is not a court of fourth instance that should re-evaluate facts and evidence *de novo*.’¹²⁷

The Committee held in the past that it would regard decisions of local immigration authorities as violating the Covenant where the author was able to point to serious irregularities in the decision-making procedures, or where the final decision was manifestly unreasonable or arbitrary in nature because inadequate consideration was given in domestic proceedings to

¹²⁴ *ibid* paras 4.4, and 5.4.

¹²⁵ *ibid* para 8.5.

¹²⁶ Compare *ibid*; with *RG et al v Denmark* Comm no 2351/2014 (Human Rights Committee, 2 November 2015) CCPR/C/115/D/2351/2014, and *A and B v Denmark*.

¹²⁷ *Shakeel v Canada*, Individual opinion of Committee member Yuval Shany, joined by Committee members Cornelis Flinterman, Walter Kälin, Nigel Rodley, Anja Seibert-Fohr and Konstantine Vardzelashvili (dissenting) para 2.

the specific rights of the author under the Covenant or available evidence not taken properly into account.¹²⁸

The same argument was mentioned in *Choudhary v Canada*, another case related to a person allegedly accused of blasphemy and forced to return to Pakistan by dissenting members of the Committee.¹²⁹ While not undermining the legal mastery of the dissenting members of the Committee in this case, it is difficult to reconcile their decision with the practice of the body. First of all, no case is brought to the Committee *in abstracto*; it is virtually impossible for it to issue decisions without somehow evaluating some of the evidence *de novo*. This argument does not invalidate in any manner the obiter dicta that ‘generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.’¹³⁰ Second, the fact that the Committee re-evaluates evidence does not necessarily mean it will find in favour of the applicant.¹³¹ Third, “decisions of local immigration authorities” are within the jurisdiction of States, so they should not be considered differently from any other decision. Fourth, if the Committee would take this view seriously, it is difficult to foresee it performing anything more than merely check-listing procedural aspects of domestic cases.

¹²⁸ *ibid* para 3; referring to *Hamida v Canada* Comm no 1544/2007 (Human Rights Committee, 18 March 2010) CCPR/C/98/D/1544/2007, paras 8.4–8.6.

¹²⁹ *Choudhary v Canada* Comm no 1898/2009 (Human Rights Committee, 28 October 2013) CCPR/C/109/D/1898/2009, Individual opinion of Committee members Yuval Shany, Anja Seibert-Fohr, Konstantine Vardzelashvili, Cornelis Flinterman, Gerald L Neuman and Walter Kälin (dissenting) para 2.

¹³⁰ *ibid* para 9.2.

¹³¹ See eg *RG et al v Denmark*, para 7.5.

Another relevant issue in relation to the cases regarding returns to Pakistan is “internal relocation” or the “internal flight alternative”. Canada suggested in *Shakeel* and *Choudhary* that there were “internal flight alternatives” to the claimants; that is, if the authors were returned to another city, they would not suffer persecution due to blasphemy.¹³² While this argument could be taken into consideration in States where persecution due to offence to religious belief is not widespread,¹³³ it is immaterial in States which have it enshrined in customary norms or codified laws, such as Pakistan. The UNHRC guidelines on the subject determine that:

[c]laimants are not expected or required to suppress their political or religious views or other protected characteristics to avoid persecution in the internal flight or relocation area. The relocation alternative must be more than a “safe haven” away from the area of origin.¹³⁴

Therefore, while the Committee found two potential violations of *non-refoulement* in cases regarding returns to Pakistan, its rationale did not prove to be consistent with the facts of the cases, nor concerning the review of evidence. On the contrary, the Committee applied its own criteria differently in fairly similar cases. Moreover, the applicants’ claims regarding the risk of torture from State and non-State actors did not make any difference in these cases. The next two sections, however, might elucidate this point, as they will analyse jurisdictions in which the main risk of violence is posed by non-State actors.

¹³² *Choudhary v Canada*, para 4.13; and *Shakeel v Canada*, para 4.6.

¹³³ *BL v Australia*, para 7.4, as well as the joint opinion of Committee Members Gerald L Neuman and Yuji Iwasawa (concurring), and the individual opinion of Committee Member Fabián Omar Salvioli (concurring).

¹³⁴ UNHCR, ‘Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees’ (23 July 2003) HCR/GIP/03/04, para 19.

4.3.3 Cases regarding Returns to Afghanistan

Since Pakistan and Iran are infamous for enforcing legislation which proscribes offence to religious belief, it is somehow easier for applicants from these States to give evidence of personal risk if returned to these countries. Applicants facing return to other States inevitably have a more challenging task to prove that they face such risk. We suggest that this is partly a result of the lack of awareness of the returning States of what constitutes offence to religious belief, and partly due to the ever-increasing threshold imposed by States on the applicants to provide evidence that their beliefs are genuine. Two cases concerning returns to Afghanistan corroborate this proposition.

The case that best highlights the lack of awareness of the risks that offence to religious belief carries to applicants is *X v Sweden*. In this case, the author applied unsuccessfully for asylum on political grounds, then appealed on grounds of his bisexuality, which he had not previously disclosed.¹³⁵ The author claimed, based on the UNHCR's Guidelines regarding Afghan asylum seekers, that homosexuality was prohibited in Islam and 'punishable by death as a *Hudood* crime.'¹³⁶ *Hudood* or *Hudud* (plural for *hadd*) are 'crimes against God in Islamic penal systems'.¹³⁷

The guidelines refer to the Constitution of Afghanistan states that 'if there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way

¹³⁵ *X v Sweden*, paras 2.3–2.4.

¹³⁶ *ibid* para 3.2, citing UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers' (31 December 2007) Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers, 72.

¹³⁷ Etim E Okon, 'Hudud Punishments in Islamic Criminal Law' (2014) 10 European Scientific Journal 227, 228–229.

that attains justice in the best manner.’¹³⁸ Some scholars argue that the Hanafi school of law is the only one which does not prescribe the death penalty for homosexuality.¹³⁹ However, even if the claim was not precise in terms of Islamic doctrine, it is not difficult to envision that the author could be harmed if returned to Afghanistan. Hence the Committee found that Sweden violated Articles 6 and 7 of the ICCPR.¹⁴⁰

Likewise, apostasy can be considered a *Hudud* crime.¹⁴¹ The UNHCR has reported incidents of punishment for converts to Christianity and the Bahá’í Faith in Afghanistan.¹⁴² For instance, the UNHCR gave an account of a Supreme Court decision from 2007 concerning conversion to the Bahá’í Faith, as follows:

Conversion from Islam is considered apostasy and is punishable by death under some interpretations of Shari’a. As in the case of blasphemy, an Afghan citizen who has converted from Islam (if a male over age 18 or a female over age 16, who is of sound mind) has three days to recant his or her conversion and is otherwise subject to death by hanging.¹⁴³

The UNHRC further explained that converts are likely to be pressured to recant their beliefs, and ‘[i]n case of refusal, family members could resort to threats,

¹³⁸ Constitution [Afghanistan] art 130.

¹³⁹ See eg Jonathan Brown, 'The Shariah, Homosexuality & Safeguarding Each Other's Rights in a Pluralist Society' (*Al Madina Institute*, 18 June 2016) <<https://almadinainstitute.org/blog/the-shariah-homosexuality-safeguarding-each-others-rights-in-a-pluralist-so/>> accessed 24 April 2020.

¹⁴⁰ *X v Sweden*, para 9.4.

¹⁴¹ Okon, 'Hudud Punishments in Islamic Criminal Law', 229.

¹⁴² Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers, 67.

¹⁴³ *ibid* referring to the 'International Religious Freedom Report 2007: Afghanistan' (*US Department of State*, September 2017) <<https://2009-2017.state.gov/j/drl/rls/irf/2007/90225.htm>> accessed 24 April 2020.

intimidation, and, in some cases, physical abuse that could be life threatening.¹⁴⁴

Despite all this information being available to the Human Rights Committee, all cases concerning returns to Afghanistan based on apostasy after *X v Sweden* were not considered as a violation of the prohibition of *refoulement*.¹⁴⁵

These cases are not unsubstantiated, as illustrated by *X v Norway*. As in many other similar cases, in *X v Norway* the author converted to Christianity and was baptised after his asylum application was rejected.¹⁴⁶ The author then submitted an appeal based on his conversion to the Immigration Board, which in turn found that:

the author had not sufficiently considered the supposedly grave consequences of his conversion; that his understanding of the Christian religion was very superficial and seemed rehearsed; and that he had not reflected over the differences between Islam and Christianity.¹⁴⁷

Then the author demonstrated that he had acquired knowledge of his new faith, a fact that was confirmed by two pastors and a bishop of the Church of Norway.¹⁴⁸ Despite all evidence of his conversion, the State did not consider that the conversion was genuine. The reasons for this finding include suggesting that the applicant misled the priests and that his baptism took place only three months after his conversion ‘without receiving any formal training’.¹⁴⁹ In order to validate his conviction, the

¹⁴⁴ Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers, 68

¹⁴⁵ *X v Norway*, para 7.6; *MJK v Denmark*, para 6.7; *KS and MS v Denmark*, para 6.4; and *SAH v Denmark*, para 11.4.

¹⁴⁶ *X v Norway*, para 2.4.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid* para 3.3.

¹⁴⁹ *ibid* paras 4.7–4.8.

author even declared that he understood that he could be killed because of his new faith in Afghanistan, yet the State used this statement against the applicant:

[g]iven the status of Islam in Afghan society and what a break with Islam means for a Muslim in Afghanistan, the Board determined that the author had not thought about the consequences, both practical and emotional, his conversion could have for his family.¹⁵⁰

In cases of *sur place* conversion, it is understandable that States investigate whether the claims of the applicants are valid. Admittedly, leaving one's faith and/or becoming a member of a new religious group should not be considered as trump cards, overruling any subsequent inquiry, but such reviews should be reasonable. The UNHCR recommends an assessment that might include:

the nature of and connection between any religious convictions held in the country of origin and those now held, any disaffection with the religion held in the country of origin, for instance, because of its position on gender issues or sexual orientation, how the claimant came to know about the new religion in the country of asylum, his or her experience of this religion, his or her mental state and the existence of corroborating evidence regarding involvement in and membership of the new religion.¹⁵¹

Nevertheless, given the context of Afghanistan, and the alleged offences that the applicants committed, it is somewhat surprising that the Human Rights Committee has accepted most of the claims posed by the States. The Committee found in favour of the State in *X v Norway*,¹⁵² in *MJK v Denmark*,¹⁵³ *SAH v Denmark*,¹⁵⁴ and *KS and MS*

¹⁵⁰ *ibid* paras 4.2 and 4.11.

¹⁵¹ HCR/GIP/04/06, para 34.

¹⁵² *X v Norway*, para 7.6.

¹⁵³ *MJK v Denmark*, para 6.7.

¹⁵⁴ *SAH v Denmark*, para 11.9.

*v Denmark*¹⁵⁵. This is highly problematic for several reasons. First, although States claim that there is a rise in claimants bringing arguments based on *sur place* conversion or merely leaving their former religion,¹⁵⁶ this alone does not mean that their claims are not authentic. Second, some new converts have been harassed by their peers in asylum centres for abandoning their faith, which should mitigate claims that their conversion is solely based on self-interest.¹⁵⁷ Third, the current criteria imposed on applicants to prove their conversion is nearly impossible to be fulfilled. In the cases above concerning conversion to Christianity, the threshold was so high that even Jesus' apostles would not be regarded as Christians by the State.¹⁵⁸

4.3.4 Cases regarding Returns to Egypt, Malaysia, Senegal, and Somalia

There are four cases, one regarding each of these countries, which reinforce some of the issues that were discussed in the previous section, and also shed light on two other contested issues at the Human Rights Committee, namely the role of freedom of religion or belief in *non-refoulement* cases and the expanding threshold imposed by the Committee.

The cases of *Warsame v Canada* and *BL v Australia* exemplify the first issue. In *Warsame*, the author claimed to have converted to Christianity, and for that reason, he

¹⁵⁵ *KS and MS v Denmark*, para 6.4.

¹⁵⁶ *X v Norway*, para 4.5.

¹⁵⁷ See eg *SAH v Denmark*, paras 2.9, 4.7, 5.1, 6.2, and 11.5.

¹⁵⁸ See eg Mark 1:16–20 and Acts 9:1–19.

should not be returned to Somalia, where membership to other religions than Islam is prohibited.¹⁵⁹ This case differs from the previous ones at the Human Rights Committee, because the author did not provide any evidence for his conversion.¹⁶⁰ However, the case raised an important question: should freedom of religion or belief be taken into consideration in cases concerning *non-refoulement* related to offence to religious belief?

This point was further discussed in, among other cases, *BL v Australia*. BL was from Senegal, converted to Christianity in the country, and claimed that he was severely beaten by his family and members of an extremist group because of his belief.¹⁶¹ Then he first fled to South Africa, and subsequently to Australia, in both places regularly attending Christian services.¹⁶² The Committee, once again, largely agreed with the State and accepted that internal relocation was a reasonable option for the applicant.¹⁶³ The Committee also decided that, with regard to claims under Article 18, stating that ‘it could not conclude that the author would face a real risk of treatment inconsistent with that article if he were removed to Senegal.’¹⁶⁴ While it is expected that the Committee would address a claim put forward by the applicant, it often ignores such claims when they are connected with other rights.

¹⁵⁹ *Warsame v Canada*, paras 3.4 and 3.7.

¹⁶⁰ *ibid* para 5.1.

¹⁶¹ *BL v Australia*, paras 2.2–2.3.

¹⁶² *ibid* paras 2.5–2.7.

¹⁶³ *ibid* para 7.4.

¹⁶⁴ *ibid* para 7.5.

For example, some States in these cases argue that Article 18 of the Covenant, on freedom of religion or belief, does not have extraterritorial application, thus being incompatible *ratione materia* with the ICCPR.¹⁶⁵ This argument is only valid (though still arguable) *in abstracto*, but manifestly wrong in the context of offence to religious belief and *non-refoulement*. If someone is at risk to suffer torture or even receive the death penalty when returned to another State by virtue of one's belief, then Article 18 cannot be dissociated from the claim of *non-refoulement* based on Articles 6(1) and 7 of the ICCPR. The Committee usually follows this rationale, although it has also overlooked it in at least one case.¹⁶⁶

Finally, there is the matter of the high threshold formula developed by the Human Rights Committee, which is well-illustrated by *MZBM v Denmark* and *WK v Canada*. The first case regards a transgender person from Malaysia who converted from Islam to Hinduism,¹⁶⁷ and the second a gay Christian convert from Egypt.¹⁶⁸ Therefore these cases concern beliefs and sexual orientation, which could both be considered offensive to religious belief in their countries of origin.

As already mentioned, the Committee had determined, in its General Comment 31, that States should not remove a person who has 'substantial grounds for believing that there is a real risk of irreparable harm.'¹⁶⁹ Nonetheless, this formulation was

¹⁶⁵ See eg *Warsame v Canada*, para 4.7; *BL v Australia*, para 4.15; *WK v Canada*, para 4.5.

¹⁶⁶ Compare *BL v Australia*, para 6.5; with *WK v Canada*, paras 9.4–9.5.

¹⁶⁷ *MZBM v Denmark*, para 2.1.

¹⁶⁸ *WK v Canada*, paras 2.1–2.2.

¹⁶⁹ CCPR/C/21/Rev.1/Add.13, para 12.

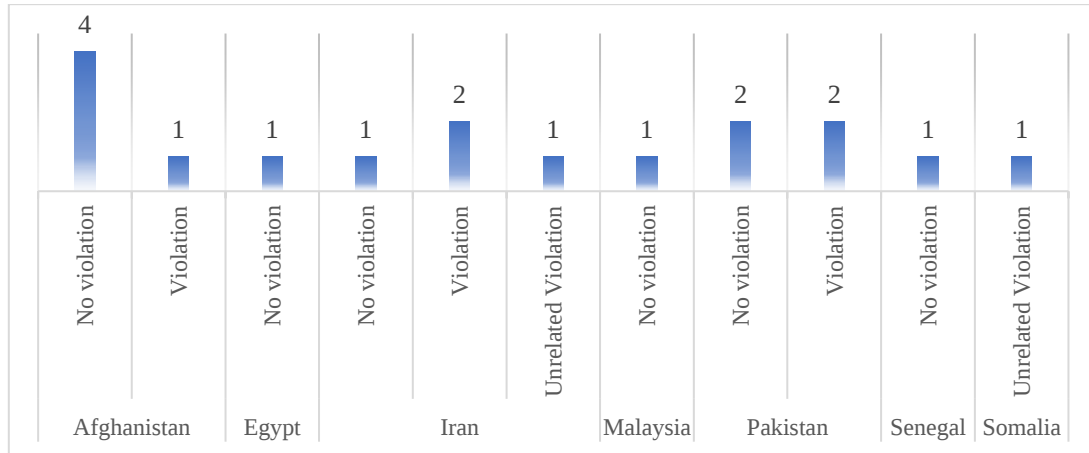
modified by the Committee, which in later cases stated that there is ‘a *high threshold* for providing substantial grounds *to establish that a real risk of irreparable harm exists*.’¹⁷⁰ Notably, the original test did not envision a *high threshold*, nor require claimants to *establish* that a real risk exists. Substantial grounds for *believing* that the risk existed was enough to characterise *non-refoulement*. The caveat here is that the wording of the new formulation substantially increases the burden of proof for applicants in cases concerning offence to religious belief and *non-refoulement*. Even more perplexing is the fact that the Committee is not following its own interpretation of the Covenant. On the contrary, it has raised its own threshold not to provide broader protection to vulnerable persons but to grant more deference to States. Predictably, the Committee did not find a violation in *MZBM v Denmark* or *WK v Canada*.¹⁷¹

In conclusion, the Human Rights Committee only found a violation of the principle of *non-refoulement* based on claims directly related to offence to religious belief in five out of seventeen cases, as illustrated in the chart below. In four of these cases, the return was to States which notoriously enforce punishments for offence to religious belief, being that in only one out of nine cases the Committee found a violation where the risk was posed by non-State actors. If considered in chronological order, these violations were often found in the first cases that argued protection due to accusations of blasphemy or apostasy. The Committee only found a violation in one case, out of twelve, after 2014. Therefore, we argue that the Committee should review its decisions regarding *non-refoulement* cases from applicants claiming to be at risk of harm in their country of origin due to norms prohibiting offence to religious belief.

¹⁷⁰ See *MZBM v Denmark*, para 7.3; and *WK v Canada*, para 10.3 (emphasis added).

¹⁷¹ See *MZBM v Denmark*, para 7.6; and *WK v Canada*, para 7.5.

- Chart 2: Human Rights Committee – Decisions regarding *non-refoulement* related to offence to religious belief by State of origin



4.4 Offence to Religious Belief and *Non-Refoulement* at the European Court of Human Rights

The ECtHR has received a high number of *non-refoulement* cases concerning offence to religious belief. These cases receive little attention from academics, likely because of the difficulty in tracing and compiling these cases. This difficulty can be explained, once again, by the range of terms used to refer to offence to religious belief, as explained in Chapter 1. While some cases will mention blasphemy,¹⁷² and others might refer to apostasy,¹⁷³ the majority will only make indirect references to these perceived wrongdoings. The primary term used in the cases is “conversion”, which can naturally be applied in several situations. In religious contexts, conversion means abandoning former beliefs to adopt new ones, that is, apostasy.¹⁷⁴

¹⁷² See eg *Samina v Sweden* App no 55463/09 (ECtHR, 20 October 2011) paras 51–52.

¹⁷³ See eg *PA v France* App no 45269/07 (ECtHR, 23 March 2010) para 2.

¹⁷⁴ See Chapter 1.2.5.

Since apostasy is a type of offence to religious belief and a crime in several jurisdictions, it is not unexpected that such conversions could lead to claims of *non-refoulement* in cases concerning the return of individuals to these jurisdictions. Likewise, homosexuality is perceived as an offence to religious belief in some countries but not always described as such by the applicants.¹⁷⁵ Consequently, the first examination of the jurisprudence of the ECtHR yielded more than 200 cases, being that 60 regarded *non-refoulement* and offence to religious belief.

As explained above, offence to religious belief can lead to violations of the right to life and the prohibition of torture.¹⁷⁶ If this happens to persons being returned to a country where they can be punished by such offences, this could implicate the returning State in a violation of the prohibition of *refoulement*, as well as possible complicity in the acts executed by the receiving State. As demonstrated in the previous sections, UN treaty bodies have a negative record in this regard. Nevertheless, the ECtHR has emphasised several times the importance of protecting persons who might suffer torture in their country of origin; thus, one could expect that it would offer better protection for persons facing such risks.¹⁷⁷

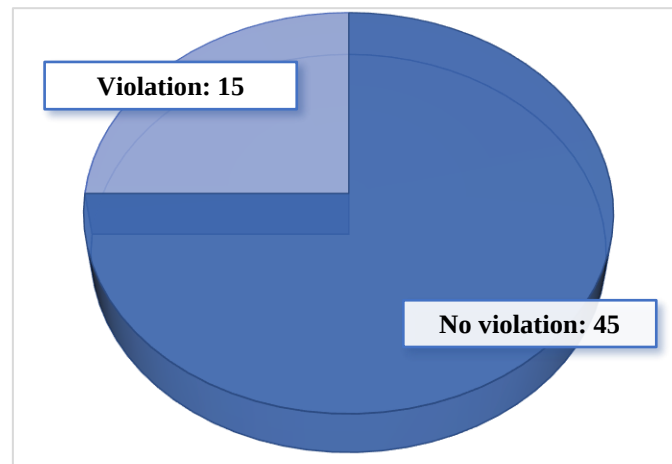
In reality, this is far from the truth, as the Court found only a violation, or potential violation, of the prohibition of *refoulement* in 15 out of the 60 decisions analysed up until November 2019 (there were 54 cases in total, but some were assessed more than once due to appeals).

¹⁷⁵ See eg *AE v Finland* App no 30953/11 (ECtHR, 22 September 2015).

¹⁷⁶ See Chapters 0 and 0.

¹⁷⁷ See eg *Chahal v UK*; and *Hirsi Jamaa and Others v Italy*.

- Chart 3: Total of ECtHR decisions concerning offence to religious belief and *non-refoulement*



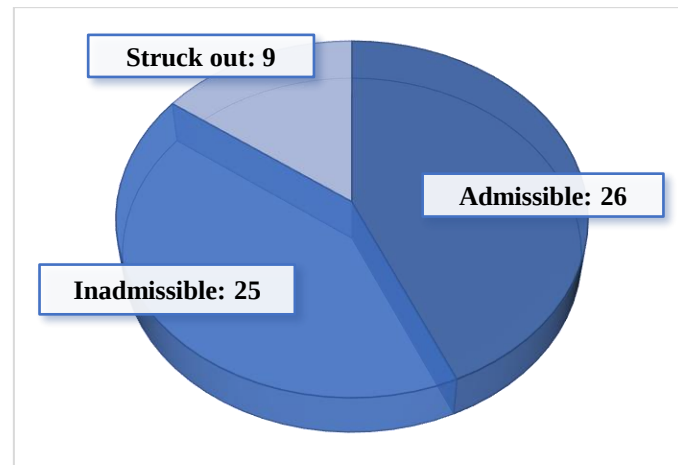
These cases were decided between 1992 and 2019, thus a longer timespan than the UN bodies.¹⁷⁸ It is also important to note that, out of the cases mentioned above, the Court considered 25 cases inadmissible, struck out 9 cases, and considered 26 admissible.¹⁷⁹ Thus, the question of admissibility merits further exploration in this section, mainly because if a case is considered inadmissible by the ECtHR, then there is no possibility of appeal of the same case.¹⁸⁰ Given these fundamental differences, the following sub-sections were not divided by the State of return, but by their outcome. This methodological choice was made to highlight the arguments that the Court found persuasive in order to prohibit States from proceeding with returns in cases of *non-refoulement* and offence to religious belief.

¹⁷⁸ The analysis was done until September 2019, however the last case relevant to this areas was *H, I and J v Switzerland* App no 27478/17 (ECtHR, 19 November 2018).

¹⁷⁹ This reflects a higher rate than the overall percentage of admissibility at the Court, which was around 18% in 2018. See Thiago Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights' (2020) 15 *Religion & Human Rights* 96, 100.

¹⁸⁰ ECHR, art 28(2).

- Chart 4: ECtHR decisions of admissibility concerning offence to religious belief and *non-refoulement*



4.4.1 Cases Related to Offence to Religious Belief in which the European Court of Human Rights Did Not Find a Violation of the Prohibition of *Refoulement*

This thesis analysed 45 decisions in which the ECtHR did not find a violation of Article 3 concerning the return of asylum seekers to countries where they could be accused of offence to religious belief and, in this way, risked suffering torture. The analysis was performed in categories, in order to examine whether there are any principled reasons that might explain the high number of cases in which the Court decided in favour of States. Such examination also helps to track whether the ratio decidendi of the ECtHR has changed since it started dealing with these cases. The analysis was divided into three categories: type of decision (cases admissible and cases struck out), context (returning State and State of return), and personal characteristics (belief or sexual orientation and type of conversion, if it took place).

4.4.1.1 *Type of decision*

Understanding the type of decisions of the ECtHR is essential to define its level of engagement with the case. For example, if the Court decides that it does not have jurisdiction to receive an application, it can consider the case inadmissible, meaning that it might not examine the merits of the case.¹⁸¹ The types of decisions analysed in this section are those “struck out from the list of cases”, those considered inadmissible, and those admissible but rejected on their merits.

(i) *Applications struck out of the list of cases by the Court*

The number of cases which were struck out are of relevance and should not be ignored.

According to Article 37 of the Convention:

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:
 - (a) the applicant does not intend to pursue his application; or
 - (b) the matter has been resolved; or
 - (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.¹⁸²

Some examples might help to illustrate the categories mentioned above. In *AA v The Netherlands*, the applicant was a Hazara Afghan man who converted to Christianity, then had his asylum denied and apparently decided to return voluntarily to Afghanistan. Therefore, since the counsel could not contact the applicant, the Court

¹⁸¹ ECHR, art 35.

¹⁸² ECHR art 37(1); See also CoE, 'Rules of Court' (1 January 2020) ECtHR Rules of Court rule 43.

struck his application out of the list of cases.¹⁸³ This exemplifies Article 37(1)(a), as the applicant indirectly indicated that he did not intend to pursue his application.

In most cases, however, it is the State that decides not to pursue the issue further. The reasons for such a decision vary significantly. In some cases, there is a change of the situation in the State of origin, often volatile States such as Libya¹⁸⁴ or Iraq.¹⁸⁵ In these cases, the issue is considered as resolved according to Article 37(1)(b), because circumstances of the State of origin could have become more stable.

Occasionally, the decision of the State is a principled one. For example, the UK decided to re-examine, *proprio motu*, cases concerning the expulsion of Ahmadis to Pakistan in light of new decisions of its Supreme Court and the CJEU decision in *Bundesrepublik Deutschland v Y and Z* in favour of the applicants.¹⁸⁶ The Netherlands also imposed a temporary moratorium on the expulsion of Christians to Iraq, so the Court struck out cases related to it.¹⁸⁷ In these cases, the Court could consider the issue resolved according to Article 37(1)(c). That said, temporary moratoriums could change, and if the applicants are not granted asylum, they would probably remain concerned about their status and potential removal from the State. Consequently, the decision of the Court in these cases is not entirely satisfactory.

¹⁸³ *AA v The Netherlands* App no 25304/10 (ECtHR, 3 July 2012). See also *Ramzy v The Netherlands* App no 25424/05 (ECtHR, 20 July 2010); and *Berfejani and Hajaran v Turkey* App no 18854/07 (ECtHR, 12 February 2008).

¹⁸⁴ *ME v Sweden (Grand Chamber)* App no 71398/12 (ECtHR, 8 April 2015) para 34.

¹⁸⁵ *WH v Sweden (Grand Chamber)* App no 49341/10 (ECtHR, 8 April 2015) para 25.

¹⁸⁶ *ANN and Others v UK and Others*, para 11(1).

¹⁸⁷ See eg *Mohammadi v The Netherlands* App no 5140/06 (ECtHR, 1 June 2006).

In other cases, it is the circumstances of the applicant that change, and subsequently, the State decides to allow the applicant to stay in the country, which leads the Court to strike out the case. One example of such a situation took place in *Razagui v Sweden*. In this case the applicant sought asylum in Sweden, claiming that he was being persecuted because ‘he had had a relationship with a married woman whose husband was a mullah [and] believed that two or three persons had seen them having sexual intercourse.’¹⁸⁸ The Swedish Immigration Board found his allegations implausible because, among other reasons, ‘it was deemed unlikely that a woman married to a mullah would have a relationship with another man.’¹⁸⁹

The applicant then appealed the decision, claiming that he had converted to Christianity in Sweden and, by virtue of that, he could have been sentenced to death in Iran for apostasy. The Appeals Board dismissed this claim, stating that there is generally no risk for apostates in Iran if ‘the Christian faith is handled discreetly’.¹⁹⁰ The State also argued that the application should be declared inadmissible as being manifestly ill-founded due to the lack of credibility of the claims of the applicant, but the Court found the case admissible without deciding on the merits.

Nevertheless, at a later point, the State decided to grant the applicant a residence permit because he declared that ‘he would rather commit suicide than return to Iran’ and qualified psychologists declared that the applicant was in need of psychiatric treatment as he ‘showed signs of desperation and expressed suicidal thoughts which

¹⁸⁸ *Razaghi v Sweden (Chamber)* App no 64599/01 (ECtHR, 11 March 2003).

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

should be taken seriously'.¹⁹¹ Thus, the defining *sur place* personal circumstance for the case to be struck out was not the conversion, but the mental health of the applicant.

(ii) *Applications considered inadmissible*

The applications struck out by the Court were considered, a priori, admissible. In other words, they followed the correct procedure and fell within the jurisdiction of the ECtHR but were later removed from the list of cases for reasons which were outside of the control of the Court. Yet, nearly half of the cases examined were considered inadmissible. The Court has divided the admissibility process into three categories: procedural, jurisdictional, and merits-based.¹⁹²

The procedural criteria are relatively straightforward, as described in Article 35(1)(2) of the ECHR. They refer to the exhaustion of domestic remedies, application within six months from the date of the final decision, the prohibition of anonymous applications, and cases which are substantially the same as another already submitted to the Court or another international body.¹⁹³ Certain flexibility in these criteria is allowed, but procedural issues tend to be interpreted narrowly.¹⁹⁴

The jurisdictional category comprises four types of jurisdiction: personal (*ratione personae*), territorial (*ratione loci*), temporal (*ratione temporis*), and subject

¹⁹¹ *Razaghi v Sweden (Struck out)* App no 64599/01 (ECtHR, 25 January 2005).

¹⁹² *Practical Guide on Admissibility Criteria* (CoE 2017) 19, 41, and 54.

¹⁹³ ECHR, art 35(1)(2).

¹⁹⁴ See eg *ASO v The Netherlands* App no 47600/12 (ECtHR, 17 September 2013); and *AG and MM v The Netherlands* App no 43092/16 (ECtHR, 26 June 2018) para 33.

matter (*ratione materiae*).¹⁹⁵ For example, the ECtHR has stated that a person who is not currently at risk of being deported to another country, due to a moratorium on expulsions, cannot claim to be a victim, in which case the complaint would be incompatible *ratione personae*.¹⁹⁶

States Parties to the ECHR have an obligation to ‘secure to everyone within their jurisdiction the rights and freedoms’ set out in the Convention.¹⁹⁷ The Court, however, has decided that the prohibition of *refoulement* is mostly related to Articles 2 and 3 of the Convention. Hence, the Court has considered that claims related to other rights—such as freedom of religion or belief and the right to private life—are not in themselves enough to justify granting someone asylum.¹⁹⁸ Consequently, requests for the prohibition of *refoulement* solely based on qualified rights could have been considered incompatible *ratione materiae*, as the Court stated: ‘[o]n a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.’¹⁹⁹

This position is indeed more pragmatic than principled. In the UK, this question was discussed in depth in the landmark case *R (Ullah) v Special Adjudicator*. Lord Steyn correctly explained that Article 3 (prohibition of torture) was not the only ECHR

¹⁹⁵ Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 102.

¹⁹⁶ *NF v The Netherlands* App no 21563/08 (ECtHR, 14 January 2014) paras 35–37; and *ASR v Turkey* App no 60079/14 (ECtHR, 7 February 2017) paras 22–24.

¹⁹⁷ ECHR, art 1.

¹⁹⁸ *F v UK* App no 17341/03 (ECtHR, 22 June 2004).

¹⁹⁹ *ibid.*

Article that could become engaged in decisions regarding *refoulement*.²⁰⁰ Other Articles, such as Article 4 (prohibition of slavery and forced labour), 5 (arbitrary detention), 6 (fair trial), 7 (no punishment without law), and even 8 (private life) in cases of sexual orientation, are relevant for the determination of expulsion.²⁰¹ Lord Steyn also considered other qualified rights but did not find that they could alone raise an issue of *refoulement*, yet he was cautious and did not rule out the consideration of these rights in immigration decisions, declaring that: ‘Saying never in law often requires courts to swallow their words in circumstances not previously contemplated.’²⁰² Lord Bingham stated that:

I find it hard to think that a person could successfully resist expulsion in reliance on article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on article 3. But I would not rule out such a possibility in principle unless the Strasbourg court has clearly done so, and I am not sure it has.²⁰³

In *Z and T v UK*, the Court explored this issue and acknowledged that although cases of *non-refoulement* often engage Articles 2 and 3 of the ECHR, the Court has not excluded that issues of arbitrary detention and fair trial (Articles 5 and 6) could also amount to a prohibition of *refoulement*.²⁰⁴ Still, the Court mentioned the *Ullah* case, but it was less cautious and provided a highly problematic illustration as follows:

protection is offered to those who have a substantiated claim that they will either suffer persecution for, inter alia, religious reasons or will be at real

²⁰⁰ *R (Ullah) v Special Adjudicator* [2004] INLR 381, para 40.

²⁰¹ *ibid*, paras 40–47.

²⁰² *ibid*, para 48.

²⁰³ *ibid*, paras 1–25.

²⁰⁴ *Z and T v UK* App no 27034/05 (ECtHR, 28 February 2006).

risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason). Where however an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself. Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world. **If, for example, a country outside the umbrella of the Convention were to ban a religion but not impose any measure of persecution, prosecution, deprivation of liberty or ill-treatment, the Court doubts that the Convention could be interpreted as requiring a Contracting State to provide the adherents of that banned sect with the possibility of pursuing that religion freely and openly on their own territories.** While the Court would not rule out the possibility that the responsibility of the returning State might in exceptional circumstances be engaged under Article 9 of the Convention where the person concerned ran a real risk of flagrant violation of that Article in the receiving State, the Court shares the view of the House of Lords in the Ullah case that it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention.²⁰⁵

Therefore, the Court found in *Z and T v UK* that the case was manifestly ill-founded.²⁰⁶ Indeed, the vast majority of cases considered inadmissible are found to be manifestly ill-founded. This is also paradoxically called inadmissibility based on merits, which can be problematic for several reasons. First, these cases do not have procedural or jurisdictional issues. Second, the ECtHR has explained that the term “manifestly” is not taken in its literal sense but construed broadly.²⁰⁷ Third, the meaning of the expression “manifestly ill-founded” is teleological, ie related to the ‘outcome of the case’.²⁰⁸ In other words, ‘if it is highly probable that the Court will

²⁰⁵ *ibid.*

²⁰⁶ *ibid* (emphasis added).

²⁰⁷ *Practical Guide on Admissibility Criteria*, 54.

²⁰⁸ *ibid* 54.

find no violation in a given case, then such a case could be considered manifestly ill-founded.²⁰⁹ Finally, since the Court is analysing the case on its merits, it could simply decide that there is no violation of the right in question.

Therefore, this admissibility criterion is highly unpredictable. Applications considered manifestly ill-founded not vitiated by procedural issues, the matter at hand might not be implausible, and the Court analyses the case on its merits. Nonetheless, this procedure has a practical function. If the Court finds that there is no violation in a particular case, then the case can be referred to the Grand Chamber.²¹⁰ However, if the case is considered inadmissible, then the decision is final.²¹¹ Consequently, even taking into consideration the financial constraints of the Court, and the fact that the principle of judicial economy should be observed in all cases,²¹² this admissibility criterion undoubtedly affects several applicants.

Crossing this data with other categories helps to visualise this point. For instance, the first case to be considered admissible in this area only took place in 2003,²¹³ 11 years after the first case on offence to religious belief and *non-refoulement* was decided

²⁰⁹ Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 8.

²¹⁰ ECHR, art 43.

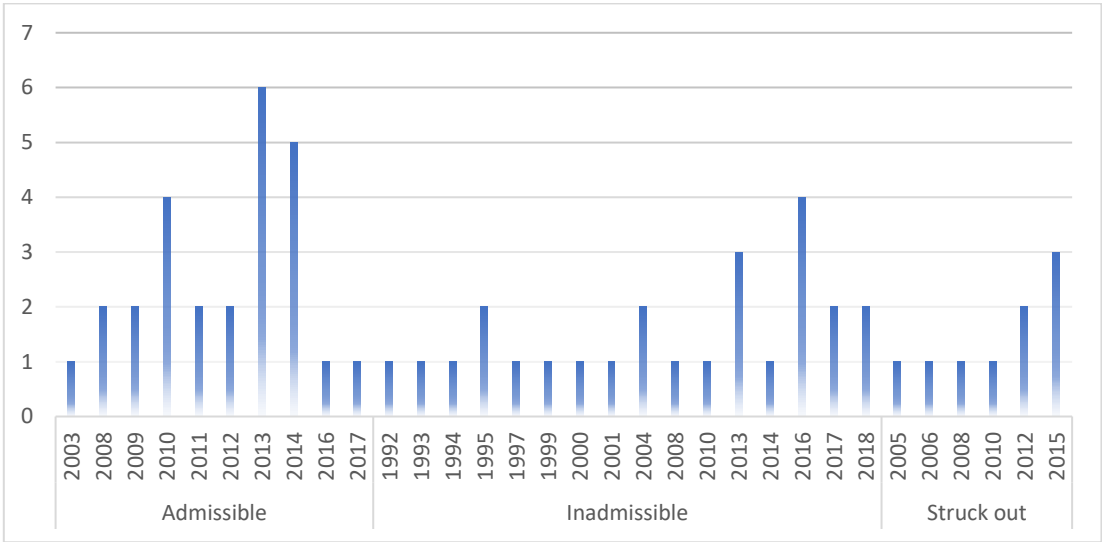
²¹¹ *ibid* art 28(2). See also Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 63.

²¹² Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 102.

²¹³ *Razaghi v Sweden (Chamber)*.

by the ECtHR.²¹⁴ Likewise, as demonstrated in the chart below, there was a limited increase of admissible cases between 2010 and 2014.

- Chart 5: ECtHR decisions of admissibility concerning offence to religious belief and *non-refoulement* per year



Two cases further illustrate the challenges related to admissibility. In *N v Switzerland* (1992), the applicant claimed that he had sought asylum in Switzerland because he converted to Christianity in Pakistan through his wife, who was Catholic.²¹⁵ She was murdered in Pakistan, and he feared that upon his return, he could be considered either as an apostate or someone who was insulting Islam.²¹⁶ The Commission analysed all the arguments from both applicant and State and decided that the applicant ‘failed to show by means of concrete submissions concerning his

²¹⁴ *N v Switzerland* App no 19184/91 (ECtHR, 10 April 1992).

²¹⁵ *ibid.*

²¹⁶ *ibid.*

situation that the treatment he must expect in Pakistan would render his expulsion contrary to Article 3’.²¹⁷

More than 25 years later, the Court decided similarly in *H, I and J v Switzerland* (2018). The applicants from Iran sought asylum for political reasons but later converted to Christianity and even signed a letter to the Iranian Ambassador in Switzerland in support of persecuted Christians in Iran.²¹⁸ The State dismissed the claims of the applicants explaining that such conversions are self-serving and that Christians are only persecuted in Iran if they manifest their faith in a visible manner.²¹⁹ Therefore, both cases were analysed on their merits, not because their claims were “ill-founded” in any way, but they were both considered inadmissible.²²⁰

4.4.1.2 Returning State and State of origin

In terms of the returning State and State of origin, the results are expressive but somewhat inconclusive. For example, the CoE has 47 members, yet the ECtHR has only received cases related to offence to religious belief and *non-refoulement* from 12 States, namely: Bosnia and Herzegovina, Bulgaria, Finland, France, Germany, Norway, Russia, Sweden, Switzerland, the Netherlands, the UK, and Turkey. This information is relevant because it shows where most cases in this region originate from. However, the information is limited because the focus of this thesis is on those

²¹⁷ ibid.

²¹⁸ *H, I and J v Switzerland*, paras 2–10 and 16.

²¹⁹ ibid paras 11 and 15.

²²⁰ *N v Switzerland*; and *H, I and J v Switzerland*, para 32.

cases that have reached international bodies. This means that the present analysis does not take into consideration the absolute numbers of asylum seekers in the CoE, as that would require a much more extensive study. In any case, the main objective of this section is to understand the rationale of the ECtHR in relation to the cases in question. Consequently, the information is indicative of a broader difficulty in understanding the dynamics of norms regulating offence to religious belief and the need for protection in Europe of those facing persecution for that matter.

- Chart 6: Returning State in ECtHR decisions concerning offence to religious belief and *non-refoulement*

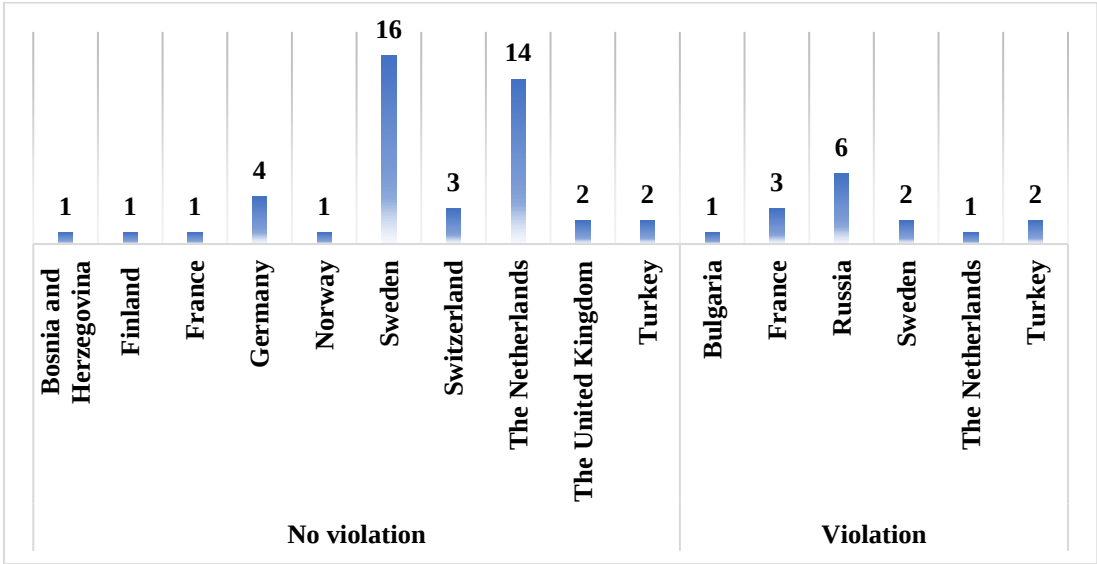


Chart 6 shows that the majority of cases analysed originated in Sweden and the Netherlands. One could reasonably argue that these States attract a higher proportion of asylum seekers than others,²²¹ but this study does not confirm this proposition. As demonstrated in the table below, regarding the annual data on final decisions on asylum applications between 2008 and 2011, Sweden received much more cases than

²²¹ CoE, 'Asylum Seekers and Refugees: Sharing Responsibilities in Europe' (6 June 2011) CoE Doc 12630, para 89.

the Netherlands, confirming that Chart 6 is merely indicative and does not reflect the absolute number of asylum seekers.²²²

- Chart 7: Total number of final decisions on asylum between 2008 and 2011 in Sweden and the Netherlands

↓↑	TIME	2008 ↓	2009 ↓	2010 ↓	2011 ↓
GEO ↓					
Netherlands		800	685	1 350	2 760
Sweden		11 065	15 395	12 830	13 195

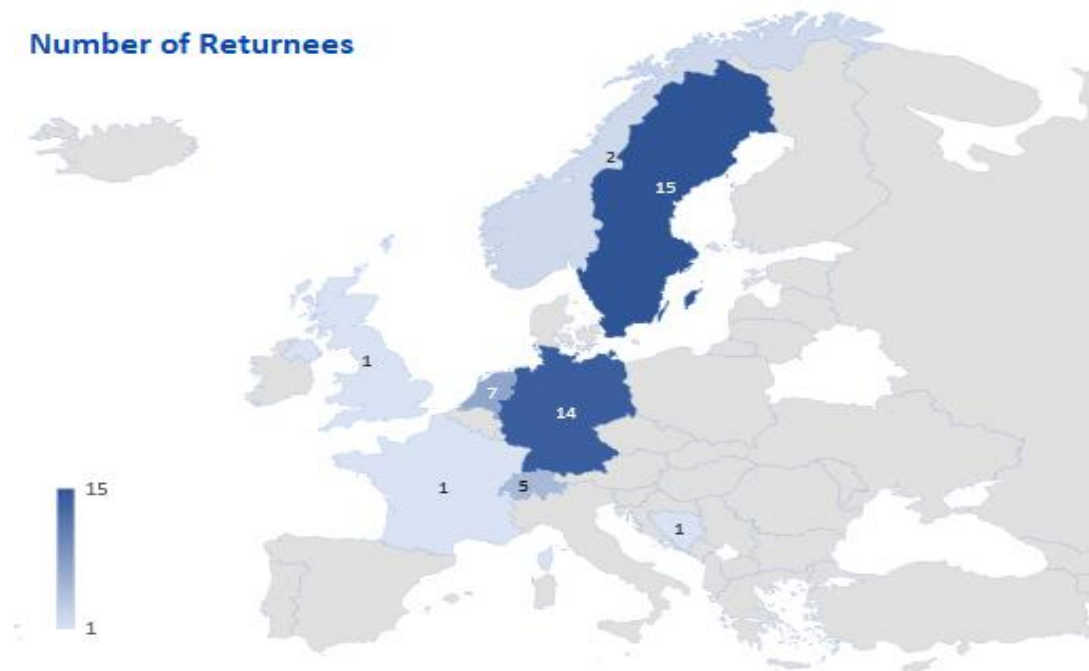
Naturally, the vast majority of cases concerning the rejection of asylum does not reach the ECtHR. Therefore, while this data is pertinent for States and the ECtHR to reconsider their approach to cases concerning offences to religious belief, it is not determinative of any trend by itself. What is truly problematic in this analysis is the actual number of people returned who claimed that they would be at risk of torture based on alleged offence to religious belief—at least 46 persons—as illustrated in Chart 8. The actual number of returnees does not correlate to the number of cases in which the Court did not find a violation because some applications had several authors, including families with children.²²³ Yet, even more remarkable is the fact that this number is higher than those of persons censored for an alleged offence to religious belief in Europe, despite the fact that the latter cases attracted much more attention.²²⁴

²²² 'Final Decisions on Asylum Applications - Annual Data' (*European Commission*, 23 May 2019) <<https://ec.europa.eu/eurostat/databrowser/product/view/TPS00193>> accessed 24 April 2020.

²²³ See eg *Ahmad and Others v Germany* App no 24131/94 (ECtHR, 27 June 1995); and *MYH and Others v Sweden* App no 50859/10 (ECtHR, 27 June 2013).

²²⁴ See eg *Otto-Preminger-Institut v Austria*; and *ES v Austria*.

- Chart 8: Total number of persons removed from Europe in ECtHR decisions concerning offence to religious belief and *non-refoulement*

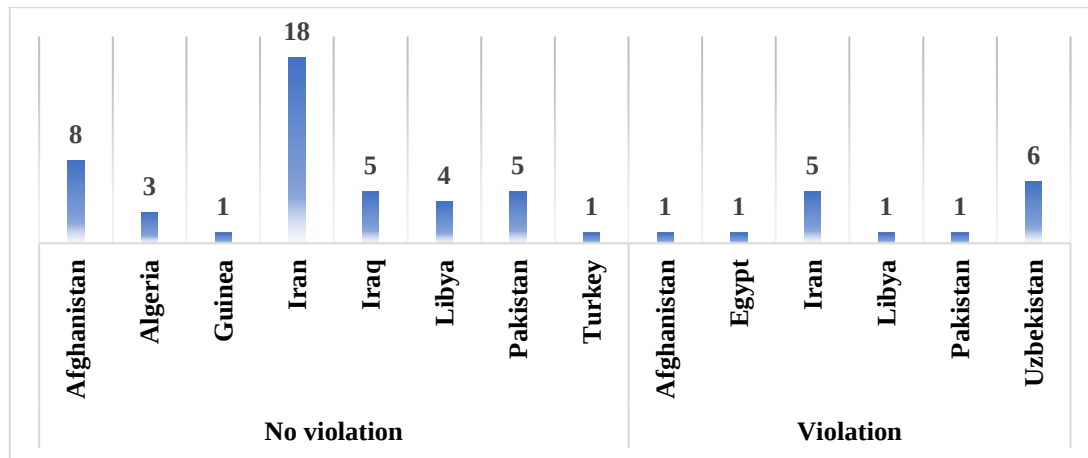


Another important finding is that the present analysis of 60 cases refers to only 10 States of origin. The chart below indicates that the ECtHR does not consider any State, as a whole, as a place to which persons should not be returned. In other words, the Court does not impose an automatic ban of returns to certain States. For instance, the ECtHR found a violation in all cases concerning *non-refoulement* and offence to religious belief in relation to Uzbekistan.²²⁵ However, these cases related to the religious and political movement Hizb ut-Tahrir. In other circumstances, such as of persons seeking asylum on political grounds alone, the Court has allowed States to return individuals to Uzbekistan.²²⁶

²²⁵ See Chapter 4.4.2.1.

²²⁶ *Mamatkulov and Askarov v Turkey* Apps nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) paras 71–78.

- Chart 9: State of origin in ECtHR decisions concerning offence to religious belief and *non-refoulement*



Furthermore, the Court has repeatedly affirmed that ‘a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion.’²²⁷ This statement was mentioned, for instance, in relation to a Christian applicant from Iraq when it was well-known, and acknowledged by the Court that Christians were being persecuted in several areas in Iraq.²²⁸ The decision of the Court expressed that there was no State-sponsored persecution of Christians, so the applicant ‘would not face a real risk of persecution or ill-treatment on the basis of his religious affiliation.’²²⁹ Nevertheless, as the dissenting Judges Power and Zupančič explained:

In its conclusion that the applicant would not face a real risk of persecution based on his religious affiliation, the majority refer to the fact that “*there is no State sanctioned persecution of Christians*” (§ 97 of the judgment). That not being the requisite test, however, they [the majority] proceed to find that protection from the Iraqi authorities would be available, if

²²⁷ *FH v Sweden* App no 32621/06 (ECtHR, 20 January 2009) para 90.

²²⁸ *ibid* para 91.

²²⁹ *ibid* para 97.

necessary. Their conclusion, in this regard, is difficult to reconcile with such objective evidence as is available.²³⁰

Therefore, the Court has been overly cautious in finding a violation of Article 3 in cases of expulsion related to offence to religious belief, even when it has enough information about the State of origin, and despite the absolute nature of the right.

4.4.1.3 Religion, belief, sexual orientation, and conversions

In terms of religious affiliation and conversion, the cases analysed present some significant clues on how the Court interprets issues concerning offence to religious belief. Evidently, most cases examined concern Christians. Nonetheless, it is imprudent to jump to conclusions that Christians are the most persecuted religious group worldwide based on these claims alone or otherwise.²³¹ Such claims are primarily political as they make use of highly selective data,²³² and do not reflect the gravity of the issue at hand nor enhance the protection of human rights for everyone.²³³

The reasons why most cases in this chapter concern Christians are varied. Most countries in Europe have a majority of Christian inhabitants; accordingly, it is predictable that Christians being persecuted on the basis of their beliefs elsewhere would seek asylum in Europe. Similarly, if asylum seekers would change their beliefs, it would more likely be to that of most of the population in the host State. Furthermore,

²³⁰ ibid dissenting opinion of Judge Power joined by Judge Zupančič (emphasis in original).

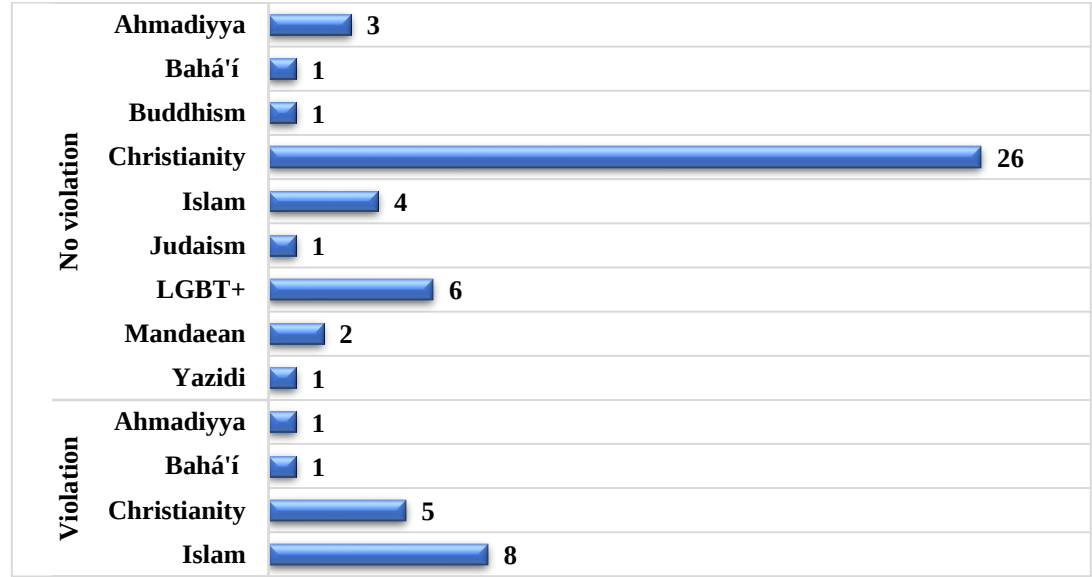
²³¹ See a contrario Mounstephen, *Bishop of Truro's Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians: Final Report and Recommendations*, 15–17.

²³² ibid 6, fn 2.

²³³ Ahmed Shaheed, Nazila Ghanea, and Malcolm Evans, 'Letters: Freedom of Religion' (*The Telegraph*, 10 February 2019) <www.telegraph.co.uk/opinion/2019/02/10/lettersremoving-backstop-wont-make-mays-deal-acceptable/> accessed 24 April 2020.

some States have been selective in their approach towards the protection of Christians. As mentioned above, the Netherlands imposed a temporary moratorium on expulsions of Christians to Iran,²³⁴ and 9 out of 15 cases on this topic against the Netherlands at the ECtHR regarded the return of Christians.²³⁵ Finally, the Court did not find a violation in any case concerning persons from several minority groups, meaning that the percentage of cases in which protection of these minorities was denied is much higher than those regarding Christians.

- Chart 10: Group affiliation in ECtHR decisions concerning offence to religious belief and *non-refoulement*



Four notable points should be highlighted in relation to Chart 10. First, even though Christianity should be a more familiar belief to European judges, they did not appear to demonstrate any preference for this religion, nor any other. Second, the

²³⁴ *Mohammadi v The Netherlands*.

²³⁵ *Arhim v The Netherlands* App no 59583/00 (ECtHR, 12 April 2001); *Mohammadi v The Netherlands*; *AA v The Netherlands*; *ASO v The Netherlands*; *NF v The Netherlands*; *JG v The Netherlands* App no 70602/14 (ECtHR, 5 July 2016); *TM and YA v The Netherlands* App no 209/16 (ECtHR, 5 July 2016); *MHA v The Netherlands* App no 61402/15 (ECtHR, 5 July 2016); *AG and MM v The Netherlands*.

relatively high number of violations concerning Islam is related to the Hizb ut-Tahrir, a fringe Islamic political group which does not represent the vast majority of Muslims.

Third, it is essential to clarify that the inclusion of the LGBT+ group in this context is due to the fact that acts related to these identities can be perceived as offence to religious belief in some States.²³⁶ Intriguingly, even though it is widely known that offence to religious belief directly affects members of the LGBT+ community, the Court has not found that LGBT+ persons deserved special protection. For instance, the ECtHR has accepted the argument that members of the LGBT+ community can act discreetly to avoid the risk of being tortured. The Court also stated in a case related to Iran that, if sexual orientation is a private matter, then applicants are ‘unlikely to face difficulties from the Iranian authorities in respect of homosexual activity conducted in private.’²³⁷ Even the criminalisation of same-sex activities in the State of origin does not meet the threshold of Article 3 for the Court. The ECtHR has declared that if such legislation is not ‘systematically applied’, then members of the CoE may return LGBT+ persons to those States.²³⁸ Regrettably, the Court has enforced the idea that members of LGBT+ can act discreetly to avoid torture,²³⁹ despite UN guidelines stating that requiring a person to be compelled to conceal one’s sexual orientation can lead to psychological harm—and it is not a reason to deny refugee status.²⁴⁰ Judge

²³⁶ See eg *IIN v The Netherlands* App no 2035/04 (ECtHR, 9 December 2004).

²³⁷ *F v UK*.

²³⁸ *MB v The Netherlands* App no 63890/16 (ECtHR, 28 November 2017) para 36.

²³⁹ *ME v Sweden (Chamber)* App no 71398/12 (ECtHR, 26 June 2014) para 88.

²⁴⁰ UNHCR, ‘Guidelines on International Protection no. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951

Power-Forde is one of the few judges that disagreed with the stance of the Court in this regard, denouncing the ECtHR decisions as antiquated on this matter.²⁴¹

Fourth, despite the high number of Christians seeking asylum based on claims related to offence to religious belief, there is still a diversity of religions represented in the cases scrutinised, such as Islam,²⁴² Judaism,²⁴³ Ahmadiyya,²⁴⁴ Buddhism,²⁴⁵ Mandaean,²⁴⁶ Yazidi,²⁴⁷ and Bahá'í.²⁴⁸ That said, religious affiliation is not a fixed attribute; persons can change it if they decide to do so. The right to change one's religion or belief is protected under Article 9 of the ECHR.²⁴⁹ Asylum seekers also have this right. Thus, it is not surprising that some persons fleeing persecution in a country might find solace in other religious beliefs or simply stop following their former religion. Nevertheless, the judges of the ECtHR seem to struggle to understand this dynamic, as the chart below demonstrates.

Convention and/or Its 1967 Protocol Relating to the Status of Refugees' (23 October 2012) HCR/GIP/12/09, paras 26–33; mentioned in *ME v Sweden (Chamber)* paras 46–49.

²⁴¹ *ME v Sweden (Chamber)* dissenting opinion of Judge Power-Forde; citing *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; and C–199/12, C–200/12 and C–201/12 *Minister Voor Immigratie en Asiel v X, Y and Z* (CJEU, 7 November 2013).

²⁴² See eg *SD v Germany* App no 45139/98 (ECtHR, 30 March 1999).

²⁴³ See eg *Berfejani and Hajaran v Turkey*.

²⁴⁴ See eg *Bakhish v Germany* App no 36717/97 (ECtHR, 31 October 1997).

²⁴⁵ See eg *HA and HA v Norway*.

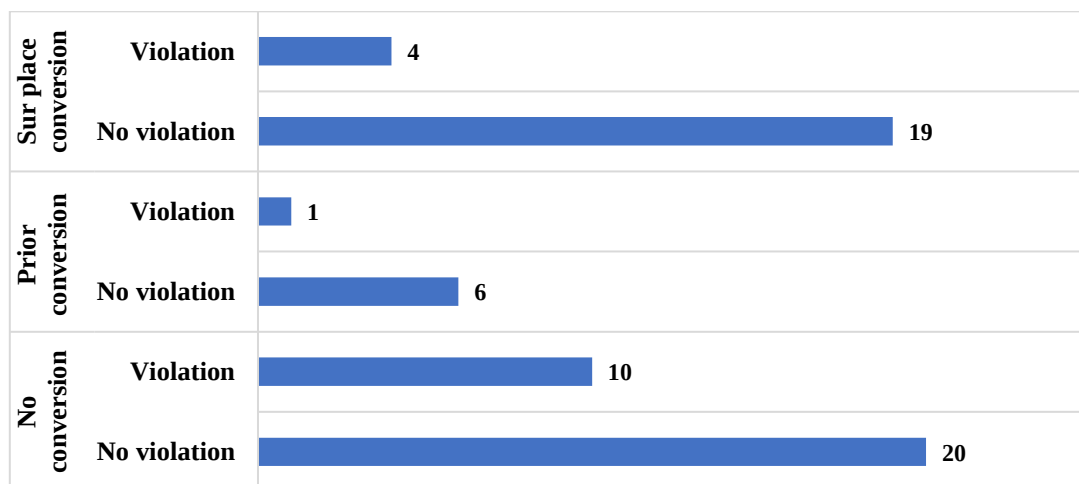
²⁴⁶ See eg *WH v Sweden (Chamber)* App no 49341/10 (ECtHR, 27 March 2014).

²⁴⁷ See eg *Damla and Others v Germany* App no 61479/00 (ECtHR, 26 October 2000).

²⁴⁸ See eg *Niknam v Sweden* App no 23446/94 (ECtHR, 12 October 1994).

²⁴⁹ Compare ECHR, art 9(1); with ICCPR, art 18(1).

- Chart 11: Type of religious conversion in ECtHR decisions concerning offence to religious belief and *non-refoulement*



The Court found more violations of Article 3 in cases where the individuals did not claim that their religious beliefs had changed.²⁵⁰ Conversion prior to seeking asylum in another country has not been a more compelling argument for the Court either.²⁵¹ Thus, it appears that the ECtHR does not take seriously the right that asylum seekers have to change their beliefs, especially in cases of *sur place* conversion.

In one of the first cases concerning *non-refoulement* and offence to religious belief at the Court, an Iranian woman who had converted to Christianity in Sweden had her faith questioned by the State.²⁵² A professor specialised in Islam told the Commission that ‘apostasy is regarded as an offence equivalent to high treason against the Iranian State, [...] and the person could face the death penalty [upon return].’²⁵³

²⁵⁰ Compare *ME v France* App no 50094/10 (ECtHR, 6 June 2013); with *NANS v Sweden* App no 68411/10 (ECtHR, 27 June 2013).

²⁵¹ See eg *ARM v Bosnia and Herzegovina* App no 5176/13 (ECtHR, 17 December 2013); and *N v Switzerland*.

²⁵² *LI v Sweden* App no 21808/93 (ECtHR, 8 September 1993).

²⁵³ *ibid.*

Yet, the ECtHR did not find a violation of Article 3. In a similar case of return to Iran, the ECommHR found the application manifestly ill-founded, stating that ‘the circumstances surrounding the applicant mother's purported conversion are dubious. *Even assuming that the conversion is genuine*, the Commission cannot find that she would run a real risk of treatment contrary to Article 3’.²⁵⁴

Indeed, even when the conversion appears to be genuine, the decision of the Court is often dismissive of such claims. The case of *Muradi and Alieva v Sweden* reinforces this argument. In this case, one of the applicants had converted to Christianity in Sweden and presented a certificate of baptism to the Migration Board. The Board did not consider his conversion genuine, despite the certificate, because he had converted after his initial asylum application was rejected.²⁵⁵ The ECtHR followed the argument of the domestic authorities, deciding that the: ‘applicant has failed to give reasons for the conversion and has only explained it in vague and general terms.’²⁵⁶

Thus, it appears that the criteria of the Court would be that vagueness in explaining the adoption of a new religion should not be accepted as deterring the return of an applicant. If that were the case, then any recent convert would probably be excluded from protection against *non-refoulement*. The following question ensues: would knowledge of the new faith suffice? Not necessarily. In a more recent case, a pastor confirmed that one of the applicants had an impressive knowledge of the Bible,

²⁵⁴ *RH and ME v Sweden* App no 26485/95 (ECommHR, 22 May 1995) (emphasis added).

²⁵⁵ *Muradi and Alieva v Sweden* App no 11243/13 (ECtHR, 25 June 2013) paras 13–15.

²⁵⁶ *ibid* para 44.

and that did not change the position of the Court either.²⁵⁷ Notwithstanding the absurdity of having a secular Court deciding on the genuineness of beliefs in the 21st century, and the general impossibility of determining one's sincerity regarding beliefs, the Court should have at least favoured the expertise of a religious leader on the topic over the State authorities.

As already mentioned, in Islamic States which outlaw apostasy, it does not matter where the conversion takes place or whether it is genuine, the mere fact of leaving Islam is an offence in itself. In practice, this means that in those States, the situation of converts from Islam is often worse than that of those born into a family from another religious minority. This point is highlighted in *A v Switzerland*, in which the Court enclosed several reports from States, NGOs, and IGOs about the situation of Christian converts in Iran.²⁵⁸ The case included an excerpt from a report written by the UN Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran, the late Asma Jahangir, in which she expressed concern about:

the targeting and harsh treatment of Christians from Muslim backgrounds and members of various Sufi groups [...] which are considered “deviant faiths” by the authorities and some members of the clerical establishment. These groups continue to face arbitrary arrest, harassment and detention, and are often accused of national security crimes such as “acting against national security” or “propaganda against the State”. Under Iranian law, individuals, including Christians of Muslim backgrounds, can be prosecuted for apostasy, although it is not specifically codified as a crime in the Islamic Penal Code.²⁵⁹

²⁵⁷ *H, I and J v Switzerland*, para 16.

²⁵⁸ *A v Switzerland* App no 60342/16 (ECtHR, 19 December 2017) paras 26–31.

²⁵⁹ UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran' (17 March 2017) A/HRC/34/65, para 78.

Evidently, this was not enough for the Court to find a violation in *A v Switzerland*, as it further explained that the applicant would only be at risk in Iran ‘if he proselytised or attracted public attention in another way’, ‘which was not the case for the applicant, who was an ordinary member of a Christian circle.’²⁶⁰ Thus, the Court allowed the deportation despite UNHCR guidelines stating that no one should be compelled to hide one’s religious belief or identity to avoid persecution.²⁶¹

Since the Court ignored these guidelines, what would happen to applicants that have demonstrated that they are not willing to be discreet about their beliefs? This scenario took place in *JG v The Netherlands*, in which the applicant converted to Christianity and then sought to persuade other asylum seekers to join the church he was attending.²⁶² Still, this was not enough for the domestic bodies or the Court to find a potential violation of Article 3 of the ECHR upon his removal. The applicant then submitted a “Report Concerning the Credibility of Conversion” elaborated by a theology professor and psychologist of religion, which analysed the credibility of the applicant’s conversion by comparing him to other converts, and analysing specific characteristics such as ‘affection, cognisance, and behaviour’.²⁶³ As a result, the expert found the conversion credible; the State and the ECtHR did not.²⁶⁴ Therefore, it seems virtually impossible for applicants to be successful in their claims concerning *non-*

²⁶⁰ *A v Switzerland*, paras 14 and 43.

²⁶¹ HCR/GIP/04/06, para 13.

²⁶² *JG v The Netherlands*, paras 11 and 22.

²⁶³ *ibid* para 21.

²⁶⁴ See *WH v Sweden (Chamber)* paras 21, 23 and 46.

refoulement in cases related to offence to religious belief. That will remain the case until the Court decides to take into consideration the opinion of specialists on the topic.

Based on the analysis of 45 decisions adverse to the applicants, it can be concluded that the Court has often condoned States returning people who face a risk of persecution for their religious or personal identity. Furthermore, the Court has belittled the beliefs of new converts as mere platitudes.²⁶⁵ These decisions clearly contradict the obiter dictum of the Court that ‘Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment.’²⁶⁶ Paradoxically, it has been this obiter dictum that has become a mere platitude in these cases, as Judge Power-Forde concluded in *ME v Sweden*:

This Court has held that to deprive a person of his reading glasses for a few months reaches the required threshold under Article 3. Depriving this applicant of his dignity for a similar or longer period by expecting him to hide an intrinsic part of his identity for fear of persecution does not. Something doesn’t fit. It is more than a minor inconvenience for the applicant to do as the majority requires. Having to hide a core aspect of personal identity cannot be reduced to a tolerable bother; it is an affront to human dignity—an assault upon personal authenticity. Sexual orientation is fundamental to an individual’s identity and conscience and no one should be forced to renounce it—even for a while. Such a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity.²⁶⁷

²⁶⁵ *MHA v The Netherlands*, para 11.

²⁶⁶ *Jabari v Turkey* App no 40035/98 (ECtHR, 11 July 2000) para 39.

²⁶⁷ *ME v Sweden (Chamber)* dissenting opinion of Judge Power-Forde. In the first sentence she was referring to the case of *Slyusarev v Russia* App no 60333/00 (ECtHR, 20 April 2010).

4.4.2 Cases Related to Offence to Religious Belief in which the European Court of Human Rights Found a Violation of the Prohibition of *Refoulement*

It is challenging to find reasons to explain such a low percentage of cases related to offence to religious belief in which the ECtHR found a violation, or potential violation, of the prohibition of *refoulement*. However, some patterns can be observed when analysing all these cases together. These patterns might help to identify what the Court expects in a case for it to find a violation of Article 3 of the Convention.

4.4.2.1 Cases concerning returns of members of outlawed organisations

The first outstanding characteristic concerning these cases is that nearly half of them concern the return of members of outlawed organisations, mainly Russia's attempt to expel members of the Hizb ut-Tahrir to Uzbekistan.²⁶⁸ Hizb ut-Tahrir means "Liberation Party", and it has been described by the ECtHR as a 'global Islamic political party and/or religious society'.²⁶⁹ According to information provided by the Court, the movement 'was established in Jerusalem in 1953 and advocates the overthrow of governments throughout the Muslim world and their replacement by an Islamic State in the form of a recreated Caliphate.'²⁷⁰ The German Federal Ministry of

²⁶⁸ *Muminov v Russia* App no 42502/06 (ECtHR, 11 December 2008); *Umirov v Russia* App no 17455/11 (ECtHR, 18 September 2012); *Abdulkhakov v Russia* App no 14743/11 (ECtHR, 2 October 2012); *Zokhidov v Russia* App no 67286/10 (ECtHR, 5 February 2013); *Akram Karimov v Russia* App no 62892/12 (ECtHR, 28 May 2014); and *Rakhimov v Russia* App no 50552/13 (ECtHR, 10 July 2014).

²⁶⁹ *Hizb Ut-Tahrir and Others v Germany* App no 31098/08 (ECtHR, 12 June 2012) para 2.

²⁷⁰ *ibid.*

the Interior considered that the organisation ‘denied the right of the State of Israel to exist and called for its destruction and for the killing of Jews. This constituted an expression of the applicant’s basic philosophical position, which included the “active *Jihad*”.’²⁷¹ The NGO Forum 18 corroborates these statements,²⁷² and a report from Human Rights Watch has highlighted the number of people arrested in Uzbekistan for membership, real or perceived, to the group.²⁷³

Since the Hizb ut-Tahrir is considered a “deviant” group and one which is “alien to traditional Islam” according to the State,²⁷⁴ its beliefs have been considered offensive by the State. In this case, the unorthodox beliefs are likely to be violent, as confirmed by the Human Rights Committee.²⁷⁵ Consequently, because the organisation is outlawed in Uzbekistan, and there was a ‘real risk of ill-treatment of detainees’, the Court has decided in these cases that the expulsion of the applicants to Uzbekistan ‘would give rise to a violation of Article 3 of the Convention.’²⁷⁶

These decisions are particularly important, as they protect the rights of those who are considered to have potentially violent views not to suffer torture in a country which

²⁷¹ *ibid* para 6.

²⁷² Geraldine Fagan and Igor Rotar, ‘Central Asia: Hizb Ut-Tahrir Wants Worldwide Sharia Law’ (*Forum 18*, 29 October 2003) <www.forum18.org/archive.php?article_id=170> accessed 24 April 2020.

²⁷³ Acacia Shields, *Creating Enemies of the State: Religious Persecution in Uzbekistan* (Human Rights Watch 2004), cited by the ECtHR in *Muminov v Russia*, para 73.

²⁷⁴ Shields, *Creating Enemies of the State: Religious Persecution in Uzbekistan*, 47; and *Abdulkhakov v Russia*, para 144.

²⁷⁵ *AK and AR v Uzbekistan* Comm no 1233/2003 (Human Rights Committee, 31 March 2009) CCPR/C/95/D/1233/2003, para 7.2.

²⁷⁶ See eg *Rakhimov v Russia*, paras 9, 102, and 103.

is not a Contracting State of the ECHR. Yet, they beg the following question: is Uzbekistan, which even provided diplomatic assurances in some cases,²⁷⁷ worse than other countries which might persecute people for offending religious beliefs? In other words, is the situation for returnees in Uzbekistan worse than in Pakistan, Iran, or Afghanistan? This question is warranted because the Court affirmed in *Rakhimov* that it considered reports of NGOs, which were corroborated by UN bodies, confirming that ‘the issue of ill-treatment of detainees remains a pervasive and enduring problem in Uzbekistan.’²⁷⁸ Nevertheless, the Court took into consideration similar reports in several cases cited in the previous section and did not find a violation of Article 3.²⁷⁹ Therefore, it seems that the defining characteristic in these cases is not the supporting reports, but the likelihood that the individuals returned will suffer torture, given that they would surely be arrested upon return.

This situation is not exclusive to Uzbekistan, as there is a similar case in relation to a person accused of being a member of an “Islamic extremist network”, who was being deported to Libya.²⁸⁰ In this case, the applicant could risk facing torture upon return, either by the State or by members of the terrorist groups for disobedience (in this instance understood as apostasy). As in the cases concerning the Hizb ut-Tahrir, the Court found in favour of the applicant and did not allow his deportation.²⁸¹

²⁷⁷ See *Umirov v Russia*, para 121; and *Abdulkhakov v Russia*, para 150.

²⁷⁸ *Rakhimov v Russia*, para 99.

²⁷⁹ See eg *MB v The Netherlands*, paras 24–29; and *A v Switzerland*, paras 26–31.

²⁸⁰ *A v The Netherlands (Merits)* App no 4900/06 (ECtHR, 20 July 2010) paras 38–62. See also *A v The Netherlands (Admissibility)* App no 4900/06 (ECtHR, 17 November 2009) para 103.

²⁸¹ *A v The Netherlands (Merits)* paras 148–151.

It is important to stress that these decisions are well-founded and in line with international law.²⁸² However, given that the Court has allowed States to return individuals who were likely to be persecuted for their religious or sexual identity in their State of origin, this results in a rather paradoxical scenario: ie the ECtHR is more likely to grant protection to members of potentially violent groups, than to those who are members of non-violent groups who might likewise be arrested for their beliefs.

4.4.2.2 Chamber cases in which the Court found a violation of non-refoulement

This section comprises seven decisions from five different States (Sweden, France, Bulgaria, the Netherlands, and Turkey), attempting to return failed asylum seekers to Iran, Pakistan, Egypt, and Afghanistan. They also concern returnees from different religious traditions (Christianity, Ahmadiyyah, Islam, and Bahá'í). At first glance, the only common thread among these cases is that they are recent, all decided between 2010 and 2016. Although, as demonstrated in Chart 5, during this period, there were several cases which the Court considered either inadmissible or found no violation. A closer look, however, shows other similarities, as demonstrated below.

(i) Cases relying on the assessment of the United Nations High Commissioner for Refugees

The first of these cases, *ZNS v Turkey*, concerned a woman who converted to Christianity while seeking asylum in Turkey. In this case, the Court did not analyse the merits in depth. It primarily relied on the UNHCR assessment, which was in favour

²⁸² See Chapter 4.1.1.

of the applicant, to find a violation of Article 3.²⁸³ Another example of a direct assessment lacking a complete analysis of the circumstances of the case is *MB and Others v Turkey*. This case was about a family who fled Iran in 1999 for political reasons and sought asylum in Hakkari, Turkey.²⁸⁴ In 2002, the UNHCR denied the request to recognise the applicants as refugees, so the applicants fled to Istanbul, eventually converted to Christianity, and started working in a church.²⁸⁵ In 2008, the UNHCR granted the applicants refugee status, as it considered the first applicant to have ‘a well-founded fear of persecution based on his conversion to Christianity and his activities to promote Christianity during his stay in Turkey and, therefore, recognised him as a refugee on the ground of his religion.’²⁸⁶ However, when the applicants went to legalise their refugee status with the police, two of them had their request denied because they had travelled to Iran after seeking asylum in Turkey.²⁸⁷ The applicants clarified that they went to Iran illegally in order to take Bibles in Farsi to the country.²⁸⁸ Still, despite being recognised as refugees by the UNHCR, they were deported to Iran.²⁸⁹

²⁸³ See *ZNS v Turkey* App no 21896/08 (ECtHR, 19 January 2010) paras 45–50.

²⁸⁴ *MB and Others v Turkey* App no 36009/08 (ECtHR, 15 June 2010) paras 10–11.

²⁸⁵ *ibid* paras 11–13.

²⁸⁶ *ibid* para 14.

²⁸⁷ *ibid* para 16.

²⁸⁸ *ibid*.

²⁸⁹ *ibid* paras 16–17.

The applicants re-entered Turkey a day after they were deported to Iran and went to the UNHCR office, which guaranteed that their refugee status was still valid. Fearing another deportation, they submitted an application to the ECtHR.²⁹⁰ The decision was straightforward, as the Court stated that it was ‘not persuaded that the applicants’ claims regarding the risks that they might face in Iran on the basis of their religion were meaningfully examined by the domestic authorities before their deportation.’²⁹¹ Once again, the Court relied entirely on the authority of the UNHCR to find that there were ‘substantial grounds for accepting that the applicants face the risk of a violation of their rights under Article 3 if returned to Iran.’²⁹² In sum, in these cases, the prevalent characteristic is the UNHCR’s assessment, not the authenticity of the conversion or whether the applicants were unable to conceal their beliefs publicly.

(ii) *Cases indirectly related to offence to religious belief*

The second type of cases is only indirectly related to offence to religious belief. *RC v Sweden* is illustrative in this regard. The case concerns an applicant who was arrested on charges of acting against the regime and against Islam after he participated in student demonstrations in Iran.²⁹³ He claimed that he was imprisoned without a trial, was tortured while in prison, and eventually managed to flee to Sweden, where he

²⁹⁰ *ibid* paras 18–19.

²⁹¹ *ibid* para 32.

²⁹² *ibid* paras 33–34. See also *M and Others v Bulgaria* App no 41416/08 (ECtHR, 26 July 2011), paras 10, 77, 84, 105, and 118.

²⁹³ *RC v Sweden* App no 41827/07 (ECtHR, 9 March 2010) paras 9–10.

applied for asylum.²⁹⁴ A physician in Sweden confirmed that the applicant had several scars, likely originated from torture, thus supporting the applicant's claims that:

he had been chained around his ankles and suspended upside down for several hours, that boiling water had been thrown at his chest, that he had received blows to his head, jaw, abdomen and legs, and that he had been stabbed twice in the left thigh with a bayonet.²⁹⁵

In this case, two main arguments persuaded the majority of the judges to decide in favour of the applicant. The applicant had presented a medical certificate indicating injuries that he suffered while imprisoned in Iran, and the Court considered international reports that confirmed that Iran often detains persons who participate in peaceful demonstrations.²⁹⁶ Consequently, the majority found that the deportation of the applicant 'would give rise to a violation of Article 3 of the Convention.'²⁹⁷

The only judge who disagreed with the decision was Elisabet Fura, from Sweden. Judge Fura stated that it was not for the Court to re-evaluate the findings of the domestic authorities in Sweden, and that the applicant did not demonstrate that he was at risk of suffering torture on his return to Iran. Most disturbingly, she further stated that '[t]he fact that the applicant has in all probability been tortured in Iran is not enough in itself to substantiate that he runs a real risk of being tortured again if

²⁹⁴ ibid.

²⁹⁵ ibid para 11.

²⁹⁶ ibid paras 52–56.

²⁹⁷ ibid para 57.

returned.’²⁹⁸ This statement is categorically wrong, as previous torture undeniably demonstrates a well-founded fear of being subject to torture in the State of origin.²⁹⁹

Another indirect case of offence to religious belief combined with political issues is *KK v France*. In this case, the applicant claimed that he was a member of the Iranian Intelligence Services *Bassidjis* and was tasked with investigating Bahá’ís—considered in Iran as “enemies of Islam”.³⁰⁰ The applicant participated in some Bahá’í meetings and reported that members of the group did not present any risk to public order.³⁰¹ He later left the *Bassidjis*, started denouncing the unfair treatment of the Bahá’ís, and claimed that he was persecuted for both of his political and religious views, which led him to flee to Europe.³⁰² The Court took into consideration the situation of the country of origin, the fact that the applicant had criticised the treatment of Bahá’ís, and that he had left the *Bassidjis*, and found that France would violate Article 3 if it returned the applicant to Iran.³⁰³ Therefore, once again, the Court found that offence to religious belief alone perhaps would not suffice to stop a deportation, but added to other factors, such as critical political views, could lead to a violation of Article 3 of the Convention.

²⁹⁸ *ibid* dissenting opinion of Judge Fura, paras 1–14.

²⁹⁹ CAT/C/GC/4, para 45(e).

³⁰⁰ *KK v France* App no 18913/11 (ECtHR, 10 October 2013) paras 6–8.

³⁰¹ *ibid* para 9.

³⁰² *ibid* paras 10–15.

³⁰³ *ibid* paras 28, 51, and 54.

(iii) *Cases directly related to offence to religious belief*

A notable case directly related to offence to religious belief with a positive outcome for the applicant was *ME v France*. In this case, an Egyptian Coptic was allegedly beaten for his beliefs, as well as accused of proselytising using videos and books that offended Islam and Muslims.³⁰⁴ According to the applicant, he was also convicted to three years in prison for proselytising, but did not serve his sentence because he fled to France.³⁰⁵ He was not granted asylum because the French government was not convinced that the applicant would be exposed to ill-treatment on his return to Egypt, and due to contradictions in his account.³⁰⁶

In this case, the analysis of the Court was very objective. It described most characteristics analysed in cases regarding *non-refoulement*. It stated that it is, in principle, for the applicant to provide evidence that he would be exposed to a risk of treatment contrary to Article 3 of the ECHR, and that domestic courts are better placed to assess the facts of the case.³⁰⁷ It also explained that the risk of ill-treatment should be examined, taking into consideration the context of the country of return, although in this particular case, it did not find that the situation in Egypt represented a generalised risk to Coptic Christians.³⁰⁸ Nevertheless, it took into account the judicial sentence against the applicant for proselytism and concluded that this could potentially

³⁰⁴ *ME v France*, paras 7–16.

³⁰⁵ *ibid* para 20.

³⁰⁶ *ibid* paras 21–31, and 42–45.

³⁰⁷ *ibid* para 47.

³⁰⁸ *ibid* para 48.

lead to persecution by “Islamic fundamentalists” (*‘persécutions et de violences de la part d'intégristes musulmans’*), either by State or non-State actors.³⁰⁹

Most recently, as described in the previous section, the Court introduced a new criterion in its analysis on *non-refoulement*, which enquired whether the applicant would share his or her faith publicly upon return. This argument can be found in *NK v France*, which involved a convert to the Ahmadiyya religion who fled persecution for his beliefs in Pakistan.³¹⁰ The emphasis on the fact that the applicant was perceived to share his faith publicly and proselytise was pivotal in the Court’s decision in favour of the applicant.³¹¹ However, this is a very high burden imposed on the applicants, as it would require them to hypothetically put themselves in harm’s way in order to satisfy the Court’s criterion to stop States from deporting asylum seekers who want to conceal their religious identity.³¹² It is important to note, however, that both cases mentioned in this section are very similar to the cases mentioned in the previous one, in which the Court did not find a violation of Article 3 of the ECHR.³¹³ Thus, these two cases are rather exceptional and, unfortunately, do not present a principled approach to cases related to offence to religious belief and *non-refoulement*. Nevertheless, more refined arguments tend to be developed in cases taken to the Grand Chamber, as shown below.

³⁰⁹ *ibid* para 51.

³¹⁰ *NK v France* App no 7974/11 (ECtHR, 19 December 2013) paras 6–11.

³¹¹ *ibid* paras 42–43, and 46–47.

³¹² See a similar conclusion in Deborah Thebault and Lena Rose, 'What Kind of Christianity? *A v Switzerland*' (2018) 7 *Oxford Journal of Law and Religion* 543, 550.

³¹³ See Chapter 4.4.1.

4.4.2.3 *Grand Chamber case – FG v Sweden*

(i) *Chamber decision*

The emphasis on proselytism mentioned above was highlighted in *FG v Sweden*, a case with several interpretations on the topic and most of them problematic to some degree. The case concerns an asylum seeker who fled Iran because of his involvement with political parties opposing the regime.³¹⁴ He applied for asylum in Sweden in 2009 and converted to Christianity there.³¹⁵ Initially the applicant did not disclose a certificate of baptism and stated that his faith was a private matter.³¹⁶ Since his application was denied, he requested a new hearing based on his conversion and explained that ‘the act of converting from Islam to another religion was punishable by death in Iran.’³¹⁷

In the Chamber judgement, the Court followed its combined analysis of the situation in the country of origin and the personal circumstances of the applicant.³¹⁸ Concerning his conversion, the Court decided that since ‘the applicant has claimed that he converted to Christianity only after arrival in Sweden and he has kept his faith a private matter’, the Iranian government was probably not aware of his conversion.³¹⁹ Consequently, the Chamber judges concluded that the applicant failed to substantiate

³¹⁴ *FG v Sweden (Chamber)* App no 43611/11 (ECtHR, 16 January 2014) para 7.

³¹⁵ *ibid* para 7.

³¹⁶ *ibid* para 10

³¹⁷ *ibid* para 12.

³¹⁸ *ibid* para 35.

³¹⁹ *ibid* para 41.

that he would be at risk of death or torture on his return to Iran.³²⁰ This was, however, a narrow decision, as four judges decided against the applicant and three in favour. Judges Zupančič, Power-Forde, and Lemmens issued a compelling dissenting opinion based on two main reasons, stating that:

Firstly, there is, in our opinion, an unacceptable failure to assess, thoroughly, the risk which the applicant faces arising from his conversion to Christianity. Secondly, insofar as the majority implies that any such risk, if it exists, could be avoided by the applicant's concealment of his religious conversion, we consider that such a requirement is wholly unreasonable and no authority for such a proposition can be found in the case law of this Court.³²¹

The first argument of the dissenting judges is procedural, and it is largely discussed in the appeal to the Grand Chamber. The second argument is substantial, as it addresses the core of the issue concerning public display of faith. The dissenting judges are accurate when they call the requirement for someone to conceal his religious belief “wholly unreasonable”, as they explained that apostasy is:

a serious human rights issue for any Iranian living in Iran. The Government accepts that conversion from Islam to Christianity is considered illegal under Islamic law and that it is punishable by death. It notes that those who have so converted suffer intense pressure and are subjected to serious human rights abuses on a regular basis. It recognizes that extra-judicial killings and attacks by official Islamic militias or radical groups are a serious cause for concern and it cites a number of cases in which Christian pastors have been imprisoned because of their beliefs. It concedes that converts who suffer persecution are unable to seek protection and redress from the authorities, acknowledging that on 22 September, 2010, the 11th Circuit Criminal Court of Appeals for the Gilan Province upheld the death sentence and conviction of Youcef Nadarkhani for apostasy. However, the Government also submits that as long as a

³²⁰ ibid para 42.

³²¹ ibid joint dissenting opinion of Judges Zupančič, Power-Forde and Lemmens.

person keeps his or her religious belief as a private matter, he or she does not generally run any risk.³²²

Additionally, we argue that by requiring someone to conceal his or her religious views, the Court implicitly recognises that the fear of being persecuted on grounds of religion is well-founded. Consequently, by enforcing this requirement, the Court indirectly allows an exception to the principle of *non-refoulement*, despite the proscription being absolute in the framework of the ECHR.

It is laudable that the dissenting judges not only presented a reasonable substantive argument based on the case in question but also found support for their opinion in the jurisprudence of the CJEU in *Bundesrepublik Deutschland v Y and Z*. The CJEU case concerned members of the Ahmadiyya community, originally from Pakistan, seeking asylum in Germany. The asylum request was rejected because, according to German courts, the act of practising faith in public did not constitute a “core area” of freedom of religion or belief.³²³ This claim is strikingly against the literal reading of Article 10(1) of the EU Charter and Article 9(1) of the ECHR.³²⁴ At any rate, the central question of the case was:

whether Article 2 (c) of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that an applicant’s fear of being persecuted is well-

³²² *ibid.*

³²³ Joined Cases C–71/11 and C–99/11 *Bundesrepublik Deutschland v Y and Z* (*Grand Chamber*) (CJEU, 5 September 2012) para 42.

³²⁴ *ibid* para 56.

founded where such a person can avoid exposure to persecution in his country of origin by abstaining from certain religious practices.³²⁵

Naturally, not all restrictions to freedom of religion or belief can be equated to persecution, only a “severe violation” of the right can be regarded as such.³²⁶ Therefore, the analysis of whether a violation of freedom of religion or belief amounts to persecution is a matter of the seriousness of the violation. It is irrelevant whether the right is manifested in public or private, or whether it affects the so-called “*forum internum*” or “*forum externum*” of the right in question.³²⁷ The analysis of the domestic courts should instead have focused on whether there could be a severe violation of freedom of religion or belief upon return that would amount to torture or CIDT, based on the personal circumstances of the applicants.³²⁸ Therefore, the CJEU decided, as quoted by the dissenting judges in *FG v Sweden* (Chamber judgement):

where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status [...]. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.³²⁹

³²⁵ *FG v Sweden (Chamber)* joint dissenting opinion of Judges Zupančič, Power-Forde and Lemmens, quoting *Bundesrepublik Deutschland v Y and Z (Grand Chamber)* para 45.

³²⁶ *Bundesrepublik Deutschland v Y and Z (Grand Chamber)* paras 58–59.

³²⁷ *ibid* paras 62–63.

³²⁸ *ibid* paras 64–66.

³²⁹ *ibid* para 79.

(ii) *Grand Chamber decision*

The Grand Chamber overruled the Chamber judgement, but unfortunately their focus was solely on the procedural—not the substantial—aspect of the decision.³³⁰ This was a missed opportunity for the Court to clarify the question of concealment of religion or identity in cases of *non-refoulement*. The omission is even more significant given the fact that there were several reasons provided by the dissenting judges in the Chamber judgement to decide differently. However, it is noteworthy that the Court clarified some of the issues regarding its assessment of *non-refoulement* cases, such as how it should consider the existence of substantial risks for the applicants, stating that:

[i]f the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.³³¹

The focus of the Grand Chamber, however, was on procedural issues, as it chose to highlight an infrequently used procedural criterion—the *ex nunc* evaluation—as it stated that '[a] full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken.'³³² The *ex nunc* evaluation is an assessment of the evidence of the case by the Court 'as to the situation at the moment of its own decision'.³³³ In other

³³⁰ A similar analysis can be found in Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 129–131.

³³¹ *FG v Sweden (Grand Chamber)* App no 43611/11 (ECtHR, 23 March 2016) para 116.

³³² *ibid* para 158.

³³³ Thomas Spijkerboer, 'Subsidiarity and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 *International Journal of Refugee Law* 48, 53.

words, if the applicant has not been deported, and the facts regarding the applicant or the State of origin have changed, then the Court will decide based on the present situation of the applicant and country of origin. This procedure is relevant because most cases take several years to be decided by the ECtHR; nevertheless, though not an entirely novel situation at the Court, it is still a rarely invoked argument.³³⁴ For example, in none of the cases in which the Court found a violation of Article 3 in this thesis has the ECtHR mentioned such assessment.

Still, this was the very criterion upon which the Court relied upon in order to find a potential violation of Article 3 by Sweden. The Court stated that Sweden would violate Articles 2 and 3 of the Convention if it proceeded with the removal of the applicant without considering his conversion to Christianity as a “new circumstance” in a re-examination of the case.³³⁵ Moreover, the applicant submitted new documents to the Grand Chamber regarding the current way in which he manifested his faith, supported by religious leaders, which would merit a review of his asylum claims.³³⁶

There are three main errors in this decision. First of all, the government did not consider the applicant’s conversion as a “new circumstance” because he had told that to the Migration Board in his first interview when he declared that his conversion was a private matter.³³⁷ Therefore, this was not problematic from a procedural perspective, even though the Court deemed it as such. The second point is the fact that Sweden

³³⁴ The Court quotes, *ia, Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR, 11 January 2007) para 136; and *Sufi and Elmi v UK* Apps nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 215.

³³⁵ *FG v Sweden (Grand Chamber)* paras 156 and 158.

³³⁶ *ibid* paras 157.

³³⁷ *ibid* paras 10–21.

considered that his personal faith would not cause any trouble for the applicant on his return because he was a Muslim ‘for almost fifty years in Iran and had converted to Christianity *sur place* shortly after his arrival in Sweden.’³³⁸ This argument is completely irrelevant with regard to apostasy. Finally, and most importantly, the decision took into consideration several reports concerning the situation of apostates and religious minorities in Iran but did not decide based on the merits of the case. This is puzzling. As Thomas Spijkerboer explains in relation to the requirement of *ex nunc* assessment in other cases concerning asylum seekers:

If the position of courts is not to decide on the merits of asylum claims, but to decide on the legality of the administrative decision, then an *ex nunc* assessment is problematic, because courts may take into account evidence of which the administration could not have been aware. Only if courts are competent to assess the substantive merit of an asylum application themselves, would an *ex nunc* assessment be a plausible option.³³⁹

Consequently, based on the decision of the Grand Chamber, Sweden could simply re-examine the case, and find that the applicant’s conversion was not genuine—despite the statements provided suggesting the contrary—and return the applicant to Iran. The removal of the applicant would, by the principle of non-contradiction, be allowed by the Grand Chamber notwithstanding its information about the situation of those accused of offending beliefs in Iran.

The deficiencies of this judgement are further exacerbated by some of the individual opinions of the judges. Judges Jäderblom and Spano enforced the view of the Swedish government, explaining that:

for a convert who keeps a low profile, in the sense that he is not proselytising or does not manifest his Christianity in a political context,

³³⁸ ibid para 105.

³³⁹ Spijkerboer, 'Subsidiarity and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases', 53.

but attends home services and keeps religious materials in the home, there is not normally a risk of ill-treatment of a degree or nature sufficient to engage Articles 2 and 3.³⁴⁰

This is merely the initial statement, the rest of part 1 of their opinion could easily be described as a serious affront to the human rights of those living in States in which they cannot freely express their views, their identity, or their beliefs.

Judge Sajó correctly expressed that a separate analysis of the right to manifest one's religion should take place in the instant case.³⁴¹ He was one of the few judges who decided in line with the dissenting judges in the Chamber judgement, which had stressed that '[n]ational authorities cannot reasonably expect from an applicant that he or she abstain from the exercise of the fundamental right to religious freedom and conscience in order to avoid treatment prohibited under Article 3.'³⁴² The concise opinion of Judge Sajó was grounded on the documents available to the Court.

Judges Ziemele, de Gaetano, Pinto de Albuquerque, and Wojtyczek issued a separate joint opinion heavily criticising the decision on its lack of substance. The opinion provides a vigorous defence of freedom of religion or belief and a robust criticism of offence to religious belief based on international human rights documents.³⁴³ The judges unequivocally affirmed that the criminalisation of offence to religious belief, such as apostasy, is a violation of international law and that '[s]uch

³⁴⁰ *FG v Sweden (Grand Chamber)* opinion of Judge Jäderblom, joined in respect of part 1 by Judge Spano, para 1.

³⁴¹ *ibid* separate opinion of Judge Sajó.

³⁴² *FG v Sweden (Chamber)* joint dissenting opinion of Judges Zupančič, Power-Forde and Lemmens.

³⁴³ See eg *A/HRC/22/51*, quoted in *FG v Sweden (Grand Chamber)* joint separate opinion of Judges Ziemele, de Gaetano, Pinto de Albuquerque and Wojtyczek, para 10, fn 28.

punishment is inherently arbitrary, in so far as the criminalisation of the act of changing one's religion violates the right to freedom of religion and it effectively coerces Muslim citizens to refrain from adopting a different faith.³⁴⁴ Accordingly, the judges concluded by declaring that the deportation of the applicant to Iran:

equates to a violation of principles deeply enshrined in the universal legal conscience. The deportation order subjected him to the serious risk of being tried under a criminal law in flagrant breach of the right to freedom of religion and the principle of criminal legality, and in a criminal trial which would constitute a flagrant denial of justice. The implementation of such a deportation order would amount to a grave violation of the principle of *non-refoulement*. Consequently, we conclude that there has been a substantive violation of Articles 2 and 3 of the Convention on account of the deportation order issued against the applicant. In the light of the above, we further add that, *rebus sic stantibus*, the respondent State should not deport the applicant to Iran.³⁴⁵

Unfortunately, the *ratio decidendi* in the present case was procedural, not substantial. Thus, despite the judges' invocation of *clausula rebus sic stantibus*, as the case stands, this line of argument cannot be implied in the decision of the Court. Thus, even though their opinion is legally sound, the decision of the Grand Chamber in the present case does not have this normative power. This conclusion can be demonstrated by the fact that in ten cases concerning *non-refoulement* and offence to religious belief after *FG v Sweden*, the Court did not find a single violation of Articles 2 and 3 of the ECtHR.³⁴⁶ Therefore, even though the present case had an immediate positive outcome for the applicant, it did not generate a positive change for the case law in this area.

³⁴⁴ *FG v Sweden (Grand Chamber)* joint separate opinion of Judges Ziemele, de Gaetano, Pinto de Albuquerque and Wojtyczek, para 10.

³⁴⁵ *ibid* para 12.

³⁴⁶ *H, I and J v Switzerland*; *AG and MM v The Netherlands*; *A v Switzerland*; *MB v The Netherlands*; *ASR v Turkey*; *HA and HA v Norway*; *AJ and FB v Sweden* App no 36384/16 (ECtHR, 13 December 2016); *MHA v The Netherlands*; *TM and YA v The Netherlands*; *JG v The Netherlands*.

4.4.3 Preliminary Conclusions about the Jurisprudence Related to Offence to Religious Belief and *Non-Refoulement* at the European Court of Human Rights

It is clear from the material presented above that the ECtHR largely denies *non-refoulement* claims to victims accused of offending religious beliefs in their State of origin. The list of requirements for applicants to prove their beliefs is ever increasing, making it nearly impossible for them to find any legal certainty in the jurisprudence of the Court. Despite the inconsistent approach of the Court, the analysis of the 60 decisions above provides some interesting findings.

First, although the Court does not seem to show a preference for any returning State or State of return, nor of religious belief or sexual identity, it has clearly decided mostly in favour of States in this area. Consequently, even if the ECtHR has become “an immigration appeals tribunal”, as many States complain,³⁴⁷ it has certainly been a very generous one for States.

Second, the facts of the cases are not decisive for the ECtHR to find a violation of Article 3. The Court has found a violation in cases in which the applicants were inconsistent or contradictory in their stories.³⁴⁸ Nevertheless, it did not find a violation in several cases in which applicants provided substantial evidence of their new beliefs and risk of persecution upon return.³⁴⁹ Reports from States, NGOs, and UN experts on the

³⁴⁷ CoE, 'Draft Copenhagen Declaration' (5 February 2018) Draft Copenhagen Declaration paras 25–26; further removed in the final versions of the CoE, 'Copenhagen Declaration' (13 April 2018) Copenhagen Declaration.

³⁴⁸ See eg *ME v France*, paras 21–31, and 42–45; and *RC v Sweden*, paras 52–56.

³⁴⁹ See eg *Muradi and Alieva v Sweden*, paras 13–14.

topic did not make the Court change its decisions either.³⁵⁰ The only aspect that seems consistently decisive for the Court in determining the outcome of the case has been the UNHCR determination of refugee status to applicants.³⁵¹

Third, the Grand Chamber decision in *FG v Sweden* cemented the idea that the ECtHR is primarily interested in analysing procedural matters rather than substantive issues. This is problematic because there is no exception to the principle of *non-refoulement*. Thus, the Court should evaluate the facts at hand to ensure that applicants are not returned to a place where they might face persecution for their beliefs or sexual identity. Instead, what the Court has done in many cases is merely an analysis of Articles 6 and 13 of the ECHR, the right to a fair trial and the right to an effective remedy. It is important to note that there are some exceptions to this approach. For example, while in *MB and Others v Turkey*, the Court found a violation of Article 13 as well as a potential violation of Article 3,³⁵² in *ME v France* and *KK v France* the Court found a potential violation of Article 3 despite France providing the applicant with the right to an effective remedy.³⁵³ These cases are crucial because their main ratio decidendi was the prohibition of *refoulement* rather than procedural issues, thereby demonstrating that the Court is able to go beyond merely assessing the asylum procedures of the returning States, as stressed in the separate opinions in *FG v Sweden*.³⁵⁴

³⁵⁰ *A v Switzerland*, paras 26–31.

³⁵¹ See *ZNS v Turkey*, paras 45–50; and *MB and Others v Turkey*, paras 33–34.

³⁵² *MB and Others v Turkey*, paras 38–40.

³⁵³ Respectively, *ME v France*, paras 54–70; and *KK v France*, paras 55–71.

³⁵⁴ *FG v Sweden (Grand Chamber)* joint separate opinion of Judges Ziemeles, de Gaetano, Pinto de Albuquerque and Wojtyczek, paras 7–12.

Fourth, the most significant outcome of *FG v Sweden* (Grand Chamber) was that its obiter dicta helped the Court to define a list of principles to be taken into consideration in cases regarding *non-refoulement*, which include an analysis of the: (a) general nature of obligations under Article 3; (b) principle of *non-refoulement*; (c) general principles concerning the application of Article 3 in expulsion cases; (d) risk of ill-treatment by private groups; (e) principle of *ex nunc* evaluation of the circumstances; (f) principle of subsidiarity; (g) assessment of the existence of a real risk; (h) distribution of the burden of proof; (i) past ill-treatment as an indication of risk; (j) membership of a targeted group.³⁵⁵ This is a positive development, as the Court has often stated that while it ‘is not formally bound to follow its previous judgements, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.’³⁵⁶ However, these criteria have not translated into more factual protection yet.

Fifth, the consequences of offence to religious belief—such as apostasy and blasphemy in States which punish these offences—are highly underestimated by the ECtHR. Moreover, the Court has mischaracterised the role of freedom of religion or belief in cases related to *non-refoulement* and offence to religious belief. In cases of offence to religious belief related to *non-refoulement*, the right to freedom of religion or belief and/or the right to private life should be analysed at least in conjunction with the *prohibition of refoulement*. When the Court disregards such analysis, it needs to create new criteria to decide on these issues. This has led the Court to develop unreasonable hurdles for applicants, such as requesting returnees to conceal their

³⁵⁵ *JK and Others v Sweden* App no 59166/12 (ECtHR, 23 August 2016) paras 77–105.

³⁵⁶ *Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002) para 74.

beliefs and sexual preferences. As Advocate General Bot of the CJEU affirmed, ‘we cannot reasonably expect an asylum-seeker to forego manifesting his faith or to conceal any other constituent element of his identity to avoid persecution’.³⁵⁷ In addition, since the prohibition of *refoulement* is absolute, being even considered as *jus cogens*,³⁵⁸ the Court should be extremely careful when deciding such cases.

Finally, there might always be a real risk of ill-treatment upon return when persons claim asylum, but it is naturally challenging to prove the prospect of such claims. While the Court has repeatedly asserted that ‘a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3 of the Convention,’³⁵⁹ often applicants cannot provide much more evidence than that. Moreover, even when they have given enough evidence of violent acts perpetrated against them, judges have been dismissive of their claims.³⁶⁰ The reality is that it is impossible for the applicants to prove that they will suffer an attack when returned to their State of origin, and a mistake by the State or a Supranational Court in this regard can be fatal.³⁶¹

In conclusion, The ECtHR and UN bodies are aware of the normative standards that they should follow regarding *non-refoulement*. Yet, they have all chosen, time and again, to ignore international normative guidelines, international reports, and even

³⁵⁷ Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* (CJEU, 19 April 2012) Opinion of AG Bot, para 103.

³⁵⁸ Costello and Foster, ‘Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’, 323.

³⁵⁹ See eg *Damla and Others v Germany*; often quoting *Vilvarajah and Others v UK* Apps nos 13163/87 et al (ECtHR, 30 October 1991) para 111.

³⁶⁰ *RC v Sweden*, dissenting opinion of Judge Fura, paras 1–14.

³⁶¹ See eg the controversial case of *NA v Finland* App no 25244/18 (ECtHR, 14 November 2019).

their own jurisprudence in order to be more flexible towards States. In turn, the returning States have often been critical of norms regulating offence to religious belief, yet they choose to be complicit with States that enforce such norms, thus violating ‘principles deeply enshrined in the universal legal conscience’.³⁶² That said, the only responsible course of action for human rights bodies and courts is to declare, unequivocally, that the removal of persons who face a risk of being persecuted due to laws regulating offence to religious belief should not be tolerated in any circumstance.

³⁶² *FG v Sweden (Grand Chamber)* joint separate opinion of Judges Ziemele, de Gaetano, Pinto de Albuquerque and Wojtyczek, para 12.

5 OFFENCE TO RELIGIOUS BELIEF RELATED TO QUALIFIED RIGHTS¹

Qualified rights are substantive rights which can be subject to limitations in exceptional circumstances. As with any type of classification, this terminology is not perfect. The categorisation here, as elsewhere in this thesis, is merely didactic. Human rights are, first and foremost, ‘universal, indivisible and interdependent and interrelated.’² Consequently, any classification of rights must always take these elements into consideration to avoid misunderstandings. As Theo van Boven affirms, categories of human rights ‘should neither distract from the indivisibility of all human rights, nor from their comprehensive and holistic nature.’³

A common misunderstanding in this area is the notion that qualified rights are less important than absolute rights. To reiterate, the classification is not intended to define the hierarchy of norms, only to highlight their differences in nature. In this way, absolute rights should not be restricted in any manner; yet qualified rights may be limited in exceptional circumstances and based on a strict test. The emphasis on the exceptionality of limitations is not unwarranted, as States tend to expand these

¹ This chapter was initially intended to be more detailed, however, this was changed for three main reasons. First, my master thesis focused on the resolutions on defamation of religions at the UN and qualified rights. Thus, to avoid repetition, this chapter has been shortened. Second, as explained in the introduction, several books on blasphemy and qualified rights have been published since the beginning of this research. Therefore, in order to keep this thesis as original as possible, preference was given to areas that were underexplored. Third, I have published during the doctorate on this subject. The Faculty of Law encourages incorporating such publications into the thesis, but due to the word limit, preference was given to the originality of the work. Faculty of Law, 'Graduate Research Students Handbook 2019-20' (*University of Oxford*, 2019) <www.law.ox.ac.uk/sites/files/oxlaw/pgr_handbook_2019-20.pdf> accessed 24 April 2020, p 19.

² A/CONF.157/23, para 5.

³ Theo van Boven, 'Categories of Rights' in Daniel Moeckli et al (eds), *International Human Rights Law* (3rd edn, OUP 2017) 136.

limitations,⁴ thus inverting the order of the rule-exception structure of rights. In sum, from a holistic perspective, qualified rights are not less important than absolute rights, but given the fact that their manifestation might impinge on other human rights, they can—in exceptional circumstances—be limited.

There are four rights that are regarded as qualified in most human rights treaties, namely the rights to freedom of religion or belief, freedom of expression, freedom of association, and freedom of assembly. The right to private life could also be included in this categorisation, primarily because of the definition given in the ECHR.⁵ However, since most human rights treaties do not display a similar text, and given that the right was already analysed in this thesis,⁶ we will not explore it separately here.

These four rights share a similar structure, which first describes the scope of the right and then the grounds on which these rights can be limited. They also tend to be grouped together in human rights treaties,⁷ and although the legitimate aims for limitation are not identical, they are fairly similar.⁸ Most importantly, limitations to these rights have been raised in several cases concerning offence to religious belief, as described below. Before moving to the case law, we will first analyse some of the principles that should be taken into consideration when adjudicating these rights.

⁴ See Heiner Bielefeldt, 'Limiting Permissible Limitation: How to Preserve the Substance of Religious Freedom' (2020) 15 Religion & Human Rights 3, 6–8.

⁵ ECHR, art 8.

⁶ See Chapter 4.4.3.

⁷ See ICCPR, arts 18–22; ECHR, arts 9–11; ACHR, arts 12, 13, 15 and 16; and Banjul Charter, arts 8–11.

⁸ Evans, *Religious Liberty and International Law in Europe*, 318; see also *Svyato-Mykhaylivska Parafiya v Ukraine*, para 132.

5.1 General Normative Principles

The scope of qualified rights will be analysed below; however, some general principles applicable to these rights are commonly misunderstood and require clarification.

5.1.1 Principled Distinctions

5.1.1.1 *Protecting humans or protecting ideas*

As mentioned earlier,⁹ human rights primarily protect human beings, not ideas, opinions, causes, or objects. In this way, ‘freedom of religion or belief protects human beings, not religions as such’;¹⁰ freedom of expression protects the rights of individuals to express themselves, not the content of their opinions; and freedom of association and assembly protects the rights of individuals to gather together, not the cause that brings them together. These are principled statements but also normative in nature; thus, *lex ferenda*, not *lex lata*.

The reason for such elucidation is twofold. First, although human rights primarily protect human beings, they also protect legal persons, such as religious organisations and corporates.¹¹ Likewise, buildings dedicated to religion and religious

⁹ See chapter 1.5.5.

¹⁰ Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary* 493.

¹¹ See in relation to freedom of religion or belief *Cha'are Shalom Ve Tsedek v France*, para 72; freedom of expression *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990) para 47; and freedom of association *Zhdanov and Others v Russia* Apps nos 12800/08 et al (ECtHR, 16 July 2019) para 170. See also Evans, *Religious Liberty and International Law in Europe*, 286–289.

sites are also protected in international law.¹² The reason for such protection is rather simple: while human rights aim to protect human beings, such protection must be real. As the European Court of Human Rights has often stated, the ECHR was designed to: ‘guarantee not rights that are theoretical or illusory but rights that are practical and effective.’¹³ Consequently, since worship is a part of freedom of religion or belief, if a person is interrupted while worshipping, then there is an interference with the said right. Equally detrimental to the right to freedom of religion or belief of individuals would be the destruction of temples and sacred objects.

The second argument within the domain of *lex lata* is that human rights are not static. Based on the “living instrument” doctrine,¹⁴ one can affirm that the protection of religious feelings currently is at least part of the human rights discourse.¹⁵ That does not mean it should be recognised as a right, only that it has been recognised by the ECtHR as being within the scope of human rights.¹⁶ We regard the ECtHR stance on this matter as deeply flawed and will provide more arguments for this proposition in this chapter. The importance of highlighting it here is that the concept of protecting

¹² *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm no 276/03 (ACHPR, 25 November 2009) para 173; and *Kichwa Indigenous People of Sarayaku v Ecuador* (IACtHR, 27 June 2012) Series C No 245, paras 217–220. See also Juan Pablo Pérez-León-Acevedo and Thiago Alves Pinto, ‘Enforcing Freedom of Religion or Belief in Cases Involving Attacks against Buildings Dedicated to Religion: The *Al Mahdi* Case at the International Criminal Court’ (2019) 37 *Berkeley Journal of International Law* 437.

¹³ *Folgerø and Others v Norway* App no 15472/02 (ECtHR, 29 June 2007) para 100.

¹⁴ See eg *Tyrer v UK* para 31; and *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) para 102. See further Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

¹⁵ See further Chapter 5.1.4.

¹⁶ See eg *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) dissenting opinion of Judge Pinto de Albuquerque.

religious feelings will not disappear only by being ignored. On the contrary, it will perdure until decisive action is taken by the Court to disavow its usage.

Naturally, in all these instances, it could be argued that the ultimate beneficiaries of these protections are individuals. However, the difference between both perceived exceptions mentioned above is stark, especially considering the element of causality. While some individuals may have their rights to freedom of religion or belief restricted if a religious building is destroyed, the same causal nexus is not observed in cases of offence to religious belief. In other words, the right to freedom of religion or belief is not generally restricted due to mere insults. Hence, though there may be exceptions, the principle that human rights should primarily protect human beings remains valid.

5.1.1.2 *Forum internum and forum externum*

This distinction is often found in academic literature but still confounds both scholars and practitioners.¹⁷ *Forum internum* means the intrinsic aspect of the right, which is primarily internal and personal. *Forum externum* is the extrinsic aspect of the right, thus related to its manifestation. Inexplicably, this distinction is referred almost exclusively in relation to freedom of religion or belief. Peter Petkoff explains that '[t]he distinction between *forum internum* and *forum externum* has been definitive for the articulation of a public-private divide in international law with reference to the different aspects of freedom of religion or belief (belief versus manifestation).'¹⁸

¹⁷ Evans, *Religious Liberty and International Law in Europe*, 294.

¹⁸ Peter Petkoff, 'Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 *Religion and Human Rights* 183, 183.

The importance of this distinction relies on the fact that the *forum internum* has absolute protection. In other words, limitations cannot be imposed ‘on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice’,¹⁹ neither on the freedom of opinion.²⁰ It is important to note that neither the Human Rights Committee in its General Comments on Articles 18 and 19 of the ICCPR nor the ECHR guide on Article 9 mention this terminology.²¹

Despite being relevant, there are many problems with this classification. On the one hand, if misinterpreted, this distinction can trivialise the significance of the *forum internum*.²² On the other hand, the distinction can be interpreted as suggesting the primacy of the *forum internum* over the *forum externum*, as refuted by Bielefeldt and Wiener.²³ In reality, these dimensions are connected, the main difference being that some dimensions of the rights, such as conscience and opinion, cannot be limited without impairing the right as a whole. Inversely, limitations on certain forms of manifestations may be limited without infringing on the entirety of the right.

¹⁹ Human Rights Committee, 'General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)' (30 July 1993) CCPR/C/21/Rev.1/Add.4, para 3.

²⁰ CCPR/C/GC/34, para 5.

²¹ Respectively CCPR/C/21/Rev.1/Add.4; CCPR/C/GC/34; *Guide on Article 9 of the European Convention on Human Rights* (CoE 2018).

²² Compare Manfred Nowak and Tanja Vorspernik, 'Permissible Restrictions on Freedom of Religion or Belief' in Tore Lindholm et al (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004), 148–150; with Bielefeldt, 'Limiting Permissible Limitation: How to Preserve the Substance of Religious Freedom', 15–18.

²³ Heiner Bielefeldt and Michael Wiener, *Religious Freedom under Scrutiny* (University of Pennsylvania Press 2020) 32–36.

A prime example of the confusion regarding these concepts is the already mentioned case of *Bundesrepublik Deutschland v Y and Z*.²⁴ In this case, the distinction between *forum internum* and *forum externum* was used to define whether Germany could deport Ahmadis to Pakistan. Certain manifestations of the Ahmadi faith, including the fact that they consider themselves Muslims, are punishable by law in Pakistan.²⁵ The argument posed by Germany was that the manifestation of religion was not part of the “core” of freedom of religion or belief.²⁶ The rationale proposed was that if the manifestation of religion is not part of the *forum internum*, then the prohibition of limitations to their freedom of religion or belief would not be absolute. Consequently, Germany would be able to deport the applicants without violating the principle of *non-refoulement*. Fortunately, in this instance, the CJEU did not accept such an argument, as it declared that:

it is unnecessary to distinguish acts that interfere with the ‘core areas’ (‘forum internum’) of the basic right to freedom of religion, which do not include religious activities in public (‘forum externum’), from acts which do not affect those purported ‘core areas’.²⁷

Accordingly, the argument posed by States that individuals could be expelled to their home countries if they keep their faith private does not find support in this distinction.

²⁴ See Chapter 4.4.2.3(i).

²⁵ Penal Code [Pakistan] arts 298-B and 298-C.

²⁶ *Bundesrepublik Deutschland v Y and Z (Grand Chamber)* para 49.

²⁷ *ibid* para 62.

5.1.1.3 *Negative and positive duties and freedoms*

Human rights impose positive and negative duties to States, which put simply means that States have obligations both to refrain from interfering with rights and to protect rights. These obligations were already observed with the other rights analysed in this thesis but are often overlooked when discussing qualified rights. Negative obligations are particularly noticeable in this context, as they impose duties on States not to interfere with qualified rights, except in the narrow circumstances envisaged in international treaties. Positive obligations are naturally more undefined, as States can decide how to protect rights. In practice, they mean that States have an obligation to protect individuals from harassment based on their beliefs, to remove barriers to expressions, and to protect the right to collective action and peaceful assembly.²⁸

By the same token, individuals have positive and negative freedoms, as Bielefeldt argues that '[t]aking freedom seriously necessarily implies equal concern for what has been called "positive" freedom and "negative" freedom. These are two sides of one and the same coin. No one can be free to do something unless he or she is also free not to do it'.²⁹ Therefore, individuals have the freedom to manifest religion and the freedom not to believe, the freedom to express themselves and the freedom not to be compelled to voice an opinion, the freedom to belong to an association and the freedom not to be coerced to join one.³⁰ Naturally, some of these rights may be restricted under the specific circumstances described in the next section.

²⁸ Dominic McGoldrick, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli et al (eds), *International Human Rights Law* (3rd edn, OUP 2018) 213, 219 and 228.

²⁹ Bielefeldt, 'Freedom of Religion or Belief: A Human Right under Pressure', 22.

³⁰ McGoldrick, 'Thought, Expression, Association, and Assembly', 225.

5.1.2 Permissible Limitations Test³¹

States must justify the need to impose limitations on qualified rights. They can justify these limitations based on strict criteria set out by international treaties as well as legal principles. These criteria are called the permissible limitations test. Thus, adjudicating bodies use such tests to assess whether a State may have legitimate reasons to interfere with qualified rights. The limitations test is also referred to as “the three-part test” or proportionality test.³² The test provides that for a limitation to be justified, it must be prescribed by law (legality), meet a legitimate aim (legitimacy) and be necessary in a democratic society (necessity).³³ Once again, limitations should always be exceptional, and a State must fulfil all these requirements. If the State is unable to fulfil any of the criteria, adjudicating bodies should find a violation of the right in question.

5.1.2.1 *Interpretative principles relating to restrictions on rights*

The Siracusa Principles on the present topic provide fundamental interpretative guidelines on limitations within the ambit of the ICCPR. The first principle states that ‘[n]o limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.’³⁴ Other

³¹ This section is based on Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 104–120, although significantly reduced in relation to the ECtHR and expanded to include other jurisdictions.

³² See Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 309.

³³ See eg *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979) para 45.

³⁴ Commission on Human Rights, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) Siracusa Principles, para 1.

relevant interpretative principles include the understanding that limitations shall not ‘jeopardize the essence of the right concerned’, ‘be applied for other purposes than it has been prescribed’, ‘be applied in an arbitrary manner’, or be discriminatory.³⁵ Given their ubiquitous nature, these principles can also help to interpret regional treaties.³⁶

Additionally, limitations shall be interpreted strictly, ‘in favor of the rights at issue’, and ‘in the light and context of the particular right concerned’.³⁷ Even though the Siracusa Principles are soft law, they embody elements of international customary law, especially the one providing that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’³⁸

5.1.2.2 *Legality*

A limitation to a human right may be regarded as “prescribed by law” whether its source lies in statute or the common law. The ECtHR developed this criterion further in *The Sunday Times v UK*, as follows:

Firstly, the law must be *adequately accessible*: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is *formulated with sufficient precision to enable the citizen to regulate his conduct*: he must be able - if need be with appropriate advice

³⁵ *ibid*, paras 2, 6, 7, and 9.

³⁶ ECHR, art 18. See also ICCPR, art 5(1); ACHR, art 29(a); and EU Charter, art 54.

³⁷ Siracusa Principles, paras 3–4.

³⁸ VCLT, art 31(1).

- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.³⁹

To put it simply, for a law to fulfil the criterion of legality, it must be accessible and foreseeable.⁴⁰ Laws about offence to religious belief, such as blasphemy and apostasy, would hardly pass this test if it was applied strictly. However, in practice, supranational adjudicating bodies tend to be flexible at this stage, thus allowing a certain degree of vagueness in the formulation of laws ‘to avoid excessive rigidity and to keep pace with changing circumstances’.⁴¹ The flexible stance of supranational courts and treaty bodies is mostly due to their subsidiary role in relation to domestic authorities. Nevertheless, they have the power to find that domestic norms do not fulfil this limb of the test, in which case they must find a violation of the right at issue without further examination.⁴²

5.1.2.3 Legitimacy

Jeremy Gunn correctly affirmed that ‘[t]o the extent that limitations clauses impose practical limits on states actions, the “legitimate purpose” requirement is the weakest prong.’⁴³ Indeed, the Banjul Charter does not even include this requirement in relation

³⁹ *The Sunday Times v UK*, para 49 (emphasis added).

⁴⁰ Siracusa Principles, para 17.

⁴¹ *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) para 29.

⁴² See eg *Church of Scientology of St Petersburg and Others v Russia* App no 47191/06 (ECtHR, 2 October 2014) para 47; *Mockutė v Lithuania* App no 66490/09 (ECtHR, 27 February 2018) para 128; and *Altun and Others v Turkey* App no 54093/10 (ECtHR, 10 July 2018) para 16.

⁴³ T Jeremy Gunn, 'Permissible Limitations on the Freedom of Religion or Belief' in John Witte Jr and M Christian Green (eds), *Religion and Human Rights: An Introduction* (OUP 2011) 261.

to qualified rights. The Human Rights Committee, despite benefiting from the normative guidance provided by the Siracusa Principles and its own General Comments on the topic, has accepted vague legitimate aims posed by States to limit rights.⁴⁴ The ECtHR has also been exceedingly forgiving of States' arguments regarding legitimate aims, even though it has maintained that the:

enumeration of legitimate aims is strictly exhaustive and the definition of the aims is necessarily restrictive; if a limitation of this freedom is to be compatible with the Convention it must, in particular, pursue an aim that can be linked to one of those listed in this provision.⁴⁵

Accordingly, to limit qualified rights, States must provide specific reasons (legitimate aims) to justify the restriction to the said rights. However, legitimate aims can differ for each right. For instance, a legitimate aim to interfere with the right to freedom of expression is “national security”,⁴⁶ yet this aim is not included as a legitimate ground to restrict freedom of religion or belief, as explained below:

This omission is by no means accidental; on the contrary, the refusal by the drafters of the Convention to include this specific ground among the legitimate grounds of interference reflects the fundamental importance of religious pluralism as “one of the foundations of a democratic society” and of the fact that the State cannot dictate what a person believes or take coercive steps to make him change his beliefs.⁴⁷

Nevertheless, it is rather common that a particular limitation will be based on grounds that are similar (although not identical) to the ones prescribed by human rights

⁴⁴ Gehan Gunatilleke, 'Criteria and Constraints: The Human Rights Committee's Test on Limiting the Freedom of Religion or Belief' (2020) 15 Religion & Human Rights 20, 36.

⁴⁵ *Guide on Article 9 of the European Convention on Human Rights*, para 33; See also *Nolan and K v Russia* App no 2512/04 (ECtHR, 12 February 2009), para 73; and *SAS v France*, para 113.

⁴⁶ ECHR, art 10(2); also ICCPR, art 19(3)(b); ACHR, art 13(2)(b).

⁴⁷ *Guide on Article 9 of the European Convention on Human Rights* 45, para 34.

treaties. Supranational courts and treaty bodies have to deal with a range of languages and legislation that might not reflect international treaties verbatim. Consequently, despite the aims being strictly exhaustive, these bodies are—once again—quite flexible in their consideration of the legitimate aims claimed by States. The most frequent reasons invoked to limit rights in cases regarding offence to religious belief are public order, public morals, and the protection of the rights of others.

(i) *Public order*

The legitimate aim of protecting public order has been contentious since its inception, as the meaning of public order in English and French (official languages of most human rights treaties) are different.⁴⁸ The former relates to the absence of disorder, whereas the latter is related to public policy.⁴⁹ The Siracusa Principles provide an ambiguous characterisation that could be interpreted as encapsulating both meanings, defining public order ‘as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).’⁵⁰ The result is that States can easily justify limitations to qualified rights in relation to this aim.⁵¹

⁴⁸ Gunatilleke, ‘Criteria and Constraints: The Human Rights Committee’s Test on Limiting the Freedom of Religion or Belief’, 24–25.

⁴⁹ *ibid* 25.

⁵⁰ Siracusa Principles, para 22 (emphasis in original).

⁵¹ In Europe, States have successfully invoked this aim to limit one’s right to manifest religion or belief through religious attire. See eg *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001); *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) para 99; and *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008) para 60.

(ii) *Public morals*

The legitimate aim of protecting public morals is arguably the least objective ground to restrict qualified rights. Despite being obscure, the Banjul Charter goes as far as imposing a duty on States to promote and protect ‘morals and traditional values recognized by the community’.⁵² Inversely, the Siracusa Principles narrows the discretion of States, asserting that ‘while enjoying a certain margin of discretion, [States] shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.’⁵³

The Human Rights Committee, when explaining the scope of freedom of religion or belief, has clarified that ‘limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition’.⁵⁴ It has also utilised the same interpretation in relation to freedom of expression, reiterating that ‘the concept of morals derives from many social, philosophical and religious traditions.’⁵⁵ Even so, the Committee has allowed—based on this aim—the censorship of radio and television programmes on issues related to homosexuality due to its potential ‘harmful effects on minors’.⁵⁶

The obiter dicta of the ECtHR on this topic is that ‘national authorities enjoy a wide margin of appreciation in matters of morals since there is no uniform European

⁵² Banjul Charter, art 17(3).

⁵³ Siracusa Principles, para 27.

⁵⁴ CCPR/C/21/Rev.1/Add.4, para 8.

⁵⁵ CCPR/C/GC/34, para 32.

⁵⁶ *Hertzberg et al v Finland* Comm no R14/61 (Human Rights Committee, 2 April 1982) paras 10.3–10.4.

conception of morals'.⁵⁷ What the Court has often considered as a matter of morality is nudity and sexual content, thus mostly related to freedom of expression. However, some issues could be linked to freedom of religion or belief as well. For instance, a State could justify an interference with the right to freedom of religion or belief of someone who professes a sincere belief in 'the inoffensiveness of the human body' and decides to walk naked, as confirmed in the case of *Gough v UK*.⁵⁸

(iii) *The protection of the rights and freedoms of others*

The aim of the protection of the rights and freedoms of others is frequently invoked by States when an interference with a qualified right takes place. The Human Rights Committee and the ECtHR have divergent theoretical perspectives on this legitimate aim. The UN body has declared about the aim of "respect of rights and reputation of others" that the term "rights" generally refers to 'human rights as recognised in the Covenant and more generally in international human rights law', and the term "others" refers to 'persons individually or as members of a community'.⁵⁹ The landmark cases decided by the Committee in this regard dealing with this legitimate aim are *Ross v Canada* and *Faurisson v France*,⁶⁰ both concerning anti-Semitic speech. In contrast, the ECtHR has an open perspective, stating that '[t]he range of rights which might be

⁵⁷ *Gough v UK* App no 49327/11 (ECtHR, 28 October 2014) para 166.

⁵⁸ *ibid* paras 156–158 and 185–188.

⁵⁹ CCPR/C/GC/34, para 28.

⁶⁰ *Ross v Canada*, para 11.5; *Faurisson v France* Comm no 550/1993 (Human Rights Committee, 8 November 1996) CCPR/C/58/D/550/1993, para 9.6.

protected is not limited.⁶¹ In practice, however, both bodies have been deferential to States on this issue.⁶²

The ECtHR approach, being even broader than other similar bodies, has been highly problematic. This has happened because the legitimate aim is often unsubstantiated by States, and the Court has been lenient with this practice. The Court has, for instance, accepted principles such as “living together” and secularism as “rights of others”.⁶³ Furthermore, the *Otto-Preminger Institute* case is often mentioned in this regard, in which a film with satirical religious themes was seized in order ‘to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons’.⁶⁴ Such a right is not present in the Convention, nor in any other international human rights document, but the rationale was accepted by the Court.⁶⁵ Therefore, the present legitimate aim is germane to the discussion in question and will be explored in more detail in this chapter.

As demonstrated above, none of these aims is particularly convincing when adjudicating offence to religious belief, yet they have been claimed by applicants and States to protect religious feelings. Overall, the requirement of legitimacy, like that of legality, is objective and should be strictly interpreted. Adjudicating bodies tend to be succinct at this stage of the test due to their own flexibility in accepting justification

⁶¹ Rainey, Wicks, and Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 323.

⁶² Gunn, ‘Permissible Limitations on the Freedom of Religion or Belief’, 261.

⁶³ See eg *SAS v France*, para 121; and *Osmanoğlu and Kocabaş v Switzerland* App no 29086/12 (ECtHR, 10 January 2017) paras 62–64.

⁶⁴ *Otto-Preminger-Institut v Austria*, para 48.

⁶⁵ See also *Wingrove v UK*; *IA v Turkey*; and more recently *ES v Austria*.

from States and because few applicants challenge States in this regard. As a result, States tend to overlook this criterion altogether. However, this is a missed opportunity for human rights courts and treaty bodies to apply an objective criterion in order to discourage States from pursuing expansive justifications for limiting human rights.

5.1.2.4 *Necessity*

The Siracusa Principles define “necessity” as implying that a limitation: ‘(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim.’⁶⁶ Similarly, the ECtHR summarised the principles that should guide its future decisions on matters of necessity in the *Silver* case, in which it explained that:

- (a) the adjective “necessary” is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”;
- (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
- (c) the phrase “necessary in a democratic society” means that, to be compatible with the Convention, the interference must, inter alia, correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued”;
- (d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.⁶⁷

As explained above, the criterion of necessity includes several elements, such as “pressing social need”, proportionality, and margin of appreciation. These elements

⁶⁶ Siracusa Principles, para 10.

⁶⁷ *Silver and Others v UK* App nos 5947/72 et al (ECtHR, 25 March 1983) para 97.

are not equally objective, despite the guidelines from the Siracusa Principles stating that ‘[a]ny assessment as to the necessity of a limitation shall be made on objective considerations.’⁶⁸ The Siracusa Principles also suggest taking into consideration the “least restrictive means” approach when analysing necessity, but once again, that relates more to the proportionality of a limitation rather than its necessity.

We suggest that it would be better for human rights courts and treaty bodies to analyse these issues separately. While a brief analysis of proportionality is required to define the necessity of an action, we argue that these issues could be decided separately in order to add a third objective step to the limitations test. There are several reasons for this argument; the most relevant are the following.

First, this approach could save resources of overloaded supranational bodies as unnecessary limitations could be dismissed at this stage, without further analysis of proportionality.⁶⁹ Second, supranational bodies might not have the expertise to decide whether a measure is strictly necessary, or if alternative means are feasible. Even national courts, which are likely to be more familiar with the facts of the cases, might struggle with this matter, as the Canadian Supreme Court stated that a ‘limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive.’⁷⁰ Third, the ECtHR already divides the consideration of necessity into several parts, commonly considering first whether an interference with the right corresponds to a “pressing social need”, and second whether

⁶⁸ Siracusa Principles, para 10.

⁶⁹ See eg *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) para 52.

⁷⁰ *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, [McLachlin, J]. See also *Beit Sourik Village Council v Israel* HCJ 2056/04, para 48.

an interference is “proportionate to the aim pursued”. Naturally, the latter assessment is inherently more subjective than the former.

In most cases concerning offence to religious belief, the limitation to qualified rights is not necessary in a democratic society. The *Pussy Riot* case is a notable example in this regard. In this case, the applicants had filmed a protest inside a church and uploaded the recording online. The State then banned all the material from the group’s website, considering it a form of extremism. The ECtHR decided these issues separately, although the reasons given by the State in both matters were, among others, to protect the religious feelings of its citizens. First, since the group’s actions could disrupt people praying at the church, the Court stated that their actions could justify the State to limit their freedom of expression to protect the rights of others.⁷¹ However, since their punishment was exceedingly harsh, the penalty was not proportionate.⁷² Second, regarding the ban of the Collective’s material, the Court simply decided that the measure did not meet a pressing social need, and therefore was not necessary.⁷³ Since the ECtHR considers both issues of necessity and proportionality *stricto sensu* under the “necessity” criterion, the finding was that the State did not fulfil this requirement in both instances. However, they are different in nature, as the first issue could require “balancing” rights, while the second did not. Consequently, the analysis of proportionality is better taken separately.

⁷¹ *Mariya Alekhina and Others v Russia*, para 228.

⁷² *ibid* paras 228–229.

⁷³ *ibid* para 268.

5.1.2.5 Proportionality

It is essential to clarify that the term proportionality has at least two meanings in the limitations analysis which are interrelated but distinct. The first meaning is proportionality as a general principle of law, or proportionality *lato sensu*. This is well-illustrated in the EU Charter:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁷⁴

In this case, the principle of proportionality should be applied whenever a limitation is imposed. Another potential function of this principle could be applying it to all phases of the limitations test, namely legality, legitimacy, and necessity. Take for instance the Finish Criminal Code, which prescribes a fine or imprisonment for a maximum of six months for a person who ‘publicly blasphemes against God’.⁷⁵ The crime is considered an offence against public order in the country. Suppose a person was arrested for blasphemy and sentenced to three months in prison. If the ECtHR were to analyse the case, it would likely consider the matter as fulfilling all three limbs of the test, then it would analyse whether the sentence was proportionate to the crime. Nevertheless, if the principle of proportionality was applied to all stages of the test, and given that there is a growing consensus that blasphemy laws should be repealed,⁷⁶ the Court could regard the criminal offence of blasphemy in itself disproportionate,

⁷⁴ EU Charter, art 52.

⁷⁵ Criminal Code [Finland] c 17, s 10.

⁷⁶ Rabat Plan of Action, para 25.

which would consequently disclose a violation of freedom of expression. In any case, that is not the approach currently taken by supranational bodies, likely because they might consider that this method would interfere excessively with domestic norms.

The second meaning of proportionality is *stricto sensu*, thus often analysed in conjunction with necessity or immediately after that, as demonstrated in the previous section. This analysis is required in many cases and, when done correctly, it can play a vital role in restricting extensive limitations to human rights. A prime example of this type of proportionality can be observed in *Larissis and Others v Greece*. In this case, air force officers were convicted of proselytising among other officers and civilians. The ECtHR considered that the interference with the right to freedom of religion or belief was prescribed by law and that it had a legitimate aim to protect the rights and freedoms of others. Yet, when examining the necessity and proportionality of the measures, the Court expressed that proselytism was protected under freedom of expression but not ‘improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church’.⁷⁷ Thus, by analysing the proportionality of the limitations, the Court found that the State could not prohibit the officers from sharing their beliefs—in their personal capacity—with civilians.⁷⁸ Therefore, the proportionality analysis helped the Court to examine each circumstance of the case separately and deliver a fair decision.

Unfortunately, the analysis of proportionality has many pitfalls. First, the scrutiny of proportionality says little about the nature of an interference. The example of *Müller and Others v Switzerland* is illustrative in this regard. In this case, the State

⁷⁷ *Larissis and Others v Greece*, para 45.

⁷⁸ *ibid* paras 47–61.

confiscated paintings regarded as obscene because they could offend “religious sensibilities”.⁷⁹ The ECtHR considered the confiscation of the paintings lawful and necessary for the protection of public morals.⁸⁰ When examining the proportionality of the case, the Court took into consideration the fact that Switzerland did not destroy the paintings, even though the local criminal code provided for the destruction of obscene media.⁸¹ Consequently, the Court did not find the imposed measures disproportionate.⁸² Therefore, the proportionality assessment did not consider whether or not laws on obscenity should be criminalised, only that the measures imposed by the State were proportionate to achieve the aim of protecting public morals.

Second, proportionality does not help States to set standards based on the decisions of supranational bodies, as exemplified by the cases of *Delfi* and *MTE*. In *Delfi AS v Estonia*, an online news website was held liable for defamation posted on the comment section of their articles.⁸³ Thus, it was obliged to pay the injured person the equivalent of EUR 320 for non-pecuniary damages—a sum that the ECtHR considered proportionate.⁸⁴ By contrast, in *Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt v Hungary*, a similar case involving notice and takedown of insulting comments from an Internet news portal, the ECtHR decided that the domestic

⁷⁹ *Müller and Others v Switzerland*, paras 12–14.

⁸⁰ *ibid* paras 38–39.

⁸¹ *ibid* para 40.

⁸² *ibid* paras 41–44.

⁸³ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 3.

⁸⁴ *ibid* paras 160–161.

courts had failed to balance the ‘rights and interests of all those involved’, thus finding a violation of freedom of expression.⁸⁵ The main difference between the cases was not their nature, nor the rights involved, but the level of the insults included in the comments. In *Delfi*, they were considered as hate speech, while in *MTE and Index.hu Zrt* they were considered as merely insulting.⁸⁶

Third, the proportionality analysis can have adverse effects when used to balance freedom of religion or belief against abstract principles—such as neutrality, secularism, or human dignity. This point can be noticed in *Ebrahimian v France*, a case concerning a social worker who claimed that her right to freedom of religion or belief was violated when her contract was not renewed because she wore a headscarf at work. While examining the issue of necessity, the Court framed the matter as a balance between the principles of neutrality in public services and the right of the applicant to wear the headscarf.⁸⁷ Despite neutrality not being a legitimate aim, the Court gave much more weight to this principle than the individual right to freedom of religion or belief, as it decided ‘to give priority to the requirement of State neutrality and impartiality’.⁸⁸ Consequently, when balancing abstract principles and the right to freedom of religion or belief, the analysis of proportionality becomes easily determined by the arguments provided by the States, as pointed out by the dissenting judges in the case:

⁸⁵ *Magyar Tartalomszolgáltatók Egyesülete and Index.Hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 91.

⁸⁶ *ibid* para 85.

⁸⁷ *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015) para 63.

⁸⁸ *ibid* para 70.

While the Court must be conscious of its subsidiary role, it cannot divest itself of its supervisory role by adjusting the terms of Article 9(2), broadening – with reference to ever more abstract ideals and principles – the scope of the limitations for which that provision exhaustively provides and disengaging with the requirements of proportionality.⁸⁹

Therefore, proportionality does not clarify what content should be prohibited, it rarely provides legal certainty about the boundaries of limitations, and States can easily surmount this step by invoking abstract interests and principles. Unsurprisingly, the concept of proportionality has been criticised, especially the terminology of balancing competing interests, which is often employed in human rights cases.⁹⁰ Bielefeldt argues that the language of balancing can undermine fundamental rights, as it results in an abstract quantification of rights⁹¹ and a zero-sum antagonism between interests.⁹² Tsakyrakis asserted that '[t]he adoption of a balancing test, according to the principle of proportionality, risks neglecting the complexity of moral evaluation and, especially, the complexity of rights.'⁹³ Möller postulates that proportionality inevitably leads to rights inflation.⁹⁴ Endicott also acknowledges the incommensurability problem,

⁸⁹ *ibid* partly Concurring and Partly Dissenting Opinion of Judge O'Leary

⁹⁰ Compare *Lautsi and Others v Italy (Grand Chamber)* App no 30814/06 (ECtHR, 18 March 2011) para 73; and Evans, *Religious Liberty and International Law in Europe*, 332–340; with Bielefeldt, 'Limiting Permissible Limitation: How to Preserve the Substance of Religious Freedom', 10–12; and Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, 57–59.

⁹¹ See also Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191.

⁹² Bielefeldt, 'Limiting Permissible Limitation: How to Preserve the Substance of Religious Freedom', 10–12.

⁹³ Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468, 475. See also Francisco J Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49.

⁹⁴ Kai Möller, 'Proportionality and Rights Inflation' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 155–172.

postulating that: ‘if there is no rational basis for deciding one way rather than the other, then the result seems to represent a departure from the rule of law, in favour of arbitrary rule by judges.’⁹⁵

All these criticisms inevitably beg the question, why is this concept still largely utilised? The answer is rather simple: because it is often unavoidable. Nevertheless, it would be foolish to dismiss these criticisms only based on necessity. We argue that the problem with proportionality *stricto sensu* relies mostly on its application rather than its terminology or theory.

Regarding the terminology, we consider it limited but merely symbolic, after all, the allegorical image of Lady Justice’s balancing scales portrays precisely this symbol. On the objection of balancing leading to a zero-sum result, that is largely intrinsic to judicial cases, especially in adversarial systems, as James Marshall explains:

In the trial situation both the party-plaintiff and party-defendant seek identical goals, that is, judgment in their favor. The ultimate value for each party is not only generally fixed but unique; thus, the litigation process customarily culminates in an all-or-nothing, or zero-sum result.⁹⁶

These answers do not invalidate the objections raised above; they just highlight that analogies and judicial litigation are limited tools to bring equal justice to everyone.

That said, balancing is particularly problematic when it is assumed that it is the only manner to solve human rights issues. Indeed, that is not the case. This is the reason why we chose to use the term “limitations test” rather than “proportionality test” or “balancing test”. Proportionality *stricto sensu* and “balancing” only take place at the

⁹⁵ Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 317.

⁹⁶ James Marshall, 'Lawyers, Truth and the Zero-Sum Game' (1972) 47 Notre Dame Law Review 919, 919.

end of the limitations test—if the State has adequately fulfilled all the other justification requirements. Naturally, the criticisms mentioned above are highly pertinent because far too often adjudicating bodies rush the case analysis to its proportionality stage, where the decisions are inevitably subjective.

While proportionality may not be desirable, it is sometimes required. If the state fulfils all objective requirements to impose a limitation, then judges may have to balance incommensurable considerations. This is not an unfamiliar task for judges, as they often perform such balancing when defining civil damages or criminal sentencing.⁹⁷ As Endicott contends, '[w]e actually need a system that authorizes judges to balance the unbalanceable.'⁹⁸ That does not mean that decisions will become completely arbitrary for two main reasons. Firstly, while qualified rights are incommensurable, they are not incomparable. Thus, in a given situation of competing rights, judges may be able to decide which right may take preference without necessarily impairing other rights completely. Secondly, the institutional premise of the judiciary is vital to lessen the negative impacts the proportionality exercise may have upon human rights.⁹⁹ This means that strong and independent judicial bodies, both domestically and internationally, are well-placed to make reasoned assessments of proportionality. As Endicott concludes, '[t]he only viable argument in favor of proportionality reasoning in human rights adjudication is an argument of necessity; that it is necessary, in light of the institutional premise, even though it does not bring

⁹⁷ Endicott, 'Proportionality and Incommensurability', 323–324.

⁹⁸ *ibid* 325.

⁹⁹ *ibid* 326.

objectivity’.¹⁰⁰ Still, it seems that the best way for judges to mitigate the subjectivity of the proportionality assessment is by limiting its application, which would require a more rigorous analysis of the stages of the limitations test prior to proportionality.

5.1.3 Subsidiarity and the Margin of Appreciation

The principle of subsidiarity and the concept of the margin of appreciation have been a constant point of contention for academics, lawyers and States.¹⁰¹ In order to understand why the concept is so controversial, one needs first to understand its meaning and function in the system. Subsidiarity is, simply put, the ‘relationship between two institutions or norms, by which one supplements the other in appropriate circumstances’.¹⁰² In the context of international human rights treaties, the principle of subsidiarity means that States Parties to such treaties have the primary responsibility to protect the rights of their citizens, and an international body or court has a supplementary responsibility to make sure that States fulfil their obligations.¹⁰³

The ECtHR has called the practical application of this principle “the margin of appreciation”. Consequently, the margin of appreciation is the level of judicial deference granted by the Court to national authorities in determining certain cases,

¹⁰⁰ ibid 329.

¹⁰¹ Janneke Gerards and Sarah Lambrecht, 'The Final Copenhagen Declaration: Fundamentally Improved with a Few Remaining Caveats' (*Strasbourg Observers*, 18 April 2018) <www.strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats> accessed 24 April 2020.

¹⁰² Gerald L Neuman, 'Subsidiarity' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013) 361.

¹⁰³ Copenhagen Declaration, para 7.

mostly those involving qualified rights.¹⁰⁴ The application of the concept is relatively loose, but some judges of the Court have called for consistency in its application.¹⁰⁵

The criteria that the ECtHR has used to apply the concept of the margin of appreciation have been less than ideal, but they have an intrinsic logic. The ECtHR takes several elements into consideration when deciding whether or not the margin of appreciation can be granted to States, for example: level of consensus, moral controversy, broad and deep consideration by national courts, and seriousness of the right infringed.¹⁰⁶ Furthermore, the Court has decided that in relation to limitations to qualified rights, it leaves to States a margin of appreciation that is ‘given both to the domestic legislator (“prescribed by law”) and to the bodies that are called upon to interpret and apply the laws in force’.¹⁰⁷

Nevertheless, this margin is not unlimited. The Court stated in a landmark case that it is empowered to give the final ruling on limitations as ‘[t]he domestic margin of appreciation thus goes hand in hand with a European supervision.’¹⁰⁸ Therefore, even if the State declares that a particular issue falls within its margin of appreciation, it is the Court that decides whether or not to grant this margin to States.

¹⁰⁴ See eg Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 26–37.

¹⁰⁵ See eg Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 1, 20; and Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 1.

¹⁰⁶ See also Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee' (2016) 65 International and Comparative Law Quarterly 21.

¹⁰⁷ *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) para 48.

¹⁰⁸ *ibid* para 49.

The main problem with the concept of the margin of appreciation is the fact that the ECtHR often grants—by default—a wide margin of appreciation for States to decide specific issues, including those regarding morality, sexuality, and religion.¹⁰⁹ Since limitations should be interpreted narrowly, it is plainly contradictory for States to have, in principle, a wide margin of appreciation.¹¹⁰ The level of deference can only be determined after all stages of the limitations test are fulfilled, not the other way around. Therefore, the criticism should be directed at the level of deference accorded to a State rather than the concept itself.

All supranational courts accord a certain level of deference to national authorities, but the concept of margin of appreciation has become synonymous with a wide level of deference to States. Consequently, other human rights courts and treaty bodies have chosen not to apply the concept in their jurisdiction. The African Court on Human and Peoples' Rights has mentioned the concept of the margin of appreciation in the *Tanganyika* case while describing the jurisprudence of the ECtHR, but it did not apply the concept in its decisions.¹¹¹ The Inter-American Court of Human Rights has avoided the concept in its jurisprudence.¹¹² Furthermore, Judge Cançado Trindade

¹⁰⁹ Nicholas Bamforth, 'Social Sensitivity, Consensus and the Margin of Appreciation' in Petr Agha (ed) *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Hart Publishing 2017) 129–144.

¹¹⁰ See *ia Ebrahimian v France*, para 65; and *Mouvement Raëlien Suisse v Switzerland*, para 61.

¹¹¹ *Tanganyika Law Society v Tanzania* App no 9/2011 (ACtHPR, 14 June 2013) paras 106.2–106.3.

¹¹² See eg '*The Last Temptation of Christ*' (*Olmedo-Bustos et al*) v Chile.

mentioned that the concept could not be developed in the Inter-American system without weakening the protection of rights.¹¹³

The Human Rights Committee, in its early decisions, granted a certain “*margin of discretion*” to States when assessing limitations to freedom of expression.¹¹⁴ This margin is also acknowledged in the Siracusa Principles, particularly in the context of limitations on grounds of protecting morals.¹¹⁵ However, these principles clarify that such a margin of discretion does not apply to the rule of non-discrimination.¹¹⁶ In any event, the Human Rights Committee affirmed in General Comment 34 that the scope of freedom of expression should not ‘be assessed by reference to a “margin of appreciation”’.¹¹⁷ Since General Comment 34 is more recent than the Siracusa Principles, this indicates that the Human Rights Committee would likely extend the same interpretation to other qualified rights.

The main difference between the Human Rights Committee and the regional courts is that the former does not issue binding judgements, only expert views. Therefore, it is naturally easier for the Human Rights Committee to make more forceful assertions because there is no legal obligation imposed by the Committee on States.¹¹⁸ Nonetheless, this is not the case at the other regional courts, which also

¹¹³ Antônio Augusto Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (2nd edn, Editorial Jurídica de Chile 2006) 390.

¹¹⁴ *Hertzberg et al v Finland*, para 10(3).

¹¹⁵ Siracusa Principles, para 27.

¹¹⁶ *ibid* para 28.

¹¹⁷ CCPR/C/GC/34, para 36.

¹¹⁸ See eg McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee’, 106.

rejected the concept of the margin of appreciation. Consequently, we argue that the ECtHR could be more involved in a judicial dialogue with other regional courts, which have similar jurisdiction powers, in order to review its approach to subsidiarity.

5.1.4 The Evolutionary Interpretation of Human Rights

One of the consequences of proportionality is what some scholars call “rights inflation”.¹¹⁹ To put it briefly, this means that different types of interests become “rights”, as they are balanced against other interests or rights by adjudicating bodies. One example often referred to in academic literature is the case of *Hatton v UK* at the ECtHR. In this case, residents living close to Heathrow Airport argued that the increase in night flights affected their sleep, and subsequently their health. The dissenting judges stated that the residents had a right to sleep, which should be properly balanced against the town’s economic well-being.¹²⁰ Although one could conceive the right to sleep as a new right, such a right is not listed on the ECHR. The actual right in question was the right to respect for private life, as elevated noise levels during the night might disturb sleep, which could, in turn, have health implications for individuals.¹²¹

Consequently, the right to sleep is not a new right, but a manifestation of the right to private life. In the same vein, the right to be forgotten is a manifestation of the right to protection of personal data and the right to private life, LGBT+ rights are

¹¹⁹ See also Möller, 'Proportionality and Rights Inflation', 155–172; and Tsakyrakis, 'Proportionality: An Assault on Human Rights?', 475–487.

¹²⁰ *Hatton and Others v UK* App no 36022/97 (ECtHR, 8 July 2003), joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner.

¹²¹ *ibid* para 84.

expressions of the right to equality and non-discrimination, and so on. While “new rights” can be used effectively for advocacy purposes, they must be used with caution and should always be connected to an established human right in litigation.¹²²

This leads to the question of whether the scope of rights has evolved. The ECtHR has confirmed the evolving nature of rights since *Tyrer v UK* (1978) when it declared that ‘[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.’¹²³ The Court also applies this doctrine to limitations of rights, as follows:

the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights.¹²⁴

Although there is academic debate around the topic,¹²⁵ international courts and treaty bodies have largely endorsed the evolutionary interpretation of treaties.¹²⁶ What is rarely debated, however, is the fact that not all “evolution” is positive, nor is every expansion necessarily beneficial. This point is briefly raised by de Londras and Dzehtsiarou in relation to restrictions to prisoner voting and the right to wear religious

¹²² van Boven, 'Categories of Rights', 144–146. See a contrario William F Schulz and Sushma Raman, *The Coming Good Society: Why New Realities Demand New Rights* (HUP 2020).

¹²³ *Tyrer v UK*, para 31.

¹²⁴ *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) para 146.

¹²⁵ See Bjørge, *The Evolutionary Interpretation of Treaties*; and de Londras and Dzehtsiarou, *Great Debates on the European Convention on Human Rights*, 71–92.

¹²⁶ See eg *Judge v Canada*, para 10.3; and *Atala Riffo and Daughters v Chile* (IACtHR, 24 February 2012) Series C No 239, para 83.

attire.¹²⁷ We argue, additionally, that one of the best issues to illustrate this point is limitations to offence to religious belief.

The ECtHR has stated time and again that there is a ‘right of citizens not to be insulted in their religious feelings by the public expression of views of other persons.’¹²⁸ Since this is not a proper Convention right, it must be within the scope of another right, namely freedom of religion or belief. This is not a new issue, as it was predicted by Malcolm Evans more than 20 years ago when analysing the cases of *Otto-Preminger* and *Wingrove*.¹²⁹ Consequently, this “right” exists within the European system and imposes a restriction on other rights. However, this “right” is neither in accordance with normative standards for qualified rights, nor in line with developments in international human rights law, as we will demonstrate below.

5.2 Freedom of Religion or Belief

5.2.1 Scope

The right to freedom of thought, conscience, religion or belief is enshrined in all major human rights treaties.¹³⁰ Freedom of religion or belief has gained substantive prominence in the last decade, and there are currently many publications providing an

¹²⁷ de Londras and Dzehtsiarou, *Great Debates on the European Convention on Human Rights*, 89–91.

¹²⁸ See *ia Otto-Preminger-Institut v Austria*, para 48; *Wingrove v UK*, para 45; and *ES v Austria*, para 51.

¹²⁹ Evans, *Religious Liberty and International Law in Europe*, 341.

¹³⁰ ECHR, art 9; ICCPR, art 18; ACHR, art 12; Banjul Charter, art 8.

in-depth analysis of the right.¹³¹ Put simply, the right ‘enables persons from all beliefs and none to express themselves according to their conscience.’¹³² Yet, despite being a well-established right, it is highly controversial.¹³³

There are at least three reasons which make this right particularly relevant for this thesis. First, the right has been manipulated politically, being a core element of the “culture wars” and, for this reason, it is often mischaracterised.¹³⁴ Second, the right is often conflated with religion itself. Consequently, since discussing religious issues can be controversial, supranational courts often abdicate their role to decide on limitations to the right, granting a wide level of deference to States in these matters.¹³⁵ Third, while the right is often neglected in many cases, its scope has also paradoxically been unduly expanded by the ECtHR. In other words, it is often invoked when it has no role to play in adjudication and ignored when it is essential for legal reasoning.¹³⁶

All the points mentioned above regard the “right for religious persons not to be offended”, which was not in the original scope of the right to freedom of religion or belief. The scope of the right ‘encompasses freedom of thought on all matters, personal

¹³¹ See ia Tore Lindholm et al, *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004); Evans, *Religious Liberty and International Law in Europe*; Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*; and Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (OUP 2018).

¹³² Nazila Ghanea and Thiago Alves Pinto, 'Limitations to Freedom of Religion or Belief in Theory and Practice' (2020) 15 *Religion & Human Rights* 1, 1.

¹³³ Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, 1–5.

¹³⁴ McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs*, 51–56.

¹³⁵ Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 132.

¹³⁶ Respectively, Chapter 5.2.2, and Chapter 4.

conviction and the commitment to religion or belief, whether manifested individually or in community with others.’¹³⁷ This includes the right to have or adopt a belief, to wear religious attire, to worship, and to observe religious traditions. Moreover, as mentioned above, the right to freedom of religion was meant to protect individuals, not beliefs per se.¹³⁸ Therefore, in theory, it should not protect beliefs from being criticised. Nor should it protect individuals from criticism, as long as such criticism does not threaten ‘an individual’s freedom of conscience.’¹³⁹ This is because States have a duty to protect individuals from harassment while they are manifesting their beliefs. However, since the Court has endorsed ‘the right of citizens not to be insulted in their religious feelings’, such a right has become part of the scope of freedom of religion or belief for Member States of the Council of Europe.¹⁴⁰

5.2.2 Jurisprudence Related to Offence to Religious Belief

Offence to religious belief is often perpetrated by individuals, not the State. Therefore, there have been several cases where individuals have claimed that States have a positive duty to protect them from symbolic attacks against their religions. If portrayed in this manner, one might assume that there is a real conflict of rights in these cases, in which courts would have to balance between freedom of religion or belief and freedom of expression. However, as mentioned above, there are other steps that require

¹³⁷ CCPR/C/21/Rev.1/Add.4, para 1.

¹³⁸ See Chapter 5.1.1.1.

¹³⁹ Evans, *Religious Liberty and International Law in Europe*, 295.

¹⁴⁰ *Otto-Preminger-Institut v Austria*, para 48.

close consideration before the proportionality is analysed. In this manner, a better understanding of the right to freedom of religion and the “protection of religious feelings” is required to address this issue appropriately.

5.2.2.1 Making sense of offence to religious feelings

The “right to be protected from religious offence” was developed slowly due to a series of misunderstandings and problematic cases. In 1980, the European Commission on Human Rights opined that it disagreed with the interpretation that ‘a particular creed or confession can derive from the concept of freedom of religion a right to be free from criticism.’¹⁴¹ The Commission also stated that it did not ‘exclude the possibility of criticism or “agitation” against a church or religious group reaching such a level that it might endanger freedom of religion and where a tolerance of such behaviour by the authorities could engage State responsibility.’¹⁴² These are excellent normative standards, but they were never fully endorsed by the Commission nor the ECtHR. The Commission declared, two years after the obiter dicta mentioned above, that there was a ‘right of citizens not to be offended in their religious feelings by [blasphemous] publications’ and consequently decided that:

If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.¹⁴³

¹⁴¹ *Church of Scientology v Sweden* App no 8282/78 (ECommHR, 14 July 1980) para 5.

¹⁴² *ibid.*

¹⁴³ *Gay News Ltd and Lemon v UK*, paras 11–12.

While one could argue that blasphemy is different from the criticism of religion, most expressions considered as blasphemous, at least the ones discussed in this chapter, aim to criticise religious beliefs. Still, the cases above demonstrate that the Commission was inconsistent in its jurisprudence since it started deciding cases regarding apparent conflicts between freedom of religion or belief and freedom of expression. The decision of the Commission in *Gay News* led, predictably, to an increase in claims for it to protect religious feelings.

Another factor that led to the expansion of the concept of “religious feelings” was that it became a synonym for “religious convictions”; despite the term “feelings” being significantly more fluid and flexible than “convictions”. There are several examples of this usage. In one case, the Commission described that the applicant had ‘progressed to a higher stage in his religious feelings’.¹⁴⁴ In another, the Court defined prayers and worship as ‘manifestations of religious feelings’.¹⁴⁵

Since descriptions of religious feelings are broad and vague, both applicants and States have used them on numerous occasions. On the one hand, applicants have claimed that States did not respect their religious feelings because they could no longer display their religion on their identity cards,¹⁴⁶ or because they refused to be assigned a tax card number which they believed was a sign of the Antichrist.¹⁴⁷ Applicants have also claimed protection of their right to freedom of religion or belief against several

¹⁴⁴ Compare *Chauhan v UK* App no 11518/85 (ECommHR, 12 July 1988); with *Chauhan v UK* App no 11518/85 (ECommHR, 16 May 1990) Report 28.

¹⁴⁵ *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) para 24.

¹⁴⁶ *Sofianopoulos and Others v Greece* Apps nos 1988/02 et al (ECtHR, 12 December 2002).

¹⁴⁷ *Skugar and Others v Russia* App no 40010/04 (ECtHR, 3 December 2009).

forms of offence to religious belief perpetrated by other persons. Some examples are individuals who considered the ordination of women to the priesthood as “heresy”,¹⁴⁸ the depiction of a saint with a gas mask on the cover of a magazine as “profanation”,¹⁴⁹ the publication of the “Satanic Verses” and the Danish Cartoons as “blasphemous”,¹⁵⁰ and the depiction of Jesus in a film as “defamatory”.¹⁵¹

On the other hand, States have argued even more abstract definitions of the term. For example, Turkey claimed that women wearing the headscarf, or military officers manifesting their religion in private, could somehow hurt the religious feelings of others as these manifestations infringed the principle of secularism.¹⁵² Italy defended that the removal of crucifixes from classrooms would equally offend the feelings of the majority of its population.¹⁵³ Germany even considered the dismissal of a church

¹⁴⁸ *Karlsson v Sweden* App no 12356/86 (ECommHR, 8 September 1988) and *Williamson v UK*.

¹⁴⁹ *Dubowska and Skup v Poland* Apps nos 33490/96 and 34055/96 (ECommHR, 18 April 1997); and *Kubalska and Kubalska-Holuj v Poland* App no 35579/97 (ECommHR, 22 October 1997).

¹⁵⁰ *Choudhury v UK*; and *Ben El Mahi and Others v Denmark* App no 5853/06 (ECtHR, 11 December 2006).

¹⁵¹ *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*.

¹⁵² Constitution [Turkey] art 24; See also *Kalaç v Turkey* App no 20704/92 (ECtHR, 1 July 1997); *Acarca v Turkey* App no 45823/99 (ECtHR, 3 October 2002); *Aksoy v Turkey* App no 45376/99 (ECtHR, 3 October 2002); *Balci v Turkey* App no 48718/99 (ECtHR, 3 October 2002); *Baspınar v Turkey* App no 45631/99 (ECtHR, 3 October 2002); *Celikates and Others v Turkey* App no 45824/99 (ECtHR, 3 October 2002); *Dagli v Turkey* App no 45373/99 (ECtHR, 3 October 2002); *Dal and Özen v Turkey* App no 45378/99 (ECtHR, 3 October 2002); *Duman v Turkey* App no 42788/98 (ECtHR, 3 October 2002); *Gündoğdu v Turkey* App no 47503/99 (ECtHR, 3 October 2002); *Kayseri v Turkey* App no 46643/99 (ECtHR, 3 October 2002); *Önce v Turkey* App no 45627/99 (ECtHR, 3 October 2002); *OÖ v Turkey* App no 42137/98 (ECtHR, 3 October 2002); *Pektas v Turkey* App no 39682/98 (ECtHR, 3 October 2002); *Soysever v Turkey* App no 39826/98 (ECtHR, 3 October 2002); *Yüğrük v Turkey* App no 39826/98 (ECtHR, 3 October 2002); *Akbulut v Turkey* App no 45624/99 (ECtHR, 6 February 2003); *Sen and Others v Turkey* App no 45824/99 (ECtHR, 8 July 2003); and *Leyla Şahin v Turkey*.

¹⁵³ *Lautsi and Others v Italy (Grand Chamber)* para 37.

organist for getting a divorce as a matter of religious feelings.¹⁵⁴ As a result, by interpreting religious feelings as being within the scope of protection of freedom of religion, the right became much more subjective and malleable than it was originally intended to be. Subsequently, by becoming an undefined right, this generates less accountability for States, as the Court grants by default a wide margin of appreciation on issues concerning offence to religious belief.¹⁵⁵ Even though this could be seen as an astute strategy by States to “win” cases, this is a self-defeating move as it leads to more cases of offence to religious belief being brought to the Court against the State.

As a result, the right to freedom of religion has become so vague that the ECtHR not only tries to avoid dealing with it by granting a wide margin of appreciation to States, but also by overlooking it when other rights are claimed in conjunction with freedom of religion or belief. For example, in a case concerning pressure against a missionary, the Court decided that the case was a matter of private life,¹⁵⁶ while in another case considering the ban on religious literature, it found a violation of freedom of expression.¹⁵⁷ Surely those other rights were involved in these cases; however, it is difficult to explain why the Court has been reticent in also finding a violation of freedom of religion or belief. It appears that, although there is no hierarchy among rights, freedom of religion or belief is regarded as an esoteric right, while other rights

¹⁵⁴ *Schüth v Germany* App no 1620/03 (ECtHR, 23 September 2010) para 48.

¹⁵⁵ *Correia de Matos v Portugal* App no 56402/12 (ECtHR,), dissenting opinion of Judge Pinto de Albuquerque, para 8.

¹⁵⁶ *Bremner v Turkey* App no 37428/06 (ECtHR, 13 October 2015).

¹⁵⁷ *Ibragim Ibragimov and Others v Russia* Apps nos 1413/08 and 28621/11 (ECtHR, 28 August 2018).

are more rational. No wonder the right is viewed with suspicion by some scholars.¹⁵⁸ Finally, by unduly expanding the scope of a right, there is a higher likelihood that it will clash with other rights. Here the criticism of balancing is highly relevant since whenever there is a real conflict of rights, balancing might be necessary.

5.2.2.2 Freedom of religion or belief claimed by applicants in cases concerning offence to religious belief

When individuals are accused of offence to religious belief, such as apostasy or causing division within religious communities, they could rightly claim that there was an interference with their freedom of religion or belief.¹⁵⁹ All cases regarding *non-refoulement* explored in the previous chapter could fall within this category. However, the most common form of offence to religious belief explored in international human rights law refers to the censorship of films, books, and other artistic manifestations that are considered offensive to religious feelings.¹⁶⁰ Thus, it seems that there is a conflict between two rights, freedom of expression versus freedom of religion or belief.

Since the ECtHR often avoids the more objective limbs of the limitations test, this conflict tends to be exacerbated, and the Court might be required to perform a balancing between these rights. While we consider the main problem in this area procedural in nature, the balancing itself is also defective and partial. It is defective

¹⁵⁸ See Bielefeldt and Wiener, *Religious Freedom under Scrutiny*, ch 1.

¹⁵⁹ *Tothpal and Szabo v Romania* Apps nos 28617/13 and 50919/13 (ECtHR, 19 February 2019); and *Miroļubovs and Others v Latvia* App no 798/05 (ECtHR, 15 September 2009); see also *Kosta and Others v Turkey* and *Petsas and Others v Turkey* Apps nos 30984/96 and 35213/97 (ECtHR, 6 December 2011).

¹⁶⁰ See eg *Otto-Preminger-Institut v Austria*.

because offence to religious belief should not be a part of freedom of religion or belief. In this instance, courts are dealing with an apparent conflict of rights, not a real one, meaning that the conflict is moot.

Nevertheless, even if one considers that a right to be protected against religious offence exists, as the ECtHR does, the balancing is partial. Freedom of religion or belief protects everyone's right to believe or not to believe.¹⁶¹ Consequently, an atheistic display of art that mocks or criticises religion is not only a matter of freedom of expression, but a matter of freedom of religion or belief all the same. Most cases analysed in this chapter include expressions regarded as offensive by some, but they also come from a belief of the authors. In other words, in these cases, the issue at hand is not freedom of expression versus freedom of religion, but freedom of religion or belief and freedom of expression versus the "right not to be offended".

This can be observed in several cases, most notably in *Mouvement Raëlien Suisse v Switzerland*. This case concerned members of a non-religious movement who were prohibited from advertising their ideology, primarily because of the content of the advertisements, including one which displayed the caption: 'God does not exist'.¹⁶² The Court accepted the legitimate aim of the State to limit the expression of the group, which was 'to prevent crime, to protect health or morals and to protect the rights of others.'¹⁶³ In the balancing stage, the ECtHR decided that the State had not violated

¹⁶¹ CCPR/C/21/Rev.1/Add.4, para 2.

¹⁶² *Mouvement Raëlien Suisse v Switzerland*, para 22.

¹⁶³ *ibid* para 54.

the freedom of expression of the applicants, and that it was not necessary to analyse claims regarding the right to freedom of religion or belief of the applicant separately.¹⁶⁴

This argument does not grant legitimacy to the right not to be offended being within the scope of freedom of religion or belief. However, if courts are going to balance these issues, they need to do it properly, otherwise the idea that freedom of religion or belief encompassing all beliefs becomes inconsequential. Unsurprisingly, the result of not performing such balancing properly is a pragmatic one: a wide margin of appreciation is granted to States, which in turn prioritise the views of majority religious groups over members of minority religious and non-religious groups.

An alternative is possible, as demonstrated by the Inter-American Commission on Human Rights in the case of *The Last Temptation of Christ*. In this case, the Commission took the claims of those willing to display a controversial film as a matter of freedom of religion or belief and freedom of expression. The IACtHR did not follow this argument, yet both bodies provided reasoned arguments about the scope of the rights in question, thus resulting in a careful and sensible decision in this area.¹⁶⁵

5.2.2.3 Freedom of religion or belief invoked by States in cases concerning offence to religious belief

As mentioned before, States have a positive duty to protect individuals from harassment while they manifest their beliefs. The ECtHR expanded this duty to protect individuals from being offended in their religious feelings. As Malcolm Evans asserts,

¹⁶⁴ ibid paras 69–80.

¹⁶⁵ *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*; In *Ross v Canada*, the applicant also claimed his right to freedom of religion or belief, but it was quickly dismissed by the Human Rights Committee, see paras 5.1–5.4 and 11.8.

‘there is no explanation where this right comes from and it seems to emerge spontaneously out of the interaction of competing claims’,¹⁶⁶ yet the ECtHR has repeatedly confirmed this right. This means—in the European system—that even when not triggered by individual complaints, States can limit expressions considered offensive in order to protect the rights of others to freedom of religion or belief.

The development of this “right” started in *Gay News Ltd and Lemon v UK*. In this case, the issue in question was a poem with an illustration which ‘purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.’¹⁶⁷ We regard the content irrelevant, but that was not the understanding of the ECommHR, even considering that the poem was in a magazine with limited readership.

Since blasphemy laws in the UK had not fallen in desuetude, the very fact that the offence existed was enough to satisfy the legality limb of the limitations test.¹⁶⁸ Regarding the legitimate aim and necessity, the ECommHR decided that the offence of blasphemous libel was necessary ‘to protect the right of citizens not to be offended in their religious feelings.’¹⁶⁹ Nevertheless, although the Commission introduced offence to religious belief in modern international law, it is not the main reason why

¹⁶⁶ Evans, *Religious Liberty and International Law in Europe*, 336.

¹⁶⁷ *Gay News Ltd and Lemon v UK*, para 1.

¹⁶⁸ *ibid* para 5.

¹⁶⁹ *ibid* para 11.

the offence has perdured, as the Commission decided differently in other cases regarding offence to religious belief.¹⁷⁰

The ECtHR, however, cemented the right not to be offended in the European human rights system. In the infamous *Otto-Preminger* case, the Court decided that a film could be seized and forfeited because it portrayed ‘God the Father as old, infirm and ineffective, Jesus Christ as a "mummy’s boy" of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton.’¹⁷¹ Thus, similar in content, but milder than the widely available graphic novels and TV series “Preacher”.

This case follows a pattern that will be replicated in several cases in this section. First, the Court started its assessment by mentioning its principles regarding freedom of expression, stating that religious people are not exempt from criticism and must tolerate views hostile to their faith.¹⁷² The Court also mentioned the dictum from *Handyside*, that expressions that shock, offend, or disturb are to protected by the Convention.¹⁷³ Then the ECtHR contrasted these statements with exceptions, such as:

The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. [...] whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not

¹⁷⁰ See eg *Karlsson v Sweden*; *Choudhury v UK*; *Williamson v UK*; *Dubowska and Skup v Poland*; and *Kubalska and Kubalska-Holuj v Poland*.

¹⁷¹ *Otto-Preminger-Institut v Austria*, para 21.

¹⁷² *ibid* para 47.

¹⁷³ *ibid* para 49.

contribute to any form of public debate capable of furthering progress in human affairs.¹⁷⁴

While both principles and exceptions might seem equally reasonable, they are not. When presented side by side, it seems that the exceptions are just as important as the principles, thus enforcing the idea that this is a real conflict of rights or interests. This construction is required procedurally, as without an apparent conflict, it would be challenging for the State to justify the legitimacy and necessity of the interference.

The Court accepted the arguments presented by the State and moved to the proportionality assessment. At this stage, the Court mentioned that ‘it is not possible to discern throughout Europe a uniform conception of the significance of religion in society.’¹⁷⁵ Since the Court projected a lack of consensus in this area, this justified a wide margin of appreciation to the State, thus upholding the censorship of the film.¹⁷⁶

Although some scholars defend that public morals should be used to censor blasphemous content,¹⁷⁷ we strongly disagree with this position. In our opinion, the only reason to consider balancing freedom of expression with freedom of religion or belief is the exceptional cases in which ‘particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.’¹⁷⁸ In this manner, we consider that morals

¹⁷⁴ ibid para 47.

¹⁷⁵ ibid, para 50.

¹⁷⁶ ibid paras 52–57. For a more extensive critical analysis of this structure see Tsakyrakis, 'Proportionality: An Assault on Human Rights?', 475–487.

¹⁷⁷ See eg Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law'.

¹⁷⁸ *Otto-Preminger-Institut v Austria*, para 47.

and notions about the role of religion in society are irrelevant for the protection of the right to freedom of religion or belief in cases about offence to religious belief.

The arguments posed by the ECtHR in *Otto Preminger* were similarly presented in *Wingrove v UK* (1996),¹⁷⁹ *Murphy v Ireland* (2003),¹⁸⁰ *IA v Turkey* (2005),¹⁸¹ *Bulgaru v Romania* (2012),¹⁸² *Mouvement Raëlien Suisse v Switzerland* (2012),¹⁸³ and *ES v Austria* (2018).¹⁸⁴ In all these cases, the abstract protection of the rights of others to freedom of religion, invoked by States, prevailed over freedom of expression.

Despite that, some judges noticed the poor legal reasoning of the Court in these cases. In *Otto-Preminger*, Judges Palm, Pekkanen and Makarczyk contended that ‘unlike the paintings by Mr Müller, the film was to have been shown to a paying audience in an "art cinema" which catered for a relatively small public with a taste for experimental films.’¹⁸⁵ Judge de Meyer opined in *Wingrove* that for people of faith, ‘the strength of their own belief is the best armour against mockers and blasphemers.’¹⁸⁶ In *IA*, Judges Costa, Cabral Barreto, and Jungwiert demonstrated the risks of the State in prosecuting individuals for blasphemy, such as a “chilling effect”,

¹⁷⁹ *Wingrove v UK*, paras 45–54.

¹⁸⁰ *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003) paras 63–82.

¹⁸¹ *IA v Turkey*, paras 23–32.

¹⁸² *Bulgaru v Romania* App no 22707/05 (ECtHR, 15 May 2012) paras 51–58.

¹⁸³ *Mouvement Raëlien Suisse v Switzerland*, paras 48–77.

¹⁸⁴ *ES v Austria*, paras 41–58.

¹⁸⁵ *Otto-Preminger-Institut v Austria*, joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, para 9, comparing the case to *Müller and Others v Switzerland*, paras 12–14.

¹⁸⁶ *Wingrove v UK*, dissenting opinion of Judge de Meyer, para 3.

blacklisting, fatwas, and self-censorship.¹⁸⁷ They also reminded the Court that *Otto-Preminger* and *Wingrove* were highly controversial and that the ECommHR considered that they disclosed a violation of freedom of expression, thus defending that it was time to revisit the case law protecting religious feelings.¹⁸⁸

However, although the Court had the opportunity to revisit its jurisprudence, on several occasions it chose to continue endorsing such cases. This has not only impacted the protection of rights in Europe but has also supported claims to prosecute blasphemy in countries outside the continent.¹⁸⁹ Furthermore, it is not a coincidence that the terminology of offence to religious feelings might remind some of the resolutions on defamation of religions. As demonstrated in Chapter 1, they share the same characteristics; so much so that the OIC—the organisation who tabled the resolutions on defamations of religions—commended the Court for its decision in the *ES* case mentioned above, stating that the:

ruling is certainly historic given that it puts a limit to unbridled freedom of expression, most expressly so, in instances of denigrating religious beliefs. This is certainly a welcome development and sets a good precedence. This showed that freedom of expression has its limits.¹⁹⁰

¹⁸⁷ *IA v Turkey*, joint dissenting opinion of Judges Costa, Cabral Barreto, and Jungwiert, paras 1–9.

¹⁸⁸ *ibid* joint dissenting opinion of Judges Costa, Cabral Barreto, and Jungwiert, para 8.

¹⁸⁹ See cases that have relied on *Otto-Preminger* to protect religious beliefs from Finland to Brazil, respectively, *KKO:2012:58* and *Processo no 0155164-57.2017.8.19.0001*.

¹⁹⁰ *12th Report on Islamophobia*, 17.

5.3 Freedom of Expression

5.3.1 Scope

Freedom of expression is another classic right enshrined in several international treaties.¹⁹¹ The Banjul Charter has been criticised for not being as comprehensive as other human rights treaties regarding freedom of expression,¹⁹² but this has been remedied by regional soft law documents interpreting the right.¹⁹³ While freedom of expression is not as controversial as freedom of religion or belief, its limitation has generated many more cases than the latter. As an illustrative example, in 2019 the ECtHR found 79 violations of freedom of religion or belief, 282 violations of freedom of assembly and association, and 845 violations of freedom of expression.¹⁹⁴ Although these statistics do not mention pending cases, it is clear which freedom is the most contentious. Naturally, many books have been written concerning freedom of expression directly related to the topic in question and hate speech.¹⁹⁵

¹⁹¹ ECHR, art 10; ICCPR, art 19; ACHR, art 13; Banjul Charter, art 9.

¹⁹² See eg Frans Viljoen, 'The African Regional Human Rights System' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) 520–512.

¹⁹³ ACHPR, 'Declaration of Principles on Freedom of Expression in Africa' (17-23 October 2002) ACHPR Res 62(XXXII)02.

¹⁹⁴ *Annual Report: European Court of Human Rights 2019* (CoE 2020) 137.

¹⁹⁵ Some notable examples are Michael E Herz and Péter Molnár (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (CUP 2012); Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (Atlantic Books 2017), ch 6; and Temperman and Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*.

Freedom of expression includes the ‘freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.’¹⁹⁶ Moreover, controversial expressions are within the scope of protection of freedom of expression. In many cases regarding controversial expressions, the obiter dictum of the ECtHR in *Handyside v UK* is invoked. The statement declares that the right to freedom of expression protects ‘not only “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population’.¹⁹⁷ Pornography is also protected under the right to freedom of expression.¹⁹⁸ In practice, however, the Court has often allowed the censorship of expressions regarded offensive, as demonstrated in the cases examined in the previous section, rendering the dictum of *Handyside* somewhat ineffective. Here, the reminder of Judges Costa, Cabral Barreto and Jungwiert about the dictum from *Handyside* remains highly relevant: ‘these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court.’¹⁹⁹

The most puzzling feature of the cases regarding offence to religious belief at the ECtHR is that the Court has acted against not only the jurisprudence of other human

¹⁹⁶ ACHR, art 13(1).

¹⁹⁷ *Handyside v UK*, para 49.

¹⁹⁸ See eg *Pryanishnikov v Russia* App no 25047/05 (ECtHR, 10 September 2019).

¹⁹⁹ *IA v Turkey*, joint dissenting opinion of Judges Costa, Cabral Barreto, and Jungwiert, para 1.

rights bodies,²⁰⁰ but also against the UN and regional normative documents concerning such offences.²⁰¹ For example, in *ES v Austria* the Court mentioned several international and regional documents contrary to the application of penalties in blasphemy cases.²⁰² The ECtHR could have utilised even more relevant sources on the topic,²⁰³ but it chose to ignore these documents and found unanimously that there was no violation of freedom of expression when a person was fined for uttering controversial religious remarks.²⁰⁴ Thus, there is no lack of clarity regarding the scope of freedom of expression, nor a shortage of normative documents on how to assess these cases. Nevertheless, the Court has frequently opted, deliberately, to act against the current opinion in international law about the subject.

5.3.2 Jurisprudence Related to Offence to Religious Belief

We have criticised the jurisprudence of the ECtHR regarding offence to religious belief for not taking either freedom of religion or belief, or freedom of expression seriously on many occasions. The criticism is deserved, yet it does not show the whole picture

²⁰⁰ Compare *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*; with *IA v Turkey*.

²⁰¹ See eg Rabat Plan of Action; and CoE Committee of Ministers, 'Recommendation of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors' (13 April 2016) CM/Rec(2016)4.

²⁰² ICCPR; PACE Recommendation 1805; *Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred* (Venice Commission, CoE 2008); A/HRC/RES/16/18; CCPR/C/GC/34; and European Parliament, 'Fundamental Rights in the European Union (2012)' (27 February 2014) EU 2013/2078(INI).

²⁰³ See eg *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*; Rabat Plan of Action; and CM/Rec(2016)4.

²⁰⁴ *ES v Austria*, paras 26–31.

since, in many cases, the ECtHR did not accept the argument posed by States that some expressions should be curbed because they offend religious feelings. Consequently, the ECtHR's main problem in this area has been its lack of consistency.

It is difficult to pinpoint the exact reason why the Court is so inconsistent regarding offence to religious belief. It could be argued that the ECtHR favours some States, but this is unlikely, as the decision of the Court on this matter includes several countries. Furthermore, similar cases from the same State have led to distinct outcomes, as illustrated by some cases from Turkey. In *Gündüz v Turkey*, the Court decide whether religious comments which were anti-democratic should be protected; such comments were deemed offensive to the morals of the population by the State.²⁰⁵ In this case, the ECtHR found a violation of the right to freedom of expression.²⁰⁶ However, in other cases from Turkey regarding similar expressions, such as *Refah Partisi*, the Court did not find a violation of the same right.²⁰⁷

Another postulation could be that the ECtHR favours Christianity over Islam on matters regarding offence to religious belief, but this cannot be demonstrated from the cases analysed either. For example, from September 2005 to December 2006, the Court decided four cases regarding offence to religious belief, two concerning

²⁰⁵ *Gündüz v Turkey*, para 31.

²⁰⁶ *ibid*, paras 52–53.

²⁰⁷ *Refah Partisi (The Welfare Party) and Others v Turkey*; see also *Yarar v Turkey* App no 57258/00 (ECtHR, 19 December 2006).

Christianity and two Islam, and the Court found only one violation regarding offence to Islam.²⁰⁸

Time and content could be potential issues for inconsistencies as well, but neither is determinative. Regarding time, while the Court found fewer violations in the 1990s than in the more recent cases, it never stated that it had departed from the interpretation that offence to religious belief was within the scope of freedom of religion or belief.²⁰⁹ The content of the cases appears to be the most apparent reason for the Court to issue conflicting decisions regarding offence to religious belief, as the Court decides on a case-by-case basis and is not bound by precedent.²¹⁰ Still, although it is impossible to measure the level of obscenity or blasphemous content in certain expressions, it is at least arguable that the alternative film seized by the State in *Otto-Preminger* would cause less outrage in the population than a collage displayed on a museum portraying politicians ejaculating on a religious figure.²¹¹ Even though both cases were against the same State, the Court only found a violation of freedom of expression in the latter. The only subject where the content seems to be decisive for the Court is hate speech, which will be further explored in the next chapter.

²⁰⁸ Compare *Giniewski v France* App no 64016/00 (ECtHR, 31 January 2006); and *Klein v Slovakia* App no 72208/01 (ECtHR, 31 October 2006) (regarding Christianity); with *IA v Turkey*; and *Aydin Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006) (regarding Islam).

²⁰⁹ Compare *ES v Austria*; with *Sekmadienis Ltd v Lithuania* App no 69317/14 (ECtHR, 30 January 2018); *Stomakhin v Russia* App no 52273/07 (ECtHR, 9 May 2018); *Unifaun Theatre Productions Ltd and Others v Malta* App no 37326/13 (ECtHR, 15 May 2018); *Mariya Alekhina and Others v Russia*; and *Tagiyev and Huseynov v Azerbaijan* App no 13274/08 (ECtHR, 5 December 2019); and *Beizaras and Levickas v Lithuania* App no 41288/15 (ECtHR, 14 January 2020).

²¹⁰ Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 123.

²¹¹ Compare *Otto-Preminger-Institut v Austria*; with *Vereinigung Bildender Künstler v Austria* App no 68354/01 (ECtHR, 25 April 2007).

Strangely enough, the only aspect of cases concerning offence to religious belief in which the decisions of the Court offer some degree of legal certainty is proportionality. To reiterate, in most cases regarding offence to religious feelings, the ECtHR could have justified a violation of freedom of expression based on the legality, legitimacy, and necessity of the limitation. When such cases reach the proportionality stage, the result is much more unpredictable. In spite of that, the Court has been fairly consistent when assessing the proportionality of penalties imposed on the applicants.

In practice, this means that the ECtHR tends to find a violation of the right to freedom of expression when the State imposes excessive pecuniary penalties and imprisonment for offensive remarks and depictions.²¹² While the proportionality assessment is generally subjective, the severity of a given penalty is quantifiable, thus more objective. As mentioned above,²¹³ in many cases, proportionality is a necessary aspect of legal reasoning, yet such an assessment says nothing about the need to limit rights in the first place. As Tsakyrakis explains:

when we are preoccupied with this form of exercise, we risk losing sight of the battles of principle with which human rights law is so intimately intertwined. We also risk losing sight of the characteristic moral attitude that recognition of a right is supposed to display, and the message it is supposed to convey.²¹⁴

Thus, the legal certainty provided by the ECtHR in this area is not on the subject-matter (ie which expressions can be prohibited), it regards the level of punishment imposed by the State. This approach may limit the power of the State to punish

²¹² *Stomakhin v Russia*, para 129.

²¹³ See Chapter 5.1.2.5.

²¹⁴ Tsakyrakis, 'Proportionality: An Assault on Human Rights?', 485.

individuals to a certain extent, but it disregards the essence of freedom of expression and other rights. As a result of this consequentialist approach, the Court is likely to be deferential to the State in cases in which the penalty is a small fine.²¹⁵

Still, one cannot ignore that the Court has made significant progress regarding the protection of freedom of expression in cases concerning offence to religious belief. It has found a violation in several cases, at different stages of the limitations test, that is, on legality,²¹⁶ legitimacy,²¹⁷ necessity,²¹⁸ and proportionality.²¹⁹ These cases can help States to recognise their failures in protecting freedom of expression to pre-emptively avoid litigation, so it is beneficial for all parties involved.²²⁰ Nonetheless, the conflicting decisions in this area, which are due to the reluctance of the Court to admit its mistakes in previous decisions²²¹ and its continued protection of religious feelings,²²² still make a highly problematic jurisprudential area for the ECtHR.

²¹⁵ See eg *IA v Turkey*, para 32; and *ES v Austria*, para 56.

²¹⁶ *Unifaun Theatre Productions Ltd and Others v Malta*, paras 87–89

²¹⁷ *Bayev and Others v Russia* Apps nos 67667/09 et al (ECtHR, 20 June 2017) paras 65–84

²¹⁸ *Gündüz v Turkey*, para 52; and *Mariya Alekhina and Others v Russia*, para 268.

²¹⁹ *Mariya Alekhina and Others v Russia*, para 228.

²²⁰ See eg *Timpul de Dimeata v Moldova* App no 16674/06 (ECtHR, 23 March 2010).

²²¹ See eg *Gay News Ltd and Lemon v UK*; and *Otto-Preminger-Institut v Austria*.

²²² See eg *ES v Austria*.

5.4 Freedom of Assembly and Association

5.4.1 Scope

While freedom of religion or belief and freedom of expression have received considerable attention on matters regarding offence to religious belief, freedom of assembly and association has been largely neglected in similar discussions. Still, these freedoms are interrelated, as McGoldrick affirms: ‘[t]he guarantee of each is necessary for the enjoyment of the other and indeed for the exercise of many human rights.’²²³

Freedom of assembly and association comprises two distinct yet connected freedoms since ‘[a] group of persons could not form an effective association if they had no right to meet.’²²⁴ They also share the same objective, which is to allow ‘individuals to come together for the expression and protection of their common interests.’²²⁵ This thesis places both freedoms together, in the same manner as the ECHR.²²⁶ In other human rights treaties they are often drafted as separate articles.²²⁷

The right to freedom of assembly ‘protects non-violent, organized gatherings in public and private, both indoors and outdoors. A broad range of assemblies is encompassed, including political, economic, artistic, and social gatherings’, as well as

²²³ McGoldrick, ‘Thought, Expression, Association, and Assembly’, 208.

²²⁴ Rainey, Wicks, and Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 464.

²²⁵ D J Harris et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 710.

²²⁶ ECHR, art 11.

²²⁷ ICCPR, arts 21–22; ACHR, arts 15–16; and Banjul Charter, arts 10–11.

those based on religion or belief.²²⁸ Similarly, freedom of association protects the right of individuals to ‘associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.’²²⁹

5.4.2 Jurisprudence Related to Offence to Religious Belief

The jurisprudence related to offence to religious belief which engages freedom of assembly and association can only be found at the ECtHR. While there are few cases concerning freedom of assembly and association related to offence to religious belief, the ECtHR has been remarkably consistent and objective in its assessment of the right; unlike the jurisprudence on the other rights examined in this Chapter.²³⁰ The first relevant case in this regard is *Öllinger v Austria*, which concerns a small group protesting in front of a war memorial during All Saints Day. The group was remembering the Jewish people killed by SS officers during the Second World War and protesting against another group remembering the SS soldiers.²³¹ Austria argued that the protest had to be cancelled to protect the religious feelings of people at the memorial, but this argument did not convince the Court, which found a violation of

²²⁸ McGoldrick, 'Thought, Expression, Association, and Assembly', 228.

²²⁹ ACHR, art 16(1).

²³⁰ Compare *Vraniskoski v Macedonia*; with “*Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)*” v *Macedonia* App no 3532/07 (ECtHR, 16 November 2017). See also *Fáber v Hungary* App no 40721/08 (ECtHR, 24 July 2012); and *Bączkowski and Others v Poland* App no 1543/06 (ECtHR, 3 May 2007).

²³¹ *Öllinger v Austria* App no 76900/01 (ECtHR, 29 June 2006), paras 7–20

freedom of assembly.²³² Former judge Tulkens praised the judgement for its use of “practical concordance”, but also mentioned the limitations of this technique.²³³

Other relevant cases include *Alekseyev v Russia* and *Zhdanov and Others v Russia*, both cases concerning the rights of LGBT+ persons to assembly. In *Alekseyev*, the main issue was the prohibition of Gay Pride Marches.²³⁴ Russia submitted that the marches were prohibited in accordance with the jurisprudence of the Court regarding the protection of morals,²³⁵ stating that the promotion of homosexuality was:

incompatible with the “religious doctrines for the majority of the population”, as had been made clear in the statements by the religious organisations calling for the ban. They contended that allowing the gay parades would be perceived by believers as an intentional insult to their religious feelings and a “terrible debasement of their human dignity”.²³⁶

The Court did not consider these arguments persuasive—and although it did not dismiss the arguments based on its own case law—it decided that the prohibitions were not necessary without delving into other immaterial issues.²³⁷ Similarly, in *Zhdanov and Others v Russia*, the applicants contested the violent close down of a gay nightclub, as well as the prohibition of NGOs working to defend the rights of LGBT+ persons. The legitimate aims presented by the State were based on the decisions of the

²³² *ibid* paras 39–51

²³³ *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*, 129–130, citing Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn, CF Müller 1995).

²³⁴ *Alekseyev v Russia*, paras 6–48.

²³⁵ See *ia Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981); *Müller and Others v Switzerland*; and *Otto-Preminger-Institut v Austria*.

²³⁶ *Alekseyev v Russia*, para 59.

²³⁷ *ibid* para 87.

domestic courts and included the protection of morals, rights of others, prevention of disorder, and the protection of the State's 'sovereignty, safety and territorial integrity.'²³⁸

Regarding public morals, in *Bayev* the Court had resolutely rejected the notion that 'regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.'²³⁹ Nevertheless, in a dissenting opinion, Judge Dedov argued that the Court's decision did not protect the human dignity and integrity of children, nor the traditional family, nor the religious conviction of parents.²⁴⁰ In the present case, however, the Court followed the majority in *Bayev* regarding public morals.

The peculiar arguments regarding the protection of national sovereignty were absent in *Alekseyev*, and were postulated based on new legislation against extremism, as the State affirmed that LGBT activities lead to a decrease in the population and are:

incompatible with basic morality and State family policy and that its activities would amount to propaganda of non-traditional sexual orientation. Such activities might undermine Russian national security, sovereignty and territorial integrity and incite social and religious hatred and enmity; they were therefore extremist in nature. In the Government's opinion, there was no need to submit any proof for the finding that LGBT advocacy might lead to a decrease in population. Given the nature of childbearing, it was absurd to deny it.²⁴¹

The Court did not find the "undeniable" argument regarding the correlation between the decrease of population and the need to protect national security

²³⁸ *Zhdanov and Others v Russia*, para 151.

²³⁹ *Bayev and Others v Russia*, para 71.

²⁴⁰ *ibid* dissenting opinion of Judge Dedov.

²⁴¹ *Zhdanov and Others v Russia*, para 151.

convincing.²⁴² The ECtHR accepted the legitimate aim of preventing disorder; however, it did not find the measures imposed by Russia to be necessary in a democratic society, thus finding a violation of freedom of assembly and association.²⁴³

5.5 Qualified Rights and Incitement to Hatred

Most of the cases explored in the previous sections did not require an analysis of proportionality, being that a strict assessment of the limitations test was enough to disclose the violation of a right. That said, one of the circumstances in which qualified rights are likely to collide is incitement to hatred.²⁴⁴ International treaties approach this issue in different ways. The ICCPR imposes a specific obligation on States to prohibit incitement to hatred, the ACHR has a provision on the topic within the scope of freedom of expression, and other regional instruments consider general positive obligations as being required to protect individual rights.²⁴⁵ In the next chapter we will scrutinise this issue. We argue, however, that even in more extreme cases, qualified rights are sufficient to deal with incitement to hatred, without the creation of new concepts or simply resorting to the concept of abuse of rights.

Our argument can be illustrated by the case of *Karaahmed v Bulgaria*, in which the ECtHR considered whether Bulgaria was responsible for clashes between a political group (Ataka) and Muslims attending a mosque. The case is more

²⁴² *ibid* para 156.

²⁴³ *ibid* paras 160–165.

²⁴⁴ See eg *Plattform "Ärzte Für das Leben" v Austria* App no 10126/82 (ECtHR, 21 June 1988).

²⁴⁵ Compare ICCPR, art 20; ACHR, art 13(5); ECHR, art 10; and Banjul Charter, art 9.

complicated than it appears at first sight. Bulgaria had to respect both the rights of members of the political party to expression and assembly and the right of persons attending the mosque not to be harassed.²⁴⁶ The political party planned a demonstration close to the mosque, on a Friday, but did not disclose to the authorities that they aimed at protesting against people attending the mosque for prayers.²⁴⁷ The authorities allowed the demonstration, but since it took place very close to the mosque, and there were only a few police officers in the area, it quickly turned violent. Members of the political party shouted insults, pelted the worshippers with eggs and stones, and set fire to prayer rugs, leaving several Muslims injured.²⁴⁸

The Court could not, while performing its legal reasoning, simply apply a consequentialist approach, as the local authorities did not have the benefit of hindsight when authorising the political demonstration.²⁴⁹ The decision had to be contextual. Since Ataka was well-known for holding anti-Islamic views, the fact that the authorities allowed the protest to take place in the proximity of the mosque, on a Friday, demonstrated a level of negligence by the State,²⁵⁰ as the Court concluded:

the failure by the domestic authorities to strike a proper balance in the steps they took to ensure the effective and peaceful exercise rights of the demonstrators and the rights of the applicant and the other worshippers to pray together, as well as their subsequent failure properly to respond to those events, means there has been a failure of the State to comply with its

²⁴⁶ *Karahmed v Bulgaria* App no 30587/13 (ECtHR, 24 February 2015) para 91.

²⁴⁷ *ibid* paras 11–14.

²⁴⁸ *ibid* paras 15–25.

²⁴⁹ *ibid* para 95.

²⁵⁰ *ibid* paras 97–110.

positive obligations under Article 9. There has accordingly been a violation of that article.²⁵¹

Consequently, despite the challenge of having to take seriously all the rights discussed in this chapter, the Court managed to strike a fair balance between competing rights without having to resort to imprecise concepts such as Islamophobia, or even hate speech, nor being minimalist in deciding the proportionality of the sentences, or being overly deferential to the State. Thus, should States take rights seriously, and observe both their positive and negative obligations adequately, most of the problematic jurisprudence in this area would be dissipated.

The normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief related to qualified rights are easily found. There is no shortage of material in this regard, including international documents on the scope of rights and limitations, expert studies, and well-reasoned international cases.²⁵² For the ECtHR to move forward, however, it is not enough to simply change its jurisprudence on the topic. The Court must also denounce its flawed decisions on the protection of religious feelings.

²⁵¹ *ibid* para 111.

²⁵² See eg Siracusa Principles; CCPR/C/GC/34; Rabat Plan of Action; *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*; Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (23 December 2015) A/HRC/31/18; A/HRC/40/58; *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*; and *Karaahmed v Bulgaria*.

6 OFFENCE TO RELIGIOUS BELIEF RELATED TO INCITEMENT TO HATRED

This chapter deals with the ultimate question concerning offence to religious belief: can offence to religious belief lead to incitement to hatred? As analysed in the previous chapter, qualified rights offer protection to expressions considered offensive to religious groups. Nevertheless, what if such expressions lead directly to incitement to hatred of believers? Could expressions targeting religious beliefs be implicitly used to discriminate against people belonging to a particular religious group? These questions are not merely theoretical. Courts and treaty bodies have dealt with them, and the decisions they produced are mostly at odds with the predominant scholarship in the area. Therefore, to better explain this phenomenon, the present chapter will focus on provisions that are related to incitement to hatred, ie those related to Article 20 of the ICCPR and those regarded as ‘abuse of rights’ (mainly Article 17 of the ECHR). These provisions are related to other human rights but rarely receive the same attention as other substantive rights. However, they provide a unique perspective on limitations to such rights and the issue of offence to religious belief.

Not all instances of offence to religious belief reaches the threshold of incitement to hatred; only a small percentage of cases are regarded as such. This chapter focuses on the exceptional cases in which applicants or States claimed that certain expressions lead to incitement to hatred, thus requiring the State to restrict these expressions. This issue has been mentioned in several international documents, and some overlooked cases, yet it had not been explored in depth by scholars until recently.¹

¹ There are a few scholars recently explored this topic, eg Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*; Erica Howard,

6.1 International Human Rights Framework

As mentioned above, this chapter focuses on offences to religious belief related to Article 20 of the ICCPR and those considered as abuse of rights. This division seems, a priori, somewhat arbitrary. However, as will be demonstrated in the cases analysed in this chapter, incitement to hatred and abuse of rights perform the same function in different human rights systems. The ICCPR requires States to prohibit expression that advocates incitement to hatred, while regional treaties address this issue through qualified rights.² The European Court of Human Rights has also used the prohibition of “abuse of rights”, enshrined in Article 17 of the ECHR, to justify restrictions to expressions regarded as inciting hatred. Consequently, both Article 20 of the ICCPR and Article 17 of the ECHR are used to restrict offence to religious belief. This matter will be problematised later, once the terminology utilised in this field is clarified.

6.1.1 Terminology

The terminology regarding incitement to hatred is, once again, a problematic issue, mostly because it is difficult to find an expression that does not exclude certain groups. In some instances, the nomenclature in this field seems neutral but is, in fact, used to discriminate against religious groups, for example, legislation combatting extremism.³

Freedom of Expression and Religious Hate Speech in Europe (Routledge 2017); and Richard Moon, *Putting Faith in Hate: When Religion Is the Source or Target of Hate Speech* (CUP 2018).

² Compare ICCPR, art 20; ACHR, art 13(5); ECHR, art 10; and Banjul Charter, art 9.

³ Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 333.

The most precise term in this area, related to offence to religious belief, would be “incitement to hatred based on religion or belief”. This term is a combination of the expression used in Article 20 of the ICCPR and the one applied by the 1981 Declaration.⁴ We will usually refer to the broader term “incitement to hatred”, unless the qualifier “based on religion or belief” is required to differentiate between distinct targets of incitement.

Other expressions may appear in the chapter, especially in quotes by other authors or cases. For example, incitement to religious hatred is a commonly used expression, as it is similar to the wording of Article 20(2) of the ICCPR. The problem with this expression is that a literal interpretation would not necessarily encompass incitement to hatred towards atheists or other non-religious beliefs without recourse to other soft law documents.⁵ Other terms used to describe the same phenomenon are “religious hatred”⁶ and “religious hate speech”,⁷ expressions which invariably beg the question of whether they regard offences committed by religious believers or against them. Finally, hate speech—despite being an inherently vague term—is also mentioned in recent documents and cases.⁸ Notwithstanding shorter terms being

⁴ See ICCPR, art 20(2); and UNGA, 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (25 November 1981) 1981 Declaration.

⁵ CCPR/C/21/Rev.1/Add.4, para 2.

⁶ Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*.

⁷ Howard, *Freedom of Expression and Religious Hate Speech in Europe*.

⁸ See eg CERD, 'General Recommendation No 35: Combating Racist Hate Speech' (26 September 2013) CERD/C/GC/35; *Delfi AS v Estonia*, para 115; UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (9 October 2019) A/74/486, para 1; and UN, 'United Nations Strategy and Plan of Action on Hate Speech' (18 June 2019) UN Strategy and Plan of Action on Hate Speech.

helpful for the sake of brevity, they may obfuscate the boundaries of permissible limitations to rights in international human rights law.

6.1.2 International Framework

Regardless of the terms used to address incitement to hatred based on religion or belief, we argue that the international human rights mechanisms—as they stand—are sufficient to address these issues, even in more extreme cases involving physical violence, as demonstrated in the previous chapter.⁹ Nevertheless, this statement does not mean that the human rights system has always been successful in tackling incitement to hatred; it only indicates that the instruments in place are capable of addressing this issue adequately while safeguarding other fundamental human rights.

The prohibition of incitement to hatred is found in several human rights treaties either as a stand-alone prohibition or as a limitation to the right to freedom of expression. At the UN, the development of this provision started indirectly in the UDHR, from a combination of two Articles, one which could limit freedom of expression,¹⁰ and the other prohibiting abuse of rights. The latter states that ‘[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’¹¹ Stephanie Farrior and Jeroen Temperman

⁹ See Chapter 5.5.

¹⁰ UNGA, 'Universal Declaration of Human Rights' (10 December 1948) UDHR, arts 29(2)–29(3).

¹¹ *ibid* art 30.

suggest that Article 7 of the UDHR also played a role in shaping the prohibition of incitement to hatred,¹² as it declares that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.¹³

The UDHR was drafted just after the Second World War, when the world was still dealing with the widespread consequences of the free dissemination of an ideology based on incitement to hatred of minority groups. Therefore, the drafters of the UDHR did not envision the protection of incitement to hatred under the banner of freedom of expression. Charles Malik proposed that the Declaration should include a clause asserting that '[p]ersons who were opposed to the spirit of the Declaration or who were working to undermine the rights of men should not be given the protection of those rights.'¹⁴ The USSR later proposed a specific limitation to freedom of expression, maintaining that it should not be used to propagate 'Fascism'. However, the idea was rejected by being too narrow and out of place.¹⁵ Subsequently, the USSR strongly supported the addition of what would become Article 30 of the UDHR as a clause to

¹² See Stephanie Farrior, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech' (1996) 14 *Berkeley Journal of International Law* 1, 12; and Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*, 19.

¹³ UDHR, art 7.

¹⁴ ECOSOC, 'Proposal by the Representative of Lebanon for an Addition at the End of the Declaration' (16 December 1947) E/CN.4/74.

¹⁵ UNGA, '53. Draft International Declaration of Human Rights' (10 November 1948) A/C.3/SR.129.

stop Nazi, Fascist, and groups like the Ku Klux Klan, from destroying the rights of others.¹⁶

6.1.2.1 *International Covenant on Civil and Political Rights*

While the Soviet lobby to promote the inclusion of a stand-alone limitation to freedom of expression was not successful in relation to the UDHR, it was successful in the ICCPR, drafted almost 20 years after the Declaration. This provision became Article 20, which prohibits in its first paragraph the propaganda of war, and in its second paragraph provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'¹⁷ The ICCPR also has a provision to prohibit abuse of rights in Article 5(1) which is similar to Article 30 of the UDHR, but it also prohibits States from limiting the rights and freedoms 'to a greater extent than is provided for in the present Covenant.'¹⁸ This article provides a sense of balance: individuals cannot abuse their rights, and States may not abuse restricting rights.

Article 5(1) applies to the whole Covenant, while Article 20 is located immediately after Article 19 on freedom of expression,¹⁹ thus being regarded as *lex specialis* with regard to the previous article.²⁰ As a general principle of Law, *lex*

¹⁶ UNGA, '84. Draft International Declaration of Human Rights' (25 November 1948) A/C.3/SR.156.

¹⁷ ICCPR, art 20(2).

¹⁸ *ibid* art 5(1).

¹⁹ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 115.

²⁰ CCPR/C/GC/34, para 51.

specialis derogat legi generali, meaning that in particular circumstances, a more specific law would be applied to cases instead of the general law.

Article 20 has generated much controversy at the UN,²¹ although mainly due to political reasons rather than the substance of the prohibition itself. The article was formulated by representatives of the USSR and China, but the US and the UK considered the provision too broad,²² thus echoing the arguments that led to the rejection of the inclusion of a similar provision in the UDHR.²³ In reality, both justifications in favour and against the article raise reasonable concerns. On the one hand, Article 20(2) suggests a narrow proscription, as it only prohibits advocacy of national, racial or religious hatred. The term ‘advocacy’ implies a deliberate action, meaning that a passive act, such as mere reproduction or transmission, would not fall within the ambit of this article.²⁴ Article 20(2) also qualifies advocacy of hatred, only prohibiting advocacy that incites precisely to discrimination, hostility or violence.

On the other hand, this provision does not add anything substantially new to the Covenant, as such acts could be restricted by the limitations to other qualified rights.²⁵ One could argue that Article 20 adds an explicit positive obligation on States to create legislation to prohibit “advocacy of national, racial or religious hatred that constitutes

²¹ See eg Monroe Price, 'Closure, Strategic Communications, and International Norms' in Monroe Price and Nicole Stremlau (eds), *Speech and Society in Turbulent Times: Freedom of Expression in Comparative Perspective* (CUP 2018) 41.

²² Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 483–484.

²³ A/C.3/SR.129.

²⁴ Rabat Plan of Action, para 29(c); and *Camden Principles on Freedom of Expression and Equality* (ARTICLE 19 2009) principle 12.

²⁵ See Chapter 5.1.2.

incitement to discrimination, hostility or violence”. Yet, using the interpretation of the Human Rights Committee, Article 20 is specific (*lex specialis*), not new law (*lex posterior*), meaning that general law could still address incitement to hatred.

Regarding the positive obligation, in accordance with Article 2(1) of the Covenant, States Parties must protect persons subject to their jurisdiction against discrimination.²⁶ This obligation even applies to acts caused by private persons.²⁷ Likewise, States Parties have a positive obligation to protect rights which are related to Article 20, such as freedom of religion or belief and non-discrimination.²⁸

Concerning the requirement to prohibit incitement to hatred “by law”, the answer is twofold. First, Article 2 of the ICCPR also requires States Parties to adopt legislation to fulfil their legal obligations.²⁹ Second, should a State impose a restriction on expressions that constitute “incitement to discrimination, hostility or violence”, that limitation must be “provided by law”.³⁰ Consequently, this requirement is redundant.

Since the ICCPR was drafted during the Cold War, the political argument seems to be the decisive reason why several democratic States opposed an article formulated by communist States. This political standoff led to several States making reservations concerning the application of the said article.³¹ Nonetheless, it is important to note that

²⁶ ICCPR, art 2(1).

²⁷ CCPR/C/21/Rev.1/Add.13, para 8.

²⁸ ICCPR, arts 18, 26 and 27.

²⁹ *ibid* art 2(2). See also CCPR/C/21/Rev.1/Add.13, para 7.

³⁰ ICCPR, art 19(3).

³¹ VCLT, art 21.

while some influential countries made reservations to Article 20 of the ICCPR, the vast majority of countries have not followed the same course of action. In any case, the most common reason for the reservations was, as mentioned above, the fact that the Article is rather redundant, as the limitations on qualified rights provided for in Articles 18, 19, 21, and 22 are sufficient to curb advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.³²

To recapitulate, in order to curb incitement to hatred based on the ICCPR alone, one could argue that States have a positive obligation in relation to Article 20(2), as well as Article 18 (freedom of religion or belief) and Article 19 (freedom of expression). Additionally, individuals could argue that expressions which are likely to lead to incitement to hatred violated Article 26 (non-discrimination), Article 27 (in case of minorities), and Article 5(1) (abuse of rights). Finally, States could even argue that groups which envisage the destruction of the rights of others are not only prohibited by Article 5(1) but also should not be able to submit communications to the Human Rights Committee based on Article 3 of the Optional Protocol to the ICCPR (abuse of the right to submission).

6.1.2.2 Other Instruments of the United Nations

There have been several discussions, both at the UN and among scholars, suggesting the creation of a convention on the elimination of all forms of intolerance and of discrimination based on religion or belief.³³ At the UN, this debate started formally in

³² See eg Australia, UNTS, 'ICCPR Ratification: Australia' (13 August 1980) UNTS 1197, 412; and Belgium, UNTS, 'ICCPR Ratification: Belgium' (21 April 1983) UNTS 1312, 329.

³³ Michael Wiener, 'Interpretation of the 1981 Declaration through the Mandate Practice of the United Nations Special Rapporteur on Freedom of Religion or Belief' in Malcolm D Evans, Peter

1962—thus prior to the ICCPR—with the request of a draft declaration and a draft convention on the elimination of all forms of religious intolerance.³⁴ Both drafts were prepared, but only the declaration was adopted in 1981.³⁵ Therefore, after 19 years of debates, the UN could only approve a declaration, which indicates how controversial the subject is in international law. The 1981 Declaration is not binding on States; however, it reflects other international legally binding norms, notably the ICERD.³⁶

The ICERD does not explicitly mention incitement to hatred based on religion or belief in its text, meaning that its Committee does not have, in principle, jurisdiction *ratione materia* over issues concerning discrimination against members of religious groups.³⁷ However, when such discrimination is combined with incitement to racial discrimination, then the complaint may fall within the jurisdiction of the CERD as an issue of intersectionality. Therefore, there have been cases regarding offence to religious belief and alleged religious discrimination decided by the CERD.³⁸

Moreover, in 2013 the CERD issued General Recommendation 35, stating that:

In the light of the principle of intersectionality, and bearing in mind that “criticism of religious leaders or commentary on religious doctrine or tenets of faith” should not be prohibited or punished, the Committee’s

Petkoff and Julian Rivers (eds), *Changing Nature of Religious Rights under International Law* (OUP 2015) 52.

³⁴ UNGA, 'Preparation of a Draft Declaration and a Draft Convention on the Elimination of All Forms of Religious Intolerance' (7 December 1962) A/RES/1781(XVII), paras 1(a)–1(b).

³⁵ 1981 Declaration.

³⁶ Natan Lerner, 'Incitement to Hatred and the 1981 United Nations Declaration on Religion or Belief' in Malcolm D Evans, Peter Petkoff and Julian Rivers (eds), *Changing Nature of Religious Rights under International Law* (OUP 2015) 94–96.

³⁷ See ICERD, art 1.

³⁸ See eg *PSN v Denmark* Comm no 36/2006 (CERD, 8 August 2007) CERD/C/71/D/36/2006; and *AWRAP v Denmark* Comm no 37/2006 (CERD, 8 August 2007) CERD/C/71/D/37/2006.

attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism.³⁹

Consequently, by endorsing an expansive notion of protection of ethnic and religious groups, the CERD has addressed issues related to incitement to hatred based on religion or belief.

It is important to note that the CMW also enunciated similar remarks on the protection from incitement to hatred in its General Comment 2; nonetheless, in this document the CMW stays within the boundaries of its jurisdiction *ratione personae* and *ratione materiae*.⁴⁰ The ICMW also provides, in our opinion, a better formulation for incitement to hatred, which is found in its Article 13(3)(d).⁴¹ This article echoes Article 20 of the ICCPR but locates it under the right to freedom of expression, similar to the model set by the American Convention on Human Rights.

Two other international treaties deal with incitement to hatred, namely the Genocide Convention and the Rome Statute of the International Criminal Court. The Genocide Convention defines that certain acts can be considered as genocide when ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.⁴² The Genocide Convention was the first human rights treaty adopted

³⁹ CERD/C/GC/35, para 6.

⁴⁰ CMW, 'General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families' (28 August 2013) CMW/C/GC/2, para 22.

⁴¹ ICMW, para 13

⁴² Genocide Convention, art 2.

by the UN, thus highlighting the importance of this topic for international organisations. The Rome Statute is related to the UN, but established an independent body, the International Criminal Court. The Rome Statute describes different categories of incitement to hatred based on the severity of each case. The Statute can define such instances of incitement to hatred as a war crime, a crime against humanity, or even genocide.⁴³ Therefore, even in the worst cases imaginable, there are frameworks in place to protect persons against incitement to hatred.

6.1.3 Regional Frameworks

As mentioned above, the ECHR does not have any specific article dealing with incitement to hatred, meaning that restrictions to freedom of expression must conform to the limitations test scrutinised in the previous chapter.⁴⁴ Still, the lack of a specific provision has not hindered the treaty bodies of the ECHR from addressing the issue.⁴⁵ It is important to bear in mind that the ECHR was drafted much earlier than the ICCPR and the other regional human rights treaties; therefore, its source of inspiration was the UDHR. Once again, in the UDHR framework, incitement to hatred could be addressed by Article 29 (general limitations clause) and Article 30 (prohibition of abuse of rights). Therefore, the ECtHR transposed Article 30 of the UDHR into what became its Article 17, for the same reasons as the former, that is, to prevent the ideology that

⁴³ Respectively, Rome Statute arts 8(2)(b)(ix), 8(2)(e)(iv), 7(h), and 6.

⁴⁴ See Chapter 5.1.2.

⁴⁵ See eg *Parti Communiste v Germany* App no 250/57 (ECommHR, 20 July 1957); and *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) para 56.

led to the Second World War from flourishing again.⁴⁶ The case law of the Court on Article 17 ECHR will be analysed later in this chapter.

The ECHR is not the only international human rights document without a specific prohibition on incitement to hatred. The Banjul Charter does not have any provision dealing specifically with incitement to hatred either. Similarly, the limitations on freedom of expression, Article 9(2), could be used for such a purpose.⁴⁷ The Banjul Charter has, however, a specific provision which could be interpreted as a form of protection against incitement to hatred for non-nationals, which declares that: '[t]he mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'⁴⁸

The ACHR protects freedom of expression, as demonstrated in the previous chapter, in its Article 13. This article is similar to Articles 19 and 20 of the ICCPR, but even stricter regarding the imposition of limitations to freedom of expression in two ways. First, Article 13 prohibits prior censorship of expressions by the State, except when regulating content for children.⁴⁹ Second, it restricts the prohibition of incitement to hatred within the scope of freedom of expression, and qualifies that only incitement leading to "lawless violence" can be restricted, as described below:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds

⁴⁶ Françoise Tulken, 'When to Say Is to Do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights' in Josep Casadevall et al (eds), *Freedom of Expression: Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights* (Wolf Legal Publishers 2012) 283.

⁴⁷ Viljoen, 'The African Regional Human Rights System', 510–512.

⁴⁸ Banjul Charter, art 12(5).

⁴⁹ ACHR, arts 13(2) and 13(4).

including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.⁵⁰

Notwithstanding the ACHR establishing a clear link between the prohibition of incitement to hatred and the right to freedom of thought and expression, this provision has been interpreted differently in other official languages of the Convention. As Eduardo Bertoni points out,⁵¹ the English text of Article 13(5) of the ACHR states that incitement to lawless violence ‘shall be considered as offenses punishable by law’. However, the English version is less demanding than the Spanish and French versions, which states incitement to lawless violence “will be prohibited by law” (*‘estará prohibida por la ley’*,⁵² and *‘[s]ont interdits par la loi’*⁵³). This translation issue is likely due to the fact that the expressions in Spanish and French are employed in their respective versions of Article 20 of the ICCPR. Consequently, liability in cases concerning incitement to lawless violence or similar actions would be required by the official Spanish and French versions of the ACHR, but it is somewhat conditional in the English text. The Portuguese version is similar to the Spanish and French regarding liability, but it goes beyond the text of the other official versions, prohibiting incitement to “discrimination, hostility, *crime*, and violence”.⁵⁴ Nonetheless, incitement to crime is not a prohibition included in the ICCPR, nor any other official

⁵⁰ *ibid*, art 13(5).

⁵¹ IACHR, 'Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2004' (23 February 2005) OEA/Ser.L/V/II.222. Doc 5 rev, ch VII, para 38.

⁵² ACHR [ES] art 13(5).

⁵³ ACHR [FR] art 13(5).

⁵⁴ ‘A lei deve proibir toda propaganda a favor da guerra, bem como toda apologia ao ódio nacional, racial ou religioso que constitua incitação à discriminação, à hostilidade, ao crime ou à violência.’ ACHR [PO] art 13(5).

version of the ACHR. Naturally, any conflicting issues arising from different language versions concerning this article should be decided based on the VCLT.⁵⁵

6.1.4 Final Considerations on the International Human Rights Framework against Incitement to Hatred

As mentioned at the beginning of this chapter, there is a wide array of binding norms in international law addressing incitement to hatred. It is important to emphasise this point because some organisations, such as the OIC, have called for the creation of new norms to provide for the protection of religious beliefs and religious groups from incitement to hatred.⁵⁶ Even though some legal instruments do not tackle this issue expressly, and others might not display the clarity and precision that should be expected from international human rights treaties, there is a compelling argument to be made that the system in place is sufficient to deal with incitement to hatred based on religion or belief. While the international human rights system needs to be strengthened, there is no need for additional treaties in this area.

That said, legal certainty is imperative in this field, chiefly because States should base their legislation on international human rights treaties. If international human rights norms are confusing in their original standing, those norms could be replicated—and further obscured—when the text is translated.⁵⁷ Nonetheless, legal

⁵⁵ VCLT, art 33.

⁵⁶ See Chapter 1.3.1.

⁵⁷ See n 54 above, about the Portuguese translation of article 13(5) of the ACHR, which became the following domestic law, *Convenção Americana sobre Direitos Humanos* [Brazil] art 13(5).

certainty is not obtained through legislation alone. Interpretation is always necessary to define the scope of application of legal provisions. In international law, interpretation is provided by treaty bodies, soft law, jurisprudence, and scholars. These issues are going to be discussed in the following sections.

6.2 Interpretation of Incitement to Hatred

The international community has recognised that ‘[a]ll human rights are universal, indivisible and interdependent and interrelated.’⁵⁸ This interdependence and interrelatedness should be unambiguous when considering issues associated with the rights of freedom of religion or belief and freedom of expression.⁵⁹ Even though these rights are complementary and mutually reinforcing, ‘this positive interrelatedness does not preclude concrete conflicts.’⁶⁰ Cases concerning offence to religious belief and incitement to hatred logically reflect such conflicts, as they involve expressions considered hateful by members of religious groups.

In order to solve such conflicts, the UN has produced several documents through its treaty monitoring bodies,⁶¹ special procedure mechanisms,⁶² and specialised

⁵⁸ A/CONF.157/23, para 5.

⁵⁹ Rabat Plan of Action, para 8.

⁶⁰ A/HRC/31/18, para 7.

⁶¹ See CCPR/C/21/Rev.1/Add.4; and CCPR/C/GC/34.

⁶² See eg UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (7 September 2012) A/67/357; A/HRC/31/18; A/HRC/40/58; and A/74/486.

bodies.⁶³ Nevertheless, these are soft law documents, thus not binding on States. Consequently, for States to improve their policies and minimise conflicts between the rights in question, they must implement the propositions elaborated by these bodies.

6.2.1 The 1981 Declaration

One of the most notable documents developed in this area is the 1981 Declaration, which calls States ‘to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.’⁶⁴ As mentioned before, the declaration was proposed together with a convention on the same topic.⁶⁵ As a result, it does not have the same weight that a treaty would have. This seems to be the understanding of the Human Rights Committee, as it only relied marginally on the 1981 Declaration when deciding cases that were related to its ambit.⁶⁶

Soft law is helpful to guide and interpret legally binding documents, and can even lead to the amplification of treaties,⁶⁷ but it should not be viewed as a substitute for these documents. While this is a rather orthodox statement in the field of public international law, this is not how the 1981 Declaration is always understood in discussions concerning incitement to hatred based on religion or belief.

⁶³ See eg A/HRC/RES/16/18; and Rabat Plan of Action.

⁶⁴ 1981 Declaration, para 4(2).

⁶⁵ A/RES/1781(XVII), paras 1(a)–1(b).

⁶⁶ See eg *Sister Immaculate Joseph and Others v Sri Lanka* Comm no 1249/2004 (Human Rights Committee, 21 October 2005) CCPR/C/85/D/1249/2004, paras 3.3 and 7.2, fn 5.

⁶⁷ Alan Boyle, 'Soft Law in International Law-Making' in Malcolm D Evans (ed) *International Law* (5th edn, OUP 2018) 125.

Carolyn Evans contended, in relation to the 1981 Declaration, that ‘a non-binding resolution with strong moral or political support can be as effective as a legally binding treaty.’⁶⁸ Malcolm Evans, however, retorted that there is an ‘assumption that it is the 1981 Declaration which provides the “soft law” benchmark which is to be taken up as the surrogate for a legally binding instrument. While this may appear to be a reasonable assumption, it is not a given.’⁶⁹ We concur with Malcolm Evans, as the former assumption is problematic for several reasons.

First of all, soft law does not automatically become legally binding after a teleological analysis of its effectiveness is performed. Effectiveness is undoubtedly a laudable aim, but not an end in itself, neither a prerequisite for legally binding norms. While we agree with Carolyn Evans that there is no need for a treaty on the present topic, we disagree with her principled arguments on the morality of certain soft law documents.⁷⁰ The reason why this thesis defends that a new treaty on this topic is unnecessary is that, as defended in the previous section, the current international treaties dealing with the topic are sufficient to address questions related to incitement to hatred; including circumstances not envisioned by the drafters of general human rights documents, such as incitement to hatred online.⁷¹

⁶⁸ Carolyn Evans, 'Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination' (2007) 3 Brigham Young University Law Review 617, 634.

⁶⁹ Malcolm D Evans, 'Challenging Conventional Assumptions: The Case for a Preventive Approach to the Protection of the Freedom of Religion or Belief' in Malcolm D Evans, Peter Petkoff and Julian Rivers (eds), *Changing Nature of Religious Rights under International Law* (OUP 2015) 34.

⁷⁰ Evans, 'Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination', 638.

⁷¹ See further Iginio Gagliardone, Danit Gal, Thiago Alves Pinto, and Gabriela Martinez, *Countering Online Hate Speech* (UNESCO 2015) ch 4.

The second reason is due to the intense fragmentation of international law and what Malcolm Evans describes as “treaty fatigue” at the UN.⁷² New treaties and “morally sound” soft law documents can surely address interpretative issues and perhaps help to develop new mechanisms to combat incitement to hatred more effectively. Nonetheless, they cannot pretend to elucidate every issue on a given topic. Assuming that current international law is capable of addressing even situations of discrimination that culminate in genocide, it is our opinion that more treaties do not necessarily generate more protection. Notwithstanding the number of treaties dealing with the subject not correlating directly with a heightened protection for individuals against discrimination, this fragmentation has not been particularly harmful either.⁷³

The third reason why we disagree with the proposition of Carolyn Evans is that moral issues are incredibly subjective. The OIC resolutions on combatting defamation of religions initially enjoyed “strong moral and political support”, nonetheless they were highly problematic from a human rights perspective.⁷⁴ Thus, enforcing soft law documents as legally binding does not strengthen the human rights system; it potentially undermines its structure by diminishing the credibility that recognised legally binding obligations have in international law.⁷⁵

⁷² Evans, 'Challenging Conventional Assumptions: The Case for a Preventive Approach to the Protection of the Freedom of Religion or Belief', 39.

⁷³ On fragmentation see Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (Erik Castrén Institute 2007).

⁷⁴ See eg E/CN.4/RES/1999/82; and E/CN.4/RES/2000/84.

⁷⁵ Evans, 'Challenging Conventional Assumptions: The Case for a Preventive Approach to the Protection of the Freedom of Religion or Belief', 40.

The 1981 Declaration has, however, provided a basic structure upon which the Special Rapporteurs on Freedom of Religion or Belief have developed their work.⁷⁶ In our opinion, their indelible contribution has been more impactful for the protection of human rights than the Declaration itself; thus, as Michael Wiener concludes:

their reports appear to be particularly suitable as subsidiary means for the determination of rules of law, since mandate-holders essentially document the *opinio iuris* of governments by reproducing the correspondence with them and because Special Rapporteurs evaluate the state practice by undertaking country visits and by processing information from non-governmental organizations. Thus Special Rapporteurs have an important role as the Human Rights Council's 'eyes and ears', as has often been said. In addition, within the limits of their mandate, they can also serve as the Council's 'brain and mouth', for example by further developing the interpretation of the 1981 Declaration and by publicly reporting on its application (or lack thereof) across the globe.⁷⁷

6.2.2 General Comments and General Recommendations

As mentioned above, Article 20 of the ICCPR has been highly controversial since its inception. Consequently, the Human Rights Committee has issued General Comments to guide the interpretation of rights in this contentious area. The Committee has written about the present topic in General Comments 11, 22 and 34. General Comment 11 emphasises the need for countries to implement the prohibitions set in Article 20.⁷⁸ General Comment 22 interprets Article 20 in a positive light, regarding paragraph 2 as 'important safeguards against infringement of the rights of religious minorities and of

⁷⁶ See further Wiener, 'Interpretation of the 1981 Declaration through the Mandate Practice of the United Nations Special Rapporteur on Freedom of Religion or Belief'.

⁷⁷ *ibid* 78.

⁷⁸ Human Rights Committee, 'General Comment No 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred' (29 July 1983) HRI/GEN/1/Rev.9 (Vol I) 182, paras 1–2.

other religious groups to exercise the rights guaranteed by Articles 18 and 27, and against acts of violence or persecution directed towards those groups.’⁷⁹ General Comment 34 is the most detailed on the treatment of the topic.

General Comment 34 displays a somewhat cautious approach regarding the relationship between Article 20 and other rights, most likely because it was penned after the repeated UN resolutions on defamation of religions.⁸⁰ It defends that ‘[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, *except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant*.’⁸¹ This qualification is unnecessary and problematic. By comparison, the following paragraph in the document does not have the same caveat, simply stating that: ‘Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.’⁸² Thus, one can infer that the Committee allows Holocaust denial—which can actually be proven wrong—but not always blasphemy.

The draft of General Comment 34 was even more prone to misinterpretation, as it stated that ‘[b]lasphemy laws should not be used to prevent or punish legitimate criticism of religious leaders or reasoned commentary on tenets of faith.’⁸³ This

⁷⁹ CCPR/C/21/Rev.1/Add.4, para 9.

⁸⁰ See Chapter 1.3.1 and Appendix.

⁸¹ CCPR/C/GC/34, para 48 (emphasis added).

⁸² *ibid* para 49.

⁸³ Human Rights Committee, 'Draft General Comment No 34' (29 January 2010) CCPR/C/GC/34/CRP.2, para 47.

implied that ‘illegitimate’ criticism of religious leaders and ‘unreasoned’ commentary on beliefs could be punished. The final version rectified these issues by removing the adjectives, simply declaring that blasphemy laws should not ‘prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.’⁸⁴

The final version of General Comment 34 substantially improved the draft text in several other ways. It is not restricted to blasphemy laws, which is vital in an area where the terminology changes periodically,⁸⁵ adding the expression ‘[p]rohibitions of displays of lack of respect for a religion or other belief system’.⁸⁶ It also removed the interpretative explanation given to the constitutive elements of Article 20(2),⁸⁷ but it kept the clarification that Article 20 is ‘*lex specialis* with regard to article 19’.⁸⁸ Likewise, the final version of General Comment 34 omits the reference to ‘hate speech’ mentioned in the draft.⁸⁹ General Recommendation 35, on the other hand, championed the use of the expression, without properly defining it.⁹⁰

⁸⁴ CCPR/C/GC/34.

⁸⁵ See Chapter 0.

⁸⁶ CCPR/C/GC/34, para 48.

⁸⁷ CCPR/C/GC/34/CRP.2, para 53.

⁸⁸ CCPR/C/GC/34, para 51.

⁸⁹ CCPR/C/GC/34/CRP.2, para 54..

⁹⁰ CERD/C/GC/35.

6.2.3 Resolution 16/18, Rabat Plan of Action and Other Developments

As explained in the previous section, it seems that the interpretative guidelines provided by General Comment 34 were partially addressing the resolutions on defamation of religions proposed by the OIC at the UN. The first consistent joint response at the UN level to the resolutions on defamation of religions was the Human Rights Council Resolution 16/18, entitled ‘Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.’⁹¹ Resolution 16/18 was a compromise between the OIC and States which opposed the resolutions on defamation of religions to address incitement to hatred based on religion or belief. This compromise, however, does not supersede the previous resolutions on the topic for three main reasons. First, there is nothing in the resolution that explicitly indicates a repeal of the previous resolutions on defamation of religions. Second, the last resolution on defamation of religion passed only a few months before the adoption of Resolution 16/18, and was published only one day before the latter resolution.⁹² Third, the OIC did not consent to the idea that the previous resolutions on defamation of religions should be repealed, as the organisation affirmed that they ‘continue to remain

⁹¹ A/HRC/RES/16/18.

⁹² A/RES/65/224.

valid'.⁹³ It is important to emphasise, however, that the subsequent resolutions on the topic did not mention "defamation of religions".⁹⁴

Resolution 16/18 was a step forward to solve an international stalemate, yet the so-called "16/18 framework" provided by the resolution did not seem to address the concerns of the States involved in the debate concerning defamation of religions, thus political tensions remain.⁹⁵ An attempt to implement Resolution 16/18 was made in the same year the resolution was adopted, called the Istanbul Process.⁹⁶ This process aimed at engaging relevant stakeholders to take action against incitement to hatred based on religion or belief, but few States have actually reported the measures taken to address the issue.⁹⁷ While some States have been willing to address incitement to hatred based on religion or belief via the Istanbul Process Meetings,⁹⁸ in reality, the meetings have reflected the impasse prior to the adoption of Resolution 16/18. Consequently, these meetings have achieved a paradoxical result: they have managed

⁹³ 'Draft Resolution A/HRC/16/L.38, Zamir Akram's Speech [Webcast]'.

⁹⁴ See eg A/RES/66/167; and Human Rights Council, 'Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons Based on Religion or Belief' (10 April 2012) A/HRC/RES/19/25.

⁹⁵ Marc Limon, Nazila Ghanea, and Hilary Power, 'The United Nations and the "16/18 Process"' in Jeroen Temperman and András Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (CUP 2017) 656–658.

⁹⁶ 'Joint Statement on Combating Intolerance, Discrimination, and Violence Based on Religion or Belief' (US Department of State, 15 July 2011) <<https://2009-2017.state.gov/r/pa/prs/ps/2011/07/168653.htm>> accessed 24 April 2020.

⁹⁷ Limon, Ghanea, and Power, 'The United Nations and the "16/18 Process"', 658–660.

⁹⁸ '7th Meeting of the Istanbul Process, 8-19 November 2019. Combatting Religious Intolerance: Building Inclusive and Resilient Societies, and Pushing Back against Incitement to Hatred and Violence. Concept Note' (Universal Rights Group, 2019) <www.universal-rights.org/wp-content/uploads/2019/11/Istanbul-Process-concept-note.pdf> accessed 24 April 2020.

to bring together relevant stakeholders to discuss the issue in question and, at the same time, have avoided debating the core issues that led to the creation of Resolution 16/18.

In a separate attempt to solve issues arising from the resolutions on defamation of religions, the UN established in 2008 a global research group to analyse the prohibition of incitement to hatred.⁹⁹ The research group included several scholars, practitioners, members of treaty bodies, and Special Rapporteurs.¹⁰⁰ This initiative was one of the most expensive projects funded by the OHCHR, as well as one of the longest, involving two rounds of global meetings. The investment resulted in a set of guidelines and recommendations for States entitled the Rabat Plan of Action.

The Rabat Plan of Action is the most comprehensive UN document on incitement to hatred to date. It undoubtedly provides the best blueprint available to States willing to address incitement to hatred while respecting other human rights.¹⁰¹ The Rabat Plan offers tangible features which reinforce fundamental human rights, such as the recognition that freedom of expression and freedom of religion or belief are ‘mutually dependent and reinforcing.’¹⁰² The Plan is also unequivocal in its

⁹⁹ See eg Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights. Expert Seminar on the Links between Articles 19 and 20 of the International Covenant on Civil and Political Rights: "Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence"' (16 January 2009) A/HRC/10/31/Add.3; and Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred' (11 January 2013) A/HRC/22/17/Add.4, Annex.

¹⁰⁰ Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 498.

¹⁰¹ See recommendations in Rabat Plan of Action, paras 42–59; and Sejal Parmar, 'The Rabat Plan of Action: A Global Blueprint for Combating "Hate Speech"' (2014) 19 *European Human Rights Law Review* 21, 25–26.

¹⁰² Rabat Plan of Action, para 10.

defence that blasphemy laws are counterproductive, and that States should repeal them, a much stronger call than General Comment 34.¹⁰³

The “weak jurisprudence” in the area of incitement to religious intolerance is another point mentioned in the Rabat Plan of Action.¹⁰⁴ A model was then suggested to address such issues, influenced by the incitement test formulated by the NGO ARTICLE 19, which evaluates six criteria: (a) context, (b) speaker, (c) intent, (d) content and form, (e) extent of speech, and (f) likelihood and imminence.¹⁰⁵

The Rabat Plan of Action offers a comprehensive yet objective methodology for States to address the issue at hand; nevertheless, these recommendations will remain as mere ideals if States do not implement them.¹⁰⁶ Therefore, States should take into consideration the recommendations set in the Rabat Plan of Action and implement compatible legislation, yet this will not solve all the problems in this area; as Ghanea opined: ‘[i]t is simplistic, however, to assume that more laws and new laws alone will act as a panacea to this age old problem.’¹⁰⁷

Consequently, human rights bodies and other relevant stakeholders may play an essential part in tackling incitement to hatred. Human rights courts and treaty bodies

¹⁰³ Compare *ibid* paras 19 and 25; with CCPR/C/GC/34, para 48.

¹⁰⁴ Rabat Plan of Action, para 28.

¹⁰⁵ *ibid* para 29; and *Policy Brief: Prohibiting Incitement to Discrimination, Hostility or Violence* (ARTICLE 19 2012) 29–40.

¹⁰⁶ See also Burkhard J Berkmann, 'Blasphemy, Religious Defamation and Hate Speech: A Comparison of the European Court of Human Rights and the Rabat Plan of Action' in M Christian Green, T Jeremy Gunn and Mark Hill (eds), *Religion, Law and Security in Africa* (Ludwig-Maximilians-Universität München 2018) 66.

¹⁰⁷ Nazila Ghanea, 'Nature and Means of Effective Remedies' (Prohibition of Incitement to National, Racial or Religious Hatred in accordance with International Human Rights Law Expert Seminar for the European Region, Geneva, February 2011), paras 10–11.

can utilise the Rabat Plan of Action in cases related to incitement to hatred, thus granting legitimacy to the document. As mentioned above, UN Special Rapporteurs have been instrumental in clarifying issues concerning incitement to religious hatred, so States and international adjudicating bodies should take their reports into consideration when dealing with matters deemed as incitement to hatred.¹⁰⁸ The UN is also working to bring more coherence to address hate speech and ideally should coordinate its response in line with the Rabat Plan of Action and expert reports.¹⁰⁹

Religious leaders and civil society organisations can also play a crucial role in the implementation of the recommendations of the Rabat Plan of Action. The UN has acknowledged the significance of these actors in two declarations related to incitement to hatred elaborated after the Rabat Plan of Action: the Fez Process and the Beirut Declaration on “Faith for Rights”.

The Fez Process was an initiative developed to follow up the recommendation made in the Rabat Plan of Action regarding non-legal responses to incitement to hatred.¹¹⁰ The original discussions took place in Fez, Morocco, and involved mainly religious actors, although it also included NGOs and scholars.¹¹¹ This process resulted in a declaration and a plan of action. The Fez Plan of Action offers a mostly helpful framework for non-State actors to address incitement to hatred by preventing violence,

¹⁰⁸ See eg A/HRC/31/18; A/HRC/40/58; A/74/486.

¹⁰⁹ UN Strategy and Plan of Action on Hate Speech.

¹¹⁰ See eg Rabat Plan of Action, paras 35–37.

¹¹¹ UN Office on Genocide Prevention and the Responsibility to Protect, 'Plan of Action for Religious Leaders and Actors to Prevent and Counter Incitement to Violence' (2017) Fez Plan of Action 9.

strengthening institutions, and building new networks to promote human rights.¹¹² The Fez Plan of Action briefly explains the difference between “incitement to violence” and “hate speech” and the situations which could trigger Article 20(2) of the ICCPR.¹¹³ However, this difference is mostly theoretical as, in practice, human rights monitoring bodies have not applied a clear-cut distinction between the two terms. Furthermore, even though they are a constructive attempt to move away from problematic expressions, the Fez Declaration and the Fez Plan of Action still contain vague terms such as ‘extremist ideology’ and ‘religious extremists’.¹¹⁴

In the same spirit of engaging with religious leaders, the ‘Faith for Rights’ framework was launched by the OHCHR in March 2017. Similar to the Fez Declaration, the OHCHR drafted a document entitled the Beirut Declaration on ‘Faith for Rights’ after a meeting in the city. The Beirut Declaration is rather unique, as it intertwines religious texts and human rights provisions. It also avoids expressions such as extremist ideology, and in relation to incitement to hatred it affirms that ‘[p]rohibiting such incitement is not enough. Remedial advocacy to reconciliation is equally a duty, including for religious leaders, particularly when hatred is advocated in the name of religions or beliefs.’¹¹⁵ The document also includes an age perspective as it invites stakeholders to protect children and the youth from incitement to hatred.¹¹⁶

¹¹² ibid 12.

¹¹³ ibid 5.

¹¹⁴ Respectively, UN, 'Fez Declaration' (24 April 2015) Fez Declaration, principle 10; and Fez Plan of Action, p 18.

¹¹⁵ OHCHR, 'Beirut Declaration on "Faith for Rights"' (29 March 2017) Beirut Declaration on "Faith for Rights", para 21.

¹¹⁶ 18 Commitments on "Faith for Rights", commitment XIII.

While these initiatives are commendable for providing a holistic framework to address incitement to hatred, it is imperative to emphasise that the primary duty to protect individuals against incitement to hatred remains with the State.

6.2.4 Regional Interpretations

Debates about incitement to hatred have also taken place in regional human rights systems, but their approaches have varied. The Inter-American system does not define the term. To shed light on this phenomenon, the regional Special Rapporteur for Freedom of Expression, Edison Lanza, utilised the concept provided by the UNESCO report entitled *Countering Online Hate Speech*, defining hate speech as:

expressions that advocate incitement to harm (particularly, discrimination, hostility or violence) based upon the target's being identified with a certain social or demographic group. It may include, but is not limited to, speech that advocates, threatens, or encourages violent acts. For some, however, the concept extends also to expressions that foster a climate of prejudice and intolerance on the assumption that this may fuel targeted discrimination, hostility and violent attacks.¹¹⁷

The Special Rapporteur also emphasised a central feature of the UNESCO report, which was the importance of counter-speech in cases of incitement to hatred.¹¹⁸ Additionally, the IACHR has taken into consideration, perhaps more closely than other regional human rights bodies, the developments at the UN mentioned on this matter.¹¹⁹

¹¹⁷ Gagliardone, Gal, Alves Pinto, and Martinez, *Countering Online Hate Speech*, 10–11 in IACHR, 'Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015' (31 December 2015) OEA/Ser.L/V/II. Doc 48/15, para 31.

¹¹⁸ IACHR, 'Standards for a Free, Open and Inclusive Internet' (15 March 2017) OEA/Ser.L/V/II - CIDH/RELE/INF.17/17, para 123. See also Chapter 5.3.

¹¹⁹ See OEA/Ser.L/V/II. Doc 48/15, paras 18–19.

Furthermore, the Inter-American Court of Human Rights has stated that in matters of limitations to freedom of expression, a comparison between the ACHR, the ECHR, and the ICCPR, ‘indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.’¹²⁰ Therefore, some of the limitations to expressions deemed as incitement to hatred seen in cases at the Human Rights Committee and the ECtHR would probably not meet the high threshold imposed by the American Convention on Human Rights.¹²¹

Regarding the African human rights system, as mentioned above, the Banjul Charter does not mention incitement to hatred based on religion or belief as a stand-alone prohibition or as a limitation to the right to freedom of expression. Nevertheless, the African Commission on Human Rights has approved a resolution which condemns incitement to hatred on the Internet, including on grounds of religious affiliation.¹²² Furthermore, the ‘Guidelines on Freedom of Association and Assembly in Africa’ prohibits incitement to hatred based on religion or belief in accordance with the Rabat Plan of Action.¹²³ This cross-fertilisation of legal documents is crucial for interpreting

¹²⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism: Articles 13 and 29 of the American Convention on Human Rights*, para 50.

¹²¹ OEA/Ser.L/V/II.222. Doc 5 rev, para 50.

¹²² ACHPR, 'Resolution on the Right to Freedom of Information and Expression on the Internet in Africa' (4 November 2016) ACHPR/Res.362(LIX).

¹²³ ACHPR, 'Guidelines on Freedom of Association and Assembly in Africa' (21 September 2017) Guidelines on Freedom of Association and Assembly in Africa, paras 15 and 78.

incitement to hatred based on religion or belief in the African system, especially given the lack of regional jurisprudence on the topic.¹²⁴

The European human rights system has produced several documents addressing incitement to hatred based on religion or belief. In 1968, the Committee of Ministers adopted a resolution recommending the Member States of the CoE to ‘exert their influence in the United Nations with a view to obtaining as soon as possible a satisfactory conclusion to the work on the draft convention on the elimination of all forms of intolerance and of discrimination based on religion or belief’ and review their legislation accordingly.¹²⁵ However, as discussed above, this draft convention never reached a satisfactory conclusion.¹²⁶ This resolution is somewhat unusual in that it also called Member States to add an ‘interpretative statement’ when depositing their instruments of ratification of the ICERD, declaring that the Convention should be read with respect to the rights formulated in the ECHR.¹²⁷ This interpretative question was raised by the ECtHR in *Jersild v Denmark*.¹²⁸ This call is repeated in Resolution (97) 20, which is one of the few legal documents providing a definition of hate speech.¹²⁹

¹²⁴ There are, however, cases dealing with incitement to hatred on other grounds, eg *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* Comm no 249/02 (ACHPR, 7 December 2004); and *Front for the Liberation of the State of Cabinda v Angola* Comm no 328/06 (ACHPR, 5 November 2013).

¹²⁵ CoE, 'Measures to Be Taken against Incitement to Racial, National and Religious Hatred' (31 October 1968) CoE Res (68) 30, paras 3–4.

¹²⁶ Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, vii.

¹²⁷ CoE Res (68) 30, para 2.

¹²⁸ *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 28.

¹²⁹ CoE, "'Hate Speech'" (30 October 1997) CoE Res (97) 20, para 3.

The definition, which is included in the appendix of the resolution, does not mention religion or belief explicitly, although they could be inferred in the concept.¹³⁰

The ECRI does not appear to have, *prima facie*, a mandate to deal with issues of incitement to hatred based on religion or belief in general. The exception is issues related to anti-Semitism as its statute defines that: ‘ECRI shall be a body of the Council of Europe entrusted with the task of combating racism, racial discrimination, xenophobia, *antisemitism* and intolerance in greater Europe.’¹³¹ Nevertheless, in practice, the body conflates discrimination based on ethnicity and religion, as the ECRI’s definition of racism includes discrimination on grounds of religion.¹³² The ECRI has also issued one General Recommendation on combatting intolerance and discrimination against Muslims and another on anti-Semitism.¹³³ Naturally, there is nothing wrong with singling out one religious group if intolerance is solely aimed at that specific religious community, but that is hardly the case in European multicultural societies. Moreover, these recommendations seem to be in conflict with the recommendations of other bodies of the CoE, which suggest that States should move away from laws that punish offence to religious belief.¹³⁴ In any case, an approach that

¹³⁰ *ibid* appendix, scope.

¹³¹ CoE, 'Statute of the European Commission against Racism and Intolerance' (13 June 2002, amended 9 October 2013 and 19 February 2014) CoE Res (2002) 8, appendix, art 1.

¹³² ECRI, 'General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination' (13 December 2002) CRI(2003)8, Explanatory Memorandum, para 6.

¹³³ Respectively, ECRI, 'General Policy Recommendation No 5 on Combating Intolerance and Discrimination against Muslims' (16 March 2000) CRI(2000)21; and ECRI, 'General Policy Recommendation No 9 on the Fight against Antisemitism' (25 June 2004) CRI(2004)37.

¹³⁴ See eg *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*; and CoE Commissioner for Human Rights, 'Ethical Journalism and Human Rights' (8 November 2011) CommDH (2011)40, para 12.

is selective in protecting some religious groups over others is not helpful to further the interpretation of incitement to hatred based on religion or belief in Europe.

The EU and the OSCE have also addressed the issue of incitement to hatred based on religion or belief; however, they did not elucidate how States should address the subject. After the incidents related to the Danish Cartoons, the EU sent mixed messages, stating that incitement to hatred was caused by people who felt offended by the Cartoons; but also mentioned that ‘freedom of expression should always be exercised within the limits of the law and should coexist with responsibility and with respect for human rights, religious feelings and beliefs.’¹³⁵ The OSCE has also condemned attacks against religious groups, but it too has occasionally approached the issue selectively.¹³⁶

Despite being unpredictable, the European system has positive examples of how to approach the present topic. The ECRI General Policy Recommendation 15, for example, states in its preamble that legislation against hate speech should protect persons, not religions, and refers to the Rabat Plan of Action.¹³⁷ Furthermore, the PACE and the Venice Commission have proposed effective recommendations concerning incitement to hatred on grounds of religion or belief.¹³⁸ These

¹³⁵ European Parliament, 'The Right to Freedom of Expression and Respect for Religious Beliefs' (16 February 2006) EU P6_TA(2006)0064, paras 2, 4, 13 and 15.

¹³⁶ Respectively OSCE, 'Decision No 6 on Tolerance and Non-Discrimination' (7 December 2002) OSCE MC(10).DEC/6, para 5; and *Intolerance and Discrimination against Christians: Focusing on Exclusion, Marginalization and Denial of Right* (OSCE 2009).

¹³⁷ ECRI, 'General Policy Recommendation No 15 on Combating Hate Speech' (8 December 2015) CRI(2016)15, preamble, and paras 7(d), 7(r); See also PACE Res 1743.

¹³⁸ See eg PACE Recommendation 1805; and *Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*.

recommendations are not binding on States, unlike the jurisprudence of regional human rights courts. Thus, much of the work to elucidate the interpretation in this murky area is left to the jurisprudence of courts and treaty bodies, as analysed below.

6.3 Cases of Incitement to Hatred at the Human Rights Committee

As seen in the previous chapters, there is nothing in the texts of human rights instruments that would lead to the protection of religious belief alone. The case law is, however, much more complicated. The case against the Dutch politician Geert Wilders (*Mohamed Rabbae v Netherlands*) is the one that best illustrates this issue at the Human Rights Committee,¹³⁹ and it will be analysed closely in this section. However, there are other cases that directly or indirectly raise questions of whether offence to religious belief can be considered as advocacy of religious hatred.

6.3.1 Prohibition of Incitement to Hatred invoked by States

Article 20(2) of the ICCPR, as mentioned above, imposes an obligation on States to proscribe ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’¹⁴⁰ Naturally, this is an argument raised by States to limit qualified rights, especially freedom of expression. Several cases involving dissemination of anti-Semitic material fall within this category, for instance,

¹³⁹ *Rabbae v The Netherlands*, para 2.7.

¹⁴⁰ ICCPR, art 20(2).

JRT and the WG Party v Canada, *Faurisson v France*, and *Zündel v Canada*.¹⁴¹ In *JRT and the WG Party v Canada* the expression in question were phone calls warning people ‘of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.’¹⁴² *Faurisson* and *Zündel* were Holocaust deniers.¹⁴³ Consequently, in these cases, the Committee essentially affirmed that the States were not violating the ICCPR, but actually giving effect to its Article 20(2).¹⁴⁴

States have also curbed offences related to incitement to hatred based on religion or belief by imposing limitations on freedom of expression, which indirectly reinforces the argument that Article 20 is somewhat redundant. For example, the ban on religious groups from spreading messages considered “extremist” or inciting hatred is permitted in certain cases, based on the limitation grounds set in Article 19(3) of the Covenant. The Human Rights Committee has allowed, for instance, Uzbekistan to ban the Hizb ut-Tahrir based on this article.¹⁴⁵

Nevertheless, in some cases, the expressions considered discriminatory are not apparent, thus requiring a deeper analysis by the Committee, as in *Ross v Canada*. This

¹⁴¹ *JRT and the WG Party v Canada* Comm no 104/1981 (Human Rights Committee, 6 April 1983) CCPR/C/18/D/104/1981; *Faurisson v France*; and *Zündel v Canada* Comm no 953/2000 (Human Rights Committee, 27 July 2003).

¹⁴² *JRT and the WG Party v Canada*, para 2.1.

¹⁴³ *Faurisson v France*, para 2.1; and *Zündel v Canada*, para 2.1.

¹⁴⁴ See eg *JRT and the WG Party v Canada*, para 6.2 and *Faurisson v France*, concurring opinions of Evatt, Kremer, and Lallah.

¹⁴⁵ *AK and AR v Uzbekistan*, para 7.2.

case was already mentioned in relation to other rights,¹⁴⁶ but it also raises questions regarding incitement to hatred. Ross was a teacher and author who had written some books claiming that Christianity was the true religion and was critical of Judaism. The Supreme Court of Canada declared that the expressions made by the author were discriminatory, despite having ‘no direct evidence establishing an impact upon the school district caused by R's off-duty conduct’.¹⁴⁷ The author of the complaint against Ross was a parent, but his children did not attend the School where Ross was teaching.¹⁴⁸ The Board of Inquiry found no evidence of discrimination in his classroom activities but decided that Ross ‘denigrated the faith and belief of Jews.’¹⁴⁹

The Board thus demanded the school to appoint Ross a non-teaching position, and terminate his employment if he distributed any of his publications, namely: ‘Web of Deceit, The Real Holocaust (The Attack on Unborn Children and Life Itself), Spectre of Power, Christianity vs. Judeo-Christianity (The Battle for Truth)’.¹⁵⁰ The Court of Appeal decided against the interference, considering the limitation to freedom of expression not justified, as such interference would ‘have the effect of condoning the suppression of views that are not politically popular any given time.’¹⁵¹ The Supreme Court overruled the former decision, as it considered the author a notorious anti-Semite.

¹⁴⁶ See Chapter 5.2.2.2.

¹⁴⁷ *Ross v New Brunswick School District No 15* [1996] 1 SCR 825, (2) discrimination.

¹⁴⁸ *ibid* para 3.

¹⁴⁹ *ibid* para 6.

¹⁵⁰ *ibid* para 7.

¹⁵¹ *ibid* para 14.

The main drawback in this case at the Human Rights Committee is that the link between the comments of the author and the discrimination is not clear, mainly because there are no passages indicating that there the author committed ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’, as claimed by the State.¹⁵² It appears that the Committee simply assumed that the summary provided by the domestic courts reflected the reality of the case, despite arguments of the author against such assessment. For example, the Board of Inquiry stated that:

It would be an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values.¹⁵³

Even if it would be impossible to list every discriminatory comment, the State should at least present a few. Criticisms of Jewish belief and anti-Semitism are, at least conceptually, different issues.¹⁵⁴ Therefore, the applicant was correct in stating that ‘criticism of Judaism or Zionism for religious reasons cannot be equated to anti-Semitism.’¹⁵⁵ Nonetheless, if Ross’ comments were not only criticising Judaism, but also discriminating against Jewish people, then his right to freedom of religion or belief

¹⁵² *Ross v Canada*, para 6.2.

¹⁵³ *ibid* para 4.2.

¹⁵⁴ See Chapter 1.3.3; and A/74/358.

¹⁵⁵ *Ross v Canada* para 5.4.

and freedom of expression should be limited. Once again, it is impossible to know what the comments in question are based on the case alone.

It is clear that the statements the author made were based on his religious views, but this is irrelevant for Article 20(2), as statements based on sincere beliefs could nevertheless incite hatred and violence. However, the Committee did not even question whether criticism of beliefs should indeed be prohibited, as it stated that '[w]hile noting the vague criteria of the provisions that were applied in the case [...] it is not for the Committee to re-evaluate the findings of the Supreme Court on this point'.¹⁵⁶

We found, in a study made about the writings of Ross, that his statements indeed mix criticism of Judaism and of the Jewish people in general, thus justifying the decision of the Human Rights Committee.¹⁵⁷ Still, we consider that the reasoning of the Human Rights Committee was highly problematic. The Committee could have requested more evidence from the parties in order to substantiate its decision, thus clearly demonstrating why the comments of the author were reprehensible. As a result of ignoring the evidence of incitement to hatred, this judgement provided significant support for followers of other religious traditions to bring claims that their religion was criticised and that they were victims of religious hatred.

6.3.2 Protection of Incitement to Hatred claimed by Individuals

States have used Article 20(2) in some cases to justify their own actions, ie imposing limitations on qualified rights. Therefore, they tacitly accepted that Article 20(2) also

¹⁵⁶ ibid para 11.4.

¹⁵⁷ A thorough analysis of the writings of Ross can be found in David Hunnings, 'Malcolm Ross: Truth, Hatred, and the Teacher', Master Thesis, Simon Fraser University 1994) ch 2.

created a positive obligation on States. Accordingly, it follows that if Article 20(2) can be claimed by States to protect individuals, it could also be claimed by victims when the State does not fulfil their obligation to protect persons against incitement to hatred. Nevertheless, the Human Rights Committee has struggled to take this perspective into account. The member of the Committee who first proposed this interpretation was Abdelfattah Amor in a dissenting opinion on a case considering discrimination and incitement to hatred against Romani people in Greece.¹⁵⁸ Amor defended that:

Article 20 is not an invitation to add another law to the legal arsenal merely for form's sake. Even if this was the purpose, which is not the case in Greece, such a law would be ineffective without procedures for complaints and penalties. In fact, the invocation of article 20, paragraph 2, by individuals who feel they have been wronged follows the logic of protection that underlies the entire Covenant and consequently affords protection to individuals and groups.¹⁵⁹

Amor was correct in following the logic that the Covenant was not drafted to protect States from persons, but to protect persons from the power of the State. Therefore, Article 20(2) cannot be viewed separately from the other protections included in the Covenant. However, the view of Amor was dissenting from the majority, who did not accept his interpretation of Article 20(2) of the ICCPR.

As mentioned above, the decision of the Committee in *Ross v Canada* allowed the State to impose sanctions on a teacher who offended the beliefs of members of the Jewish faith, and discriminated against them in his writings.¹⁶⁰ Therefore, it is not surprising that members of other religious groups would also bring similar claims to

¹⁵⁸ *Vassilari v Greece* Comm no 1570/2007 (Human Rights Committee, 19 March 2009) CCPR/C/95/D/1570/2007.

¹⁵⁹ *ibid* dissenting opinion of Committee Member Abdelfattah Amor, para 1.

¹⁶⁰ *Ross v Canada*, para 11.5.

the Committee. This happened after the publications of the Danish Cartoons, when a couple of Muslims argued that the Cartoons amounted to ‘incitement of hatred against Muslims, prohibited under article 20 of the Covenant.’¹⁶¹

Denmark first pointed out that context should be taken into consideration when deciding issues related to incitement to hatred. Then, Denmark stated that since the discussion in the newspaper was primarily about self-censorship, it should be allowed.¹⁶² However, Denmark also alleged that the other cases analysed by the Committee in regards to Article 20 dealt with ‘expressions of unambiguously anti-Semitic nature’.¹⁶³ This is true for *JRT and the WG Party v Canada*, *Faurisson v France*, and *Zündel v Canada*, but not necessarily for *Ross v Canada*. While this discussion is pertinent, the Committee refrained from analysing the merits of the issue, as it considered the case inadmissible ‘for failure to exhaust domestic remedies’.¹⁶⁴

Given the lack of clarity on this topic, other cases raised the same questions to the Committee. In *Andersen v Denmark*, the author—a Muslim woman—affirmed that statements from politicians, such as equating the use of the headscarf with the swastika, were ‘based on a clear pattern of Islamophobic statements amounting to hate propaganda against Muslims in Denmark.’¹⁶⁵ Once again, Denmark employed a literal reading of Article 20(2) in its defence, stating that for expressions to fall within this

¹⁶¹ *Ahmad and Abdol-Hamid v Denmark*, para 3.1.

¹⁶² *ibid* para 4.6.

¹⁶³ *ibid* para 4.7.

¹⁶⁴ *ibid* para 6.2.

¹⁶⁵ *Andersen v Denmark* Comm no 1868/2009 (Human Rights Committee, 26 July 2010) CCPR/C/99/D/1868/2009, paras 2.1 and 3.1.

provision, '[a]dvocacy of national, racial or religious hatred is not sufficient. The advocacy must be particularly qualified as it must have the intention of inciting to discrimination, hostility or violence.'¹⁶⁶ The State also emphasised that in this case, the expressions should be protected due to the importance of political debate in society.¹⁶⁷ The Committee considered the case inadmissible once again, but this time due to the *locus standi* of the author, ie she failed to demonstrate that she was a victim of the statements mentioned above.¹⁶⁸ Consequently, the Committee found the case inadmissible, but the reason for such a finding is problematic. *Prima facie*, there seems to be enough reason for a Muslim woman to feel discriminated against if a politician equates her beliefs to Nazism. Therefore, the issue that should be determined by the Committee was not *locus standi*, but the causal nexus (or lack thereof) between the statements and the potential religious discrimination.

While the author in *Andersen v Denmark* did not substantiate her claims, the author in *AWP v Denmark* presented better arguments regarding Article 20(2) of the ICCPR, as the description of the facts below demonstrate:

On 18 April 2007, Member of Parliament (MP) Søren Krarup, member of the Danish Popular Party (DPP) expressed his views in an article from the newspaper "Morgenavisen Jyllands-Posten", about allowing a female parliamentary candidate to speak in Parliament wearing her Muslim scarf. Mr. Krarup stated that "just like the Nazis believed that everyone from another race should be eliminated it is the belief in Islam that everyone of another faith must be converted and if not eliminated". On 20 April 2007, MP Morten Messerschmidt from the DPP stated in an article from Nyhedsavisen that "Muslim societies are per definition losers. Muslims cannot think critically [...] and this produces losers [...]" On the same date, Member of the European Parliament (MEP) Mogens Camre from the same political party stated in the same newspaper article that "the idea that

¹⁶⁶ *ibid* para 4.3.

¹⁶⁷ *ibid*.

¹⁶⁸ *ibid* para 6.5.

a fundamentalist with headscarf should become member of the Danish Parliament is sick. She (the candidate for Parliament) needs mental treatment [...]’.¹⁶⁹

The applicant was a Muslim and therefore felt offended by the statements, which he also considered as fostering an environment of discrimination against him. He claimed that Denmark failed to fulfil its obligation to prohibit incitement to hatred against Muslims.¹⁷⁰ In this case, the Danish argument was less precise. Denmark upheld the importance of political debate *in abstracto* but also appeared to defend the politician who made the allegedly discriminatory remarks. Denmark asserted that the politician’s comments about the headscarf ‘had not intended to insult Muslims but simply express his view that Islamism was problematic because its adherents prized God’s will above ordinary common sense and turned religion into a political ideology.’¹⁷¹ In any case, the Committee once again decided that the author was not a victim.¹⁷² The applicant retorted, stating that his case was similar to *Toonen v Australia*, a case considering the criminalisation of ‘unnatural sexual intercourse’ by the Tasmanian Criminal Code.¹⁷³ In *Toonen*, the author was considered a potential victim because although the law in question was not being enforced, it was still valid;

¹⁶⁹ *AWP v Denmark* Comm no 1879/2009 (Human Rights Committee, 1 November 2013) CCPR/C/99/D/1868/2009, para 2.1.

¹⁷⁰ *ibid* para 3.1.

¹⁷¹ *ibid* para 4.1.

¹⁷² *ibid* para 6.4.

¹⁷³ *Toonen v Australia* Comm no 488/1992 (Human Rights Committee, 31 March 1994) CCPR/C/50/D/488/1992, para 2.3.

consequently, the Committee considered that as a threat to the author and found a violation of the right to privacy of Toonen.¹⁷⁴

We find the analogy between *Toonen* and *AWP* rather weak, but that does not diminish the validity of the author's claim as a potential victim, given that some of the statements were directed at Muslims, not just Islamic beliefs. The real problem was, as pointed out by the concurring judges, 'the author's failure to substantiate a violation of his rights under articles 20, paragraph 2, and 27 of the Covenant, and not lack of victim status due to the collective nature of the harm allegedly afflicted by the acts or omissions of the State party.'¹⁷⁵ The importance of this conclusion is subtle but imperative to the development of the case law in the field, as the author should not wait to be the victim of violence to claim that the State had not done enough to curb advocacy to religious hatred. In sum, the main problem with the arguments put forward by the author was not his potential victimhood but that he did not establish a causal link between the statements in question and the likelihood of discrimination.

Ultimately, given the weak arguments presented by the applicants, it would be difficult for the Committee to reach a different outcome, but its views on the cases were equally weak.¹⁷⁶ The Committee would have a more difficult task at hand if the applicants brought forth, as a comparator, *Ross v Canada*. In *Ross v Canada* there was no causal nexus between the alleged victims and the interference of the State. Once again, in that case the complaint arose from 'a Jewish parent, whose children attended

¹⁷⁴ *ibid* paras 8.2 and 9.

¹⁷⁵ *AWP v Denmark*, concurring opinion by Committee members Yuval Shany, Fabian Omar Salvioli and Victor Manuel Rodríguez-Rescia, para 3.

¹⁷⁶ Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*, 113.

another school within the same school district'.¹⁷⁷ It is not difficult to envision that a public speech by politicians demeaning Muslims will be much more widespread than a teacher spreading conspiracy theories. Regardless, if the cases from Denmark on alleged incitement to hatred appear to be inconsistent with the views of the Committee in *Ross v Canada*, the case concerning Geert Wilders makes it blatantly clear.

6.3.3 The Case concerning Statements Made by Geert Wilders about Islam and Muslims

The present case is referred to using the names of the parties, not the politician in question. It is called *Mohamed Rabbae v The Netherlands*. In this case, three dual nationals of the Netherlands and Morocco claimed that the Dutch politician Geert Wilders made several remarks that amounted to incitement to hatred.¹⁷⁸ The statements in question include the film *Fitna* and the following:

“The demographic composition of the population is the biggest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here. If you look at the figures and its development. Muslims will move from the big cities to the countryside. We have to stop the tsunami of Islamization. That stabs us in the heart, in our identity, in our culture. If we do not defend ourselves, then all other items from my programme will prove to be worthless” [...]

[Questioned about whether Islam and crime were related, he answered] “Absolutely. The figures are proving so. One out of five Moroccan youngsters has a police record. Their behaviour arises from their religion and culture. You can’t look at that detachedly. The Pope was completely right when he was saying that Islam is a violent religion. Islam means submission and conversion of non-Muslims. That interpretation applies in

¹⁷⁷ *Ross v Canada*, para 2.3.

¹⁷⁸ *Rabbae v The Netherlands*, para 2.1.

the living rooms of those delinquents and in the mosques. It is in the communities themselves”. [...]

“We had enough. The borders are closed, no more Islamic people coming to the Netherlands, a lot of Muslims exiting the Netherlands, denaturalization of Islamic criminals”. [...]

“I get sick of Islam in the Netherlands: no more Muslim migrants anymore”.¹⁷⁹

Wilders was prosecuted but later acquitted for such statements, and under Dutch law, the authors could not appeal the decision.¹⁸⁰ The applicants acknowledged that it was difficult to draw a ‘distinction between attacking Islam and attacking Muslims’, but emphasised that in this case, they were not concerned about statements directly against Islam but those ‘against Muslims as human beings or against non-Western migrants.’¹⁸¹ They were not only afraid of the repercussion of the statements, but they also gave evidence of how they were personally affected by the comments, one being shouted at on the streets: ‘Wilders is right, piss off from here!’ and the other received threatening emails after testifying against Wilders.¹⁸² Therefore, the authors claimed that the State violated Article 20(2) of the Covenant for not prohibiting the alleged discriminatory statements, Articles 26 and 27 on non-discrimination, and Articles 14(1) and 2(3) regarding the rights to an effective remedy and fair trial.¹⁸³

¹⁷⁹ ibid para 2.7.

¹⁸⁰ ibid paras 2.2–2.6.

¹⁸¹ ibid.

¹⁸² ibid paras 2.9–2.11.

¹⁸³ ibid paras 3.1–3.4.

6.3.3.1 Admissibility

The Netherlands defended itself from the allegations emphasising admissibility issues, in this case ‘failure to exhaust domestic remedies, lack of victim status and *ratione materia*.’¹⁸⁴ The first point was the strongest, as even though the applicants could not appeal the outcome of the criminal proceedings, they could still bring a separate civil action against Wilders.¹⁸⁵ One could argue that if the seriousness of the act did not trigger a criminal investigation, it would not reach the high threshold required by Article 20(2). Nonetheless, Article 20(2) requires only prohibition by law of incitement to hatred. It does not require criminal sanctions to be imposed on the perpetrators of such acts. The OIC had advocated criminal measures for cases concerning what they defined as ‘defamation of religions’ at the UN, and Resolution 16/18 endorses the view that ‘incitement to imminent violence based on religion or belief’ should be criminalised.¹⁸⁶ However, this is not necessarily what Article 20(2) prescribes. Consequently, as Agnès Callamard affirms in relation to this topic:

in view of the objective of protecting substantive equality, hate speech regulations cannot just be reduced or limited to criminal laws and the criminalization of hate speech. They simply cannot constitute the sole or indeed central response to prejudice, racism, and discrimination. Equal or further emphasis must be placed on *positive* State obligations.¹⁸⁷

¹⁸⁴ *ibid* para 4.1.

¹⁸⁵ *ibid* paras 4.2–4.3.

¹⁸⁶ A/HRC/RES/16/18, para 5(f).

¹⁸⁷ Agnès Callamard, ‘Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence’ (Expert Seminar: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, Geneva, October 2008) 14 (emphasis in original).

This understanding is also shared by Ghanea,¹⁸⁸ who illustrated this point with the ECRI General Policy Recommendation 1, stating that ‘adequate legal remedies are available to victims of discrimination, either in criminal law or in administrative and civil law where pecuniary or other compensation may be secured.’¹⁸⁹

Concerning the argument of lack of victim status, as observed in the previous cases analysed on the same topic by the Committee, the argument was mostly superficial. On the topic of jurisdiction *ratione materia*, the Dutch government was manifestly wrong. The Netherlands affirmed that Article 20 was not justiciable because it would result in a right to specific legislation.¹⁹⁰ Firstly, persons do have a right to specific legislation in States Parties to the ICCPR, as Article 2(2) of the ICCPR affirms that Member States must adopt ‘laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’¹⁹¹ Secondly, as reiterated by Temperman, a textual analysis of Article 20(2) clearly imposes a duty on States to implement laws to address incitement to hatred.¹⁹² Thirdly, as pointed out by Amor in *Vassilari v Greece*, the invocation of Article 20(2) should be permissible to

¹⁸⁸ Ghanea, 'Nature and Means of Effective Remedies', 8.

¹⁸⁹ ECRI, 'General Policy Recommendation No 1 on Combating Racism, Xenophobia, Antisemitism and Intolerance' (4 October 1996) CRI(96)43, p 5. It is important to note that ECRI changed its stance on the issue, and it was much more inclined towards the criminalization in its latest recommendation, the CRI(2016)15.

¹⁹⁰ *Rabbae v The Netherlands*, para 4.3.

¹⁹¹ See also CCPR/C/21/Rev.1/Add.13, para 13.

¹⁹² Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*, 82.

protect individuals.¹⁹³ The Committee rejected most arguments about admissibility posed by the Netherlands, thus considering the case admissible in relation to Articles 14(1) and 2(3) read in conjunction with Articles 20(2) and 26 of the ICCPR.¹⁹⁴

6.3.3.2 Merits

The Netherlands had no difficulty dismissing the claims about the right of an effective remedy and fair trial, as the authors did not have these rights violated solely because they did not accept the outcome of the case.¹⁹⁵ Nonetheless, the Dutch government arguments regarding Article 20(2) were much less coherent. The first arguments were:

Regarding the claim under article 20, it is not disputed that that provision has been implemented correctly through section 137d of the Criminal Code. The aim of both article 20 of the Covenant and section 137d of the Criminal Code is to outlaw incitement to hatred, but it is for the national courts to decide whether incitement to hatred has actually occurred. Article 20 has been highly controversial among States, resulting in very different forms of implementation. Domestic courts are best placed to assess whether specific utterances are punishable, as they possess the entire case file and can fully assess the criminality of the acts concerned. If review by the Committee is possible, it must be restricted; it is not for the Committee to re-evaluate the findings of the court on whether Mr. Wilders' acts and statements are punishable under criminal law. That is particularly pertinent since article 20 does not provide for individual rights.¹⁹⁶

Three points must be raised in relation to this paragraph. First, it is true that Section 137(d)(1) of the Criminal Code is indeed similar to Article 20(2), and it even

¹⁹³ See also *Rabbae v The Netherlands*, opinion partiellement concordante, partiellement dissidente de Olivier de Frouville, para 2.

¹⁹⁴ *ibid* para 9.10.

¹⁹⁵ *ibid* paras 6.1–6.4.

¹⁹⁶ *ibid* para 6.5.

expands the protection to issues of sexual orientation and disability.¹⁹⁷ However, the mere existence of legislation does not automatically fulfil the positive obligation required by the State; the law must also be effective.

Second, the affirmation that Article 20 of the ICCPR has been controversial is also correct, as mentioned above,¹⁹⁸ but utterly irrelevant in this case. The issue is immaterial because the fact that an article is controversial does not mean it is not applicable. For that to be the case, the Netherlands should have issued a reservation to Article 20(2), but it did not do so. The State has imposed a reservation in relation to the first paragraph of Article 20, but not to the second.¹⁹⁹ Thus, the Netherlands obviously knew that Article 20(2) was valid, as it explained that it chose to apply a reservation instead of an interpretative declaration to Article 20(1).²⁰⁰ It also clarified in 2010 that '[b]y using the reservation form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom'.²⁰¹ Consequently, if the State accepts that Article 20(1) imposes obligations and decided to make a reservation to that paragraph, it cannot imply that Article 20(2) does not impose a similar obligation. Furthermore, by indicating that Article 20(2) is controversial, the State somehow implied that the Human Rights Committee should refrain from issuing views on domestic issues related to that article.

¹⁹⁷ Criminal Code [The Netherlands] s 137(d).

¹⁹⁸ See Chapter 6.1.2.1.

¹⁹⁹ 'Status: International Covenant on Civil and Political Rights', Netherlands.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

Such a claim directly contravenes the principle of *pacta sunt servanda* in relation to the Optional Protocol of the ICCPR. Consequently, the Netherlands cannot argue that it is not for the Human Rights Committee to review the case.²⁰²

Third, the State declared that ‘it is for the national courts to decide whether incitement to hatred has actually occurred.’²⁰³ This affirmation, and the further explanation in the paragraph, raise a question related to the principle of subsidiarity.²⁰⁴ Article 20, like any other human right, should naturally be decided first in domestic jurisdictions. National courts are best placed to decide human rights issues. That is one of the reasons why exhaustion of domestic remedies is a criterion for admissibility.²⁰⁵ As explained by Gerald L. Neuman, ‘the exhaustion doctrine embodies a strong negative subsidiarity principle that the international tribunal should not intervene when the state’s own remedies are sufficient to address the violation.’²⁰⁶ However, if the State’s remedies do not address the alleged violation, persons can bring claims to an international body. If that were not the case, then the existence of any international body would serve only to validate whatever the State had decided in the first place, thus offering no protection to persons, nor any effective supervision.²⁰⁷

²⁰² See Chapter 2.1.1.

²⁰³ *Rabbae v The Netherlands*, para 6.5.

²⁰⁴ See Chapter 5.1.3.

²⁰⁵ Optional Protocol to the ICCPR, art 2.

²⁰⁶ Neuman, ‘Subsidiarity’, 370.

²⁰⁷ See also Judge Pinto de Albuquerque in-depth explanation about the negative ramifications of such arguments in his dissenting opinion of *Hutchinson v UK* App no 57592/08 (ECtHR, 17 January 2017) paras 26–47.

The arguments above relate solely to the first paragraph of the Netherlands' defence based on Article 20(2). Unfortunately, the State's reasoning does not improve much in the following paragraphs, as the Netherlands continued to provide arguments that could be correct *in abstracto* but which did not apply to the case in question. For example, in paragraph 6.6, the State put forward the dictum of the ECtHR that freedom of expression protects 'even statements that offend, shock or disturb.'²⁰⁸ Nevertheless, although the ECtHR has often mentioned the expression above, it originated in a much milder context regarding the morality of certain remarks.²⁰⁹ Additionally, the ECtHR has declared that expressions, similar to the ones uttered by Wilders but arguably less offensive, are not protected by the right to freedom of expression.²¹⁰

The Netherlands also claimed that 'those who choose to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.'²¹¹ However, although they did not quote it, this is taken directly from the *Otto-Preminger* case, the most notorious case of the ECtHR decided in favour of protecting the feelings of religious individuals at the ECtHR.²¹² Despite the poor choice of jurisprudence to rely on, this argument addresses the complaints about blasphemous utterances against Islam—such as the authors'

²⁰⁸ *Handyside v UK*, para 49.

²⁰⁹ *ibid.*

²¹⁰ See eg *Norwood v UK* App no 23131/03 (ECtHR, 16 November 2004); and *Le Pen v France* App no 18788/09 (ECtHR, 20 April 2010).

²¹¹ *Rabbae v The Netherlands*, para 6.6.

²¹² *Otto-Preminger-Institut v Austria*, para 47. See further Chapter 5.2.2.3.

complaint about the film *Fitna*—but it says nothing about the disparaging comments against Muslims made by Wilders.

The politician in question often conflated criticism of people based on their nationality, religion, and Islamic beliefs. Therefore, the authors emphasised that their claims were in relation to these conflated complaints, affirming that '[t]hey are statements that are not directed against Islam as a religion but against Muslims as human beings or against non-Western migrants, although the distinction between attacking Islam and attacking Muslims is hard to draw.'²¹³ Not all statements provided by the authors would fit this category, but many certainly do, like the one in which Wilders declared 'I get sick of Islam in the Netherlands: no more Muslim migrants anymore', and 'the demographic composition of the population is the biggest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here.'²¹⁴ These statements are references to the 'Replacement Theory', a conspiracy theory which claims that the white population will be replaced by other cultures which have a higher birth rate.²¹⁵ The likelihood of this idea turning violent is low but not impossible, as the infamous attack on mosques in New Zealand demonstrates. In this instance, the attacker released a document online called *The*

²¹³ *Rabbae v The Netherlands*, para 2.7.

²¹⁴ *ibid* paras 2.7(a)(i) and 2.7(c)(iv), respectively.

²¹⁵ Nellie Bowles, "'Replacement Theory,' a Racist, Sexist Doctrine, Spreads in Far-Right Circles' (*The New York Times*, 18 March 2019) <www.nytimes.com/2019/03/18/technology/replacement-theory.html> accessed 24 April 2020.

Great Replacement, a direct translation of the book which helped to propagate this theory,²¹⁶ and expressed concern about birth rates in the Muslim community.²¹⁷

Naturally, this does not automatically mean that the applicants were correct, but it indicates that this case should not be dismissed solely as a matter of criticism of religion. After all, if that is what the authors were after, they would have originally brought claims under Section 147 of the Dutch penal code, which at the time of the communication proscribed any person from ‘publicly, either verbally or in writing or through images, (offending) religious sensibilities by disparaging and blasphemous utterances.’²¹⁸ The authors chose instead to bring claims, in domestic courts, under Section 137(d) of the Criminal Code, which—as confirmed by the State—aimed to ‘criminalize incitement to hatred or discrimination against persons, not religions.’²¹⁹

Another argument used in defence of the Netherlands was the importance of freedom of expression to public debate, which was supposedly in line with the jurisprudence of the ECtHR.²²⁰ The problem with this argument in the present case is twofold. First of all, just because a particular expression leads to public debate around the topic, it does not mean it should not be prohibited. For example, racist speech can surely advance the public debate on issues regarding discrimination of persons from ethnic minorities, but that does not mean that such remarks should not be outlawed.

²¹⁶ Renaud Camus, *Le Grand Remplacement* (Reinharc 2011).

²¹⁷ Bowles, "'Replacement Theory,' a Racist, Sexist Doctrine, Spreads in Far-Right Circles'.

²¹⁸ Criminal Code [The Netherlands] s 147.

²¹⁹ *Rabbae v The Netherlands*, para 6.9.

²²⁰ *ibid* para 6.14.

Secondly, in several cases at the ECtHR—including *Soulas and Others v France*,²²¹ *Féret v Belgium*,²²² and *Le Pen v France*²²³—the ECtHR did not find that imposing limitations on expressions about immigration and Islam violated freedom of expression. This does not mean that the ECtHR was necessarily correct in its approach, only that the comparative analysis employed by the Netherlands was highly selective.

The best argument raised by the Netherlands was the one that contextualised the necessity of public deliberation on a particular issue, thus combining the theoretical scope of freedom of expression and the need for a debate in society around the issues raised by Wilders. In this regard, the State declared that the domestic court:

found that, at the time the statements were made, multicultural society and immigration were major topics of public debate. The fiercer the debate, the more scope for freedom of expression is needed, and in such circumstances statements may even offend, shock or disturb. The court held that Mr. Wilders' statements were not of a nature that they should be deemed criminal as excessive and hence excluded from public debate. Thus, the court did not make public debate an absolute exception, but indicated in general terms the boundaries of when incitement to hatred and discrimination may arise.²²⁴

Both sides brought additional arguments, but none raised substantial issues. The applicants emphasised the point that the domestic court could not establish the link between Wilders' statements and incitement to hatred based on race, despite the repeated mentions of 'Moroccans' and 'non-Western immigrants'.²²⁵ The Netherlands

²²¹ *Soulas and Others v France* App no 15948/03 (ECtHR, 10 July 2008).

²²² *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).

²²³ *Le Pen v France*.

²²⁴ *Rabbae v The Netherlands*, para 6.15.

²²⁵ *ibid* para 7.7.

suggested that the present case was similar to *Perinçek v Switzerland*,²²⁶ where the ECtHR found that denial of the Armenian Genocide was a matter of public interest, and in this manner did not justify a criminal penalty.²²⁷ In sum, both parties introduced interesting principled questions, but none could fully support their arguments with the existing case law on the topic. Therefore, the Committee had a challenging task to find which side was correct.

6.3.3.3 Issues and proceedings before the Human Rights Committee

In terms of admissibility, the Committee found that the authors had victim status, as they were ‘members of the category of persons who were the specific focus of Mr. Wilders’ statements.’²²⁸ It is important to note that in doing so, the Committee somehow overruled the approach taken in *Andersen v Denmark*²²⁹ and *AWP v Denmark*,²³⁰ even though in those cases admissibility was mostly decided by virtue of the lack of substantiation of the cases.

Another interesting point is that the majority of the Committee accepted that the case had fulfilled the criterion of exhaustion of domestic remedies, despite the authors still being able to sue Wilders in civil courts.²³¹ The majority also took the opinion of

²²⁶ *Perinçek v Switzerland*.

²²⁷ *Rabbae v The Netherlands*, para 8.4.

²²⁸ *ibid* para 9.6.

²²⁹ *Andersen v Denmark*, para 6.4.

²³⁰ *AWP v Denmark*, para 6.4.

²³¹ *Rabbae v The Netherlands*, paras 9.3–9.4.

Abdelfattah Amor in his dissenting opinion of *Vassilari v Greece* regarding Article 20(2)²³² and emphasised its importance to protect persons as individuals and members of groups despite not being ‘cast in terms of a justiciable right.’²³³

Concerning the merits, the discussion is succinct, especially compared with the number of separate opinions issued by the members of the Committee. While there is little jurisprudence regarding Article 20 of the ICCPR, the Committee had at its disposition its own interpretations of the right to freedom of expression inscribed in General Comment 34,²³⁴ as well as the articles produced by experts leading to the *travaux préparatoires* of the Rabat Plan of Action, and the document itself.²³⁵ Furthermore, the members of the Committee could find enough material for a more elaborate discussion based on the debates concerning the resolutions on defamation of religion,²³⁶ the Resolution 16/18,²³⁷ and reports from Special Rapporteurs on freedom of expression, freedom of religion or belief, and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.²³⁸

²³² *Vassilari v Greece*, dissenting opinion of Committee Member Abdelfattah Amor, para 1.

²³³ *Rabbae v The Netherlands*, para 9.7.

²³⁴ CCPR/C/GC/34, paras 48–52.

²³⁵ See recommendations in Rabat Plan of Action, paras 42–59.

²³⁶ See Chapter 1.3.1 and Appendix.

²³⁷ A/HRC/RES/16/18. See also Marc Limon, Nazila Ghanea, and Hilary Power, *Combating Global Religious Intolerance: The Implementation of Human Rights Council Resolution 16/18* (Universal Rights Group 2014).

²³⁸ See eg Human Rights Council, 'Joint Statement on Freedom of Expression and Incitement to Racial or Religious Hatred by Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief; and Frank La Rue, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression [UN Special Rapporteurs Joint Statement on Freedom of Expression and Incitement to Racial or Religious

The Committee however, focused almost exclusively on General Comment 34, as it referred to the same general comment more than ten times in its decision on the merits. However, it did not mention any other soft law document. Admittedly, “general comment” is a misleading term, as Philip Alston reminds us that General Comments are ‘one of the potentially most significant and influential tools available to each of the six United Nations human rights treaty bodies in their endeavours to deepen the understanding and strengthen the influence of international human rights norms.’²³⁹ That being the case, this signifies that the Human Rights Committee preferred to focus on freedom of expression rather than the specific limitation to the right which is provided for in Article 20(2). One example that supports this interpretation is the emphasis by the Committee on the role of Article 20(2) as *lex specialis* with regard to Article 19,²⁴⁰ as expressed in General Comment 34.²⁴¹ The Committee also attempted to define the content of Article 20(2) in *Rabbae*, as follows:

Article 20 (2) is crafted narrowly in order to ensure that other equally fundamental Covenant rights, including freedom of expression under article 19, are not infringed. The Committee recalls in this regard that freedom of expression embraces even expression that may be regarded as deeply offensive. Moreover, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential to the promotion and protection of free expression. The Committee also recalls its jurisprudence that prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the

Hatred 2009]’ (22 April 2009) UN Special Rapporteurs Joint Statement on Freedom of Expression and Incitement to Racial or Religious Hatred 2009.

²³⁹ Philip Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001) 763.

²⁴⁰ See *Rabbae v The Netherlands*, para 10.4, fn 18.

²⁴¹ CCPR/C/GC/34, para 51.

specific circumstances envisaged in article 20 (2). Similarly, such prohibitions may not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith. The Committee further recalls that articles 19 and 20 are compatible with and complement each other. A prohibition that is justified on the basis of article 20 must also comply with the strict requirements of article 19 (3). Thus, in every case, measures of prohibition under article 20 (2) must also be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of article 19 (3), and they must conform to the strict tests of necessity and proportionality. The Committee notes that article 20 (2) does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be “prohibited by law”. Such prohibitions may include civil and administrative as well as criminal penalties.²⁴²

The conclusion is fairly straightforward. The Committee stressed first the importance of the right to freedom of expression, ‘since criticism of even the most deeply-held convictions of the adherents of a religion is protected by freedom of expression.’²⁴³ Then it considered that the State had enacted legislation to prohibit incitement to hatred and that the domestic courts considered the case seriously and analysed the evidence carefully.²⁴⁴ Consequently, there was no violation of ‘article 2 (3), read in conjunction with articles 26 and 20 (2) of the Covenant.’²⁴⁵

In principle, this case is the perfect example to illustrate the current interpretations suggested by most academics in the field and soft law documents. Nevertheless, there are several factual problems with the statements issued by the Committee in the views quoted above. This thesis will focus on four main issues that were virtually ignored in the decision on the merits of the Committee.

²⁴² *Rabbae v The Netherlands*, para 10.4.

²⁴³ *ibid* para 10.5.

²⁴⁴ *ibid* para 10.6.

²⁴⁵ *ibid* para 10.7.

First, there is little reference to the potential incitement to discrimination, hostility, or violence derived from the speech in question. In this regard, the Rabat Plan suggests that:

Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.²⁴⁶

The only mention of this requirement seems to be in paragraph 10.5 ‘[a]ccording to the State party, the concept of “incitement” in Section 137d of the Criminal Code is intended to reach “inflammatory behaviour that incites the commission of criminal offences or acts of violence”.’²⁴⁷ However, that seems more an implicit acceptance of subsidiarity, or the margin of appreciation which the Committee now refuses to accept,²⁴⁸ than a proper argument.²⁴⁹ Member of the Committee Rodríguez Rescia opined in line with the Rabat Plan of Action, stating that Article 20(2) does not require that a discriminatory, hostile, or violent action takes place; the prohibition is to incitement.²⁵⁰ Therefore, the word incitement is crucial in Article 20(2), yet largely

²⁴⁶ Rabat Plan of Action, para 29(f).

²⁴⁷ *Rabbae v The Netherlands*, para 10.5.

²⁴⁸ CCPR/C/GC/34, para 36.

²⁴⁹ Only de Frouville refers to this point: ‘On ne peut pas non plus invoquer une quelconque « marge d’appréciation » laissée à l’Etat partie en la matière : le Comité a explicitement rejeté cette doctrine s’agissant notamment de la liberté d’expression.’ *Rabbae v The Netherlands*, opinion partiellement concordante, partiellement dissidente de Olivier de Frouville, para 10.

²⁵⁰ *ibid* opinión parcialmente disidente de Víctor Manuel Rodríguez Rescia, para 4.

ignored by the Committee in *Rabbae*, as it simply considered that the procedural steps taken by the Netherlands would somehow fulfil this criterion.

Second, despite referring to General Comment 34's statement that restrictions to expressions based on Article 20(2) must be in conformity with Article 19(3) of the ICCPR, such analysis is not performed by the Committee. It would be understandable if the Committee would refrain from mentioning it, as the authors' claim did not relate to this point; they were claiming a positive obligation from the State in relation to Articles 20(2) and 26. Still, since the Committee mentioned the limitation test for freedom of expression in Article 19(3), one would expect the body to follow it with an analysis of the said test, but that does not happen. Thus, the dictum from General Comment 34 does not generate any consequence for the case in question.²⁵¹

The third issue that is noticeable in the case, as mentioned above, is its complete lack of reference to other soft law documents apart from General Comment 34. General Comments were initially intended to help Member States to implement the rights provided for in international treaties but evolved to provide substantive normative guidance on how to interpret the rights included in the said treaties.²⁵² However, it is important to clarify that General Comments are not legally binding, and even their status as an 'authoritative interpretation' of treaties has been challenged.²⁵³ Furthermore, as Martin Scheinin observes, they 'do not oblige the Committee to follow

²⁵¹ *ibid*, opinion partiellement concordante, partiellement dissidente de Olivier de Frouville, para 13.

²⁵² Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 123–127.

²⁵³ *ibid* 128–133.

its prior practice.’²⁵⁴ Consequently, General Comments can be considered as a starting point for the interpretation of a given right, but not its only source. What is observed in the analysis of the merits by the Committee, however, is two references to its jurisprudence and eleven to General Comment 34. As Olivier de Frouville argues in his separate opinion, the Committee could have supported its arguments by referring to the CERD Committee jurisprudence and its General Recommendation 35,²⁵⁵ especially in relation to the statements Wilders makes about Moroccans.²⁵⁶ De Frouville was not the only one who referred to other sources of law, as Sarah Cleveland and Mauro Politi also provided a myriad of sources ranging from the jurisprudence of the Committee to declarations from regional human rights bodies.²⁵⁷ While the latter members of the Committee reached a different conclusion than de Frouville, both opinions were based on a range of relevant documents, not ignoring General Comment 34, but placing it in the broader context of the current international law on the topic.

The most noticeable absence is the Rabat Plan of Action, a much more detailed document in relation to Article 20(2) of the ICCPR than General Comment 34. The Rabat Plan of Action is only mentioned once, in a footnote of the individual opinion of de Frouville.²⁵⁸ Nevertheless, the six-part threshold test that it sets is germane to the

²⁵⁴ *ibid* 129.

²⁵⁵ *Rabbae v The Netherlands*, opinion partiellement concordante, partiellement dissidente de Olivier de Frouville, paras 5 and 7.

²⁵⁶ See CERD/C/GC/35.

²⁵⁷ *Rabbae v The Netherlands*, individual opinion (concurring) of Committee Members Sarah Cleveland and Mauro Politi.

²⁵⁸ *ibid*, opinion partiellement concordante, partiellement dissidente de Olivier de Frouville, para 6, fn g.

case in question. Perhaps the Committee would reach the same conclusion if it had performed the test—ie by evaluating the context, speaker, intent, content, extent of speech, and likelihood of harm—but the decision would be reasoned adequately.²⁵⁹

In this manner, the arguments put forward by the Committee were rather superficial. For example, the Committee affirmed in the quote mentioned above that freedom of expression ‘embraces even expression that may be regarded as deeply offensive,’ which is a reference to General Comment 34.²⁶⁰ This statement is correct and must be upheld by States. Nevertheless, the dictum was quoted only partially, as General Comment 34 declares that ‘such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.’²⁶¹ Therefore, this statement does not contradict in any manner the claims of the authors. Furthermore, the General Comment supports this argument based on the case of *Ross v Canada*,²⁶² in which it allowed the censorship of religious and anti-Semitic expressions.²⁶³ Thus, the Committee actually departed from its understanding in *Ross v Canada*, in regard to similarly offensive expressions, without acknowledging it.

Finally, in the quote mentioned above, the Committee emphasised the importance of freedom of expression to advance the political debate, repeating the

²⁵⁹ Rabat Plan of Action para 29.

²⁶⁰ CCPR/C/GC/34, para 11.

²⁶¹ *ibid.*

²⁶² *ibid* para 11, fns 21 and 22.

²⁶³ *Ross v Canada*, para 10.6.

justification used by Denmark in *Andersen* and *AWP*.²⁶⁴ The Committee asserted that ‘the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential to the promotion and protection of free expression.’²⁶⁵ Indeed, Wilders is a public figure, and General Comment 34 affirms that ‘in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.’²⁶⁶ However, politicians are not immune to limitations to freedom of expression. Even the NGO ARTICLE 19, which promotes freedom of expression, has stated that ‘[p]oliticians and other leadership figures in society should avoid making statements that might promote discrimination’.²⁶⁷

Overall, the case was undoubtedly divisive, a fact which is apparent in the individual opinions of the Members of the Committee. There are seven separate opinions, which combined are almost as long as the decision itself. Some of the opinions call for inadmissibility of the case altogether, based on the applicant’s ability to pursue civil action against Wilders, which we firmly concur.²⁶⁸ Others maintained that Article 20(2) should not be invoked separately.²⁶⁹ Some members disagreed with

²⁶⁴ Respectively, *Andersen v Denmark*, para 4.3.; and *AWP v Denmark*, para 4.2.

²⁶⁵ *Rabbae v The Netherlands*, para 10.4, referring to CCPR/C/GC/34, para 20.

²⁶⁶ CCPR/C/GC/34, para 38.

²⁶⁷ *Camden Principles on Freedom of Expression and Equality*, principle 10.1; see also Rabat Plan of Action, para 36.

²⁶⁸ *Rabbae v The Netherlands* individual opinion of Committee member Dheerujlall Seetulsingh and individual opinion (partly concurring and partly dissenting) of Committee Members Yuval Shany and Sir Nigel Rodley, paras 1–5.

²⁶⁹ *ibid* paras 6–8; and individual opinion of Committee Members Anja Seibert-Fohr, Yuji Iwasawa and Konstantine Vardzelashvili.

the decision on the merits of the case, mainly because the Committee did not reason properly why such statements would not reach the threshold required for incitement to hatred. Fabián Omar Salvioli agreed that freedom of expression protects speech which is considered deeply offensive by some, but contended that this, in turn, does not mean that every expression considered offensive should be protected by freedom of expression.²⁷⁰ Once again, if that were the case, then all racist expressions would be condoned by the Committee, which is not what happens. Therefore, even though we disagree with the opinion of Omar Salvioli that all expressions in question should be prohibited, he is correct in affirming that the Committee limited itself to analyse whether the due process was followed but did not engage with the statements provided by the applicants.²⁷¹

The decision of the Committee, therefore, was mixed. It is far from satisfactory, and it does not explain why the Committee departed from its jurisprudence on the topic. From a teleological perspective, one could affirm that it generated positive changes in the Netherlands, as it indirectly led to the abolition of the offence of blasphemy.²⁷² However, such a consequentialist point of view is not, in our opinion, beneficial for the jurisprudence of the Committee. The decision underlined critical issues concerning the application of Article 20(2), but it is mostly silent about the

²⁷⁰ *ibid* opinión disidente del miembro del Comité Fabián Omar Salvioli, para 7.

²⁷¹ ‘Por eso, en el caso bajo análisis el Comité no debió limitarse a valorar en general si se habían cumplido los requisitos relativos al debido proceso, sino considerar los hechos denunciados para evaluar si quedaban comprendidos en la conducta que el artículo 20 del Pacto ordena prohibir.’ *ibid* para 9.

²⁷² Esther Janssen, ‘The Rise and Fall of the Offence of Blasphemy in the Netherlands’ in Jeroen Temperman and András Koltay (eds), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (CUP 2017) 635.

Rabat Plan of Action and its concrete application to the case in question. The Committee also failed to contextualise the principles of General Comment 34 to the rationale of the decision, merely quoting them in the case as undisputed maxims

6.4 Incitement to Hatred considered as Abuse of Rights at the European Court of Human Rights

The Netherlands defended Wilders' statements in the case above, stating that the jurisprudence of the ECtHR 'considers that it is essential to allow scope for political debate and that restrictions on political utterances may be imposed only for extremely compelling reasons.'²⁷³ As already pointed out, this statement is correct in theory, but it does not exempt political opinions from the purview of the Court. Furthermore, there are many cases in which the Court did not find censorship of offensive expressions a violation of the right to freedom of expression, including several statements similar to the ones attributed to Wilders in the case mentioned in the previous section. Many of these cases are often overlooked by the literature on the topic because they are considered inadmissible, meaning that the discussion on the merits is either inexistent or brief, thus leaving little material for an in-depth discussion. However, since the ECtHR has considered several cases as abusive, it is essential to understand which cases would fall within this category, as many are related to the topic of this thesis.

Other regional courts do not seem to rely on this concept; therefore, the emphasis will be on the ECtHR. The Court often classifies as abuse of the right to freedom of expression those cases which are *prima facie* discriminatory or which contain

²⁷³ *Rabbae v The Netherlands*, para 6.14.

expressions inciting to hatred. Consequently, by analysing these cases together, we will be able to notice patterns that the Court has developed to consider cases admissible or not, and which expressions are not protected by the Court.

6.4.1 Abuse of Rights

The question of abuse of rights suggests that some actions might be so distinctly against the content of the Convention that they should not even be considered by the Court. The concept has its roots in Roman Law, as explained by Alexandre Kiss: ‘The principle of Roman law, *sic utere iure tuo ut alterum non laedas*, prescribing the exercise of individual rights in such a way that others would suffer no injury, is therefore the very fundament of the concept of abuse of rights.’²⁷⁴ As mentioned above, the Convention was inspired by the UDHR, as stated in its preamble, and Article 30 of the UDHR became Article 17 of the Convention.²⁷⁵ The basis of Article 17, according to its *travaux préparatoires*, was that it:

cannot be ruled out that a person or a group of persons will rely on the rights enshrined in the Convention or its Protocols in order to attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention; any such destruction would put an end to democracy.²⁷⁶

²⁷⁴ Alexandre Kiss, 'Abuse of Rights', *Max Planck Encyclopedia of Public International Law* (OUP 2006) <<https://ezproxy-prd.bodleian.ox.ac.uk:3405/view/10.1093/law:epil/9780199231690/law-9780199231690-e1371?rskey=ywiLoR&result=1&prd=OPIL>> accessed 24 April 2020, para 2.

²⁷⁵ See Chapter 6.1.3.

²⁷⁶ *Zdanoka v Latvia* App no 58278/00 (ECtHR, 16 March 2006) para 99. Also, Judge Rozakis refers to Karl Popper in his dissenting opinion, stating that ‘We are to be tolerant of everything except acts of intolerance. We are to be tolerant of everything except acts of intolerance.’

The concept of abuse of rights seems to be self-explanatory, but the application of the concept is rather problematic. The ECHR declares in Article 17 that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.²⁷⁷

Article 5(1) of the ICCPR is similar to Article 17 of the ECHR,²⁷⁸ but it is not commonly argued by States, most likely because States focus on the concept of abuse of the right of submission, which is a procedural criterion set by the Optional Protocol to the ICCPR.²⁷⁹ This procedural clause is also present in the ECHR, which provides that the Court shall declare inadmissible, manifestly ill-founded or an abuse of the right of individual application, applications incompatible with the Convention.²⁸⁰ Therefore, the difference between abuse of rights and abuse of individual applications is that the former relates to the substance of the right and the latter only procedural aspects.²⁸¹ Both can be argued by States as a defence regarding the justiciability of a case.

The most difficult task for courts in this area is to define what configures as abuse of rights. Here the same interpretation techniques employed in previous chapters, that is, those borrowed from the VCLT, are employed. Article 31(1) of the VCLT establishes that: '[a] treaty shall be interpreted in good faith in accordance with

²⁷⁷ ECHR, art 17.

²⁷⁸ See also EU Charter, art 54.

²⁷⁹ Optional Protocol to the ICCPR, art 3.

²⁸⁰ ECHR, art 35(3)(a).

²⁸¹ See Rainey, Wicks, and Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 40–41.

the *ordinary meaning* to be given to the terms of the treaty *in their context and in the light of its object and purpose*.²⁸² Consequently, the general definition applied by the ECtHR in relation to the term ‘abuse’ is that it should be understood in its ordinary meaning, in line with general legal theory, ie to exercise the right contrary to its purpose in a detrimental manner.²⁸³ This definition applies both to Article 17 mentioned above as well as Article 35(3) concerning abuse of the right of application.

However, considering only the ordinary meaning of terms without contextualising or looking at the object and purpose of a treaty could lead to arbitrary decisions. Consequently, Article 17 seems to allude to the principle that a party to a treaty ‘is obliged to refrain from acts which would defeat the object and purpose of a treaty’.²⁸⁴ The Court has also followed this understanding when applying Article 17. For instance, in the case *Parti Communiste v Federal Republic of Germany*, from 1957, the ECommHR upheld the dissolution of a German Communist Party. The reason given by the Commission was that the Communist Party aimed to institute the ‘dictatorship of the proletariat’ which would be ‘incompatible with the Convention, inasmuch as it includes the destruction of many of the rights or freedoms enshrined

²⁸² VCLT, art 31(1) (emphasis added).

²⁸³ ‘a Cour considère donc que la notion d’« abus », au sens de l’article 35 § 3 de la Convention, doit être comprise dans son sens ordinaire retenu par la théorie générale du droit – à savoir le fait, par le titulaire d’un droit, de le mettre en œuvre en dehors de sa finalité d’une manière préjudiciable.’ *Miroļubovs and Others v Latvia*, para 62.

²⁸⁴ VCLT, art 18.

therein;’ thus falling ‘within the meaning of Article 17.’²⁸⁵ The case was therefore considered inadmissible.²⁸⁶

Furthermore, in order to know whether a right can be abused, one must first understand the scope of such a right. This is a challenging task because it leads to other fundamental questions about the nature of rights and their adjudication, for example: who defines the scope of freedoms? Is it for a State or a monitoring body to determine the scope of rights? In theory, both. The primary responsibility to protect and promote human rights rests with the State, yet treaty bodies and supranational courts have a supervisory role.²⁸⁷ Therefore the practice of States and the jurisprudence of courts, aided by other international law instruments, soft law documents, and the opinion of scholars, help to shape the scope of rights. The ultimate arbiter for States Parties to the ECHR in these questions remains the European Court of Human Rights.²⁸⁸

The application of Article 35(3) by the ECtHR has varied substantially but can be divided into four specific categories and a general one. They are:

misleading information; use of offensive language [against the parties or the Court]; violation of the obligation to keep friendly-settlement proceedings confidential; application manifestly vexatious or devoid of any real purpose; and all other cases that cannot be listed exhaustively.²⁸⁹

²⁸⁵ *Parti Communiste v Germany*, p 5.

²⁸⁶ The Human Rights Committee reached the same conclusion in a case concerning the member of a fascist party in Italy, see *MA v Italy* Comm no 117/1981 (Human Rights Committee, 10 April 1984) CCPR/C/21/D/117/1981, para 13.3.

²⁸⁷ See eg *Handyside v UK*, para 49.

²⁸⁸ ECHR, art 32.

²⁸⁹ *Practical Guide on Admissibility Criteria*, 37.

Interestingly, in many instances in which Article 17 is applied, such as the case of *Parti Communiste* mentioned above, the reason for inadmissibility was not abuse of the right of application but the case being manifestly ill-founded. Perhaps the differentiation is to keep the distinction between inadmissibility based on procedural and substantial matters. The technical differentiation is significant because cases decided on procedural issues tend to be much more objective, ie anonymous application.²⁹⁰ However, abuse of rights would mean a decision based on the merits of the application, which can be decided *de plano* by one or three judges.²⁹¹ This leads to the main problem with the admissibility issue, which is the fact that once an application is considered inadmissible by the ECtHR, it cannot be appealed.²⁹²

In line with what has been explained so far, it seems that there is nothing that could be regarded by default as abuse of rights, or abuse of the right of individual application, in cases concerning offence to religious belief. Article 17, however, has been interpreted by the Court in a manner that has allowed cases concerning offence to religious belief to fall under its scope, as illustrated in *Norwood v UK*.

6.4.2 *Norwood v UK*: ‘Islam out of Britain’

In *Norwood v UK*, a member of the British National Party displayed in the window of his flat a poster ‘with a photograph of the Twin Towers in flames, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a

²⁹⁰ ECHR, arts 35(1) and 35(2)

²⁹¹ *Practical Guide on Admissibility Criteria*, 54.

²⁹² ECHR, arts 27(2) and 28(2). See further Chapter 4.4.1.1(ii).

prohibition sign.²⁹³ The police removed the poster after complaints by the public, and Norwood was charged with:

an aggravated offence under section 5 of the Public Order Act 1986, of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it.²⁹⁴

The applicant was convicted of the crime mentioned above and fined GBP 300 by the District Court. His appeal to the High Court was dismissed by Lord Justice Auld, who decided that the poster was: ‘a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people.’²⁹⁵

The case was then taken to the ECtHR. The Court decision was rather brief. It considered the claim of the applicant that ‘[c]riticism of a religion is not to be equated with an attack upon its followers,’²⁹⁶ but it dismissed this argument by regarding the expression as falling within the scope of Article 17 of the ECHR. Consequently, the Court decided unanimously that the case was incompatible *ratione materiae* with the Convention, expressing that:

The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values

²⁹³ *Norwood v UK*.

²⁹⁴ *ibid.*

²⁹⁵ Crime and Courts Act [UK].

²⁹⁶ *Norwood v UK*.

proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17.²⁹⁷

The case thus avoids the broader discussion about the difference between criticism of religion and believers. A closer look into the domestic case, however, shows that the arguments put forward by both parties were heavily based on the ECtHR jurisprudence. Domestically, the defence based its arguments on the famous dictum of *Handyside v UK* that even offensive ideas are protected by the right to freedom of expression,²⁹⁸ and that ‘to attack “Islam” was not to attack Muslims, but to attack or criticise the Muslim religion, which was permissible given that it had to vie with the other two great monotheistic religions as the only true way to God.’²⁹⁹

Lord Auld, however, decided that the poster ‘could not, on any reasonable basis be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally.’³⁰⁰ His decision seems to be based primarily on the insulting aspect of the crime. This aspect of the decision has become void since Section 5 of the Public Order Act 1986³⁰¹ was amended in 2014 by the Crime and Courts Act 2013, removing the word insulting, thus ‘decriminalising insulting words, behaviour etc in the hearing or

²⁹⁷ *ibid.*

²⁹⁸ *Handyside v UK*, para 49.

²⁹⁹ *Norwood v DPP* [2003] EWHC 1564 (Admin) para 25.

³⁰⁰ *ibid* para 33.

³⁰¹ Public Order Act [UK].

sight of someone likely to be caused harassment, alarm or distress.’³⁰² However, the decision of Lord Auld goes beyond the insulting aspect of the poster, as he considered its content ‘clearly racially directed and racially insulting’ to Muslims.³⁰³ Thus, given that Lord Auld equated ethnicity and religion, it seems that the same judgement could still be applied in light of the new redaction of Section 5 of the Public Order Act.

This case highlights the contradictions that two human rights bodies have on the same issue. On the one hand, the ECtHR decided that a poster calling for Islam to be removed from the UK is not protected by the right to freedom of expression, as it is directly discriminatory towards Muslims. On the other hand, the Human Rights Committee stated that Wilders’ expressions aimed at Islam, Muslims, and people of Moroccan descent, are not discriminatory. When placing them side by side, the distinction is even starker, as Norwood called for ‘Islam out of Britain’ and Wilders uttered ‘no more Islamic people coming to the Netherlands, a lot of Muslims exiting the Netherlands, denaturalization of Islamic criminals.’³⁰⁴ This comparison is puzzling, especially considering that the expressions take place in the same region, relate to the same religion, and are subject to similar human rights treaties.

³⁰² Crime and Courts Act [UK], s 57(2), explanatory note 84.

³⁰³ *Norwood v DPP*, para 33.

³⁰⁴ Compare *Norwood v UK*; with *Rabbae v The Netherlands*, para 2.7(c)(i).

6.4.3 The Approach of the European Court of Human Rights to Article 17 post-*Norwood v UK*

Most cases related to Article 17 do not concern offence to religious belief. There were several cases concerning offensive remarks, or material published, from religious believers which could be considered incitement to hatred; but which do not necessarily fall within our definition of offence to religious belief. These cases will be pointed out for the sake of comparison, but not analysed in depth. Their importance for this thesis relies on the fact that they reinforce the decision of the Court in *Norwood v UK*.³⁰⁵

Article 17 was applied in many cases about anti-Semitism and historical revisionism.³⁰⁶ This understanding would also be at odds with the most recent interpretations of the right to freedom of expression by the Human Rights Committee. As already pointed out,³⁰⁷ in General Comment 34 the Human Rights Committee affirmed that memory laws are incompatible with the ICCPR.³⁰⁸ The Committee based its decision on its Concluding Observations on Hungary, in which it calls for the State to review memory laws in accordance with the right to freedom of expression and the prohibition of incitement to hatred.³⁰⁹ However, the Committee also referred to *Faurisson v France*, its landmark case on the topic, in which it decided that France did

³⁰⁵ *Norwood v UK*.

³⁰⁶ See eg *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998); and *Garaudy v France* App no 65831/01 (ECtHR, 24 June 2003).

³⁰⁷ See Chapter 6.2.2.

³⁰⁸ CCPR/C/GC/34, para 49.

³⁰⁹ Human Rights Committee, 'Concluding Observations on Hungary' (16 November 2010) CCPR/C/HUN/CO/5, para 19.

not violate freedom of expression when limiting expressions of a Holocaust denier.³¹⁰ France argued that the case should be decided as incitement to hatred, but the majority of members decided to analyse the case under limitations to freedom of expression instead.³¹¹ The Committee gave no explanation regarding the change of interpretation.

Nonetheless, the threshold within the CoE seems to be different. The former Commission and the Court consistently considered that Holocaust denial, even if not explicit, should not be considered as a matter of freedom of expression but of abuse of rights.³¹² The expressions not protected by the Court include those explicitly denying the Holocaust as a historical fact,³¹³ Holocaust denial disguised as scientific demonstrations,³¹⁴ as well as those which consider anti-Semitism as part of religious beliefs.³¹⁵ In 2015, in the case of *M'bala M'Bala v France*, the Court mentioned that expressions disguised as satirical and artistic, even if they require interpretation, could be considered within the aims of Article 17.³¹⁶ M'bala M'Bala is a comedian who invited Faurisson—from the case cited above—to be honoured in his comedy show, in which he also made several anti-Semitic remarks.³¹⁷

³¹⁰ *Faurisson v France*, paras 9.7 and 10.

³¹¹ *ibid* para 7.8, and the individual opinion of Rajssoomer Lallah.

³¹² See eg *Lehideux and Isorni v France*, para 47.

³¹³ See eg *Garaudy v France*; and *Witzsch v Germany* App no 7485/03 (ECtHR, 13 December 2005) the Law, para 3.

³¹⁴ *Marais v France* App no 31159/96 (ECommHR, 24 June 1996).

³¹⁵ *Pavel Ivanov v Russia* App no 35222/04 (ECtHR, 20 February 2007).

³¹⁶ *M'Bala M'Bala v France*, para 40.

³¹⁷ *ibid* paras 16, and 36–39.

Expressions supporting or condoning terrorism tend to be considered by the Court as abuse of rights. Article 17 was raised on a case concerning a cartoonist who drew a picture of the 9/11 attacks with the caption: ‘We have all dreamt of it... Hamas did it.’³¹⁸ The Court considered the provocative nature of the cartoon but decided that, unlike the Islamophobic remarks of *Norwood*, it did not immediately aim to destroy the rights and freedoms outlined in the Convention; therefore, the case was judged on its merits concerning Article 10.³¹⁹ The applicant received a fine, and the Court did not find a violation of freedom of expression in the case, as it considered the limitation necessary in a democratic society.³²⁰ On the other hand, Article 17 has been used to allow the prohibition to broadcast propaganda of the PKK,³²¹ as well as to censor members of the Hizb ut-Tahrir.³²²

What is remarkable from all the cases that came after *Norwood v UK* is that none challenges its decision; on the contrary, the Court keeps reinforcing it. For instance, the Court reaffirmed in *Paksas v Lithuania* that based on its jurisprudence, ‘Islamophobic and anti-Semitic’ expressions are not protected by Article 10.³²³ In *Pavel Ivanov v Russia*, the case of *Norwood* was also used to support the decision to

³¹⁸ « NOUS EN AVIONS TOUS RÊVÉ ... LE HAMAS L’A FAIT ». *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) para 6, Official translation.

³¹⁹ *ibid* paras 27–28.

³²⁰ *ibid* para 48.

³²¹ *ROJ TV A/S v Denmark* App no 24683/14 (ECtHR, 17 April 2018) paras 47–48.

³²² *Kasymakhunov and Saybatalov v Russia* Apps nos 26261/05 and 26377/06 (ECtHR, 14 March 2013) paras 106–113; and *Hizb Ut-Tahrir and Others v Germany*, paras 73–74 .

³²³ *Paksas v Lithuania*, para 88.

convict an applicant who ‘accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed Fascist ideology to the Jewish leadership.’³²⁴

Consequently, for the ECtHR, fear of Islam can be the same as discrimination based on ethnicity, an understanding that goes against the current interpretation of international law on the topic.³²⁵ The ECtHR is commendable for not allowing anti-Semitic expressions to take root in Europe,³²⁶ and could employ Article 17 in cases related to expressions that are clearly discriminatory towards members of religious groups.³²⁷ Still, it should not dismiss expressions considered offensive to religious groups using the same article, as they require a deeper appreciation of the facts.

6.4.4 Is Article 17 of the European Convention on Human Rights the Best Tool to Address Incitement to Hatred?

Article 17 can prohibit expressions *de plano*, that is, it creates a category of expressions that do not merit further analysis by the Court. This characteristic can be beneficial in terms of judicial economy, as the Court has a limited budget, an enormous caseload, and should strive to be efficient.³²⁸ For the sake of comparison, the ECtHR allocated

³²⁴ *Pavel Ivanov v Russia*, para 1.

³²⁵ CCPR/C/GC/34, para 48; and Rabat Plan of Action, para 11.

³²⁶ See eg *WP and Others v Poland* App no 42264/98 (ECtHR, 2 November 2004).

³²⁷ See *Glimmerveen and Hagenbeek v The Netherlands* Apps nos 8348/78 and 8406/78 (ECommHR, 11 October 1979); and *Vona v Hungary* App no 35943/10 (ECtHR, 9 July 2013) concurring opinion of Judge Pinto de Albuquerque.

³²⁸ Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights', 103.

63,350 applications to a judicial formation in 2017,³²⁹ while the CJEU received 1,656 cases in the same year.³³⁰ Nonetheless, while the CJEU had ca €370 million available for 2018,³³¹ the ECtHR received only €72 million for the same period.³³² This issue should not be ignored, but neither should the fact that the primary role of the Court is to protect human rights.

Another problem of the loose application of Article 17 by the Court is that it contradicts the obiter dicta of the Court itself, which affirms that the article is ‘only applicable on an exceptional basis and in extreme cases.’³³³ With the increase of cases being decided on the basis of Article 17, it becomes more difficult to justify its exceptionality. Furthermore, even regarding extreme cases, the Court has not been consistent. For example, it did not consider the denial of the Armenian Genocide extreme enough to fall under this category, but it did consider a poster calling a religion out of the country to reach that threshold.³³⁴

Indeed, the cases regarding “Islamophobia” clearly illustrate this point. In *Norwood v UK* the Court applied Article 17 directly.³³⁵ In *Seurot v France*, Article 17

³²⁹ *The European Court of Human Rights in Facts & Figures - 2017* (CoE 2018) 5.

³³⁰ *2017 Report: The Year in Review* (CJEU 2018) 14.

³³¹ *General Budget of the European Union for the Financial Year 2019: Draft* (EU 2018) 15.

³³² *Council of Europe Programme and Budget 2016-2017 (2017 Adjusted)* (CoE 2017) 2.

³³³ *ROJ TV A/S v Denmark*, para 46. See also *Perinçek v Switzerland*, para 114.

³³⁴ Compare *Perinçek v Switzerland*; with *Norwood v UK*. See also *Perinçek v Switzerland*, dissenting opinion of Judge Silvis, joined by Judges Casadevall, Berro And Kūris.

³³⁵ *Norwood v UK*.

was only used as an aid in interpreting Article 10.³³⁶ In *Soulas and Others v France*, Article 17 was not applied,³³⁷ and in *Le Pen v France* the application of the right was not even argued.³³⁸ Only in *Norwood v UK* the criticism was solely aimed at Islam.³³⁹ In all the other cases there is a conflation between criticisms of Islam and of Muslims.³⁴⁰ Thus, the Court took a harsher position on a theoretical indirect form of discrimination than on cases that could raise issues of direct discrimination.

Therefore, the lack of consistency in the application of Article 17 undoubtedly decreases legal certainty on the matter. It is difficult to measure the extent of incitement to hatred and the likelihood of it being used to destroy the rights of others. We argue, however, that it is precisely because of this difficulty that such remarks should be considered within the scope of freedom of expression. This would require the State to justify the limitation imposed on the alleged abusive expression. Mark Villiger further elaborates that:

by applying Article 17 directly, the Court actually pre-empts its own conclusion: it immediately arrives at its results without first analysing and balancing the content of the views expressed, as it would normally be required under Article 10 § 2 of the Convention.³⁴¹

³³⁶ *Seurot v France* App no 57383/00 (ECtHR, 18 May 2004).

³³⁷ *Soulas and Others v France*, para 48.

³³⁸ *Le Pen v France*.

³³⁹ *Norwood v UK*.

³⁴⁰ *Guide on Article 17 of the European Convention on Human Rights* (CoE 2019) 30–31.

³⁴¹ Mark E Villiger, 'Article 17 ECHR and Freedom of Speech in Strasbourg Practice' in Josep Casadevall et al (eds), *Freedom of Expression: Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights* (Wolf Legal Publishers 2012) 329.

Furthermore, even though the Court clarified that Article 17 should, in principle, be applied only in cases in which the expressions do not require any interpretation to be considered abusive, it also allows some flexibility.³⁴² The lack of rigidity on this matter certainly presents a worrisome scenario for anyone accused of offending religious feelings, as the ECtHR, based on its jurisprudence, could reject their applications *de plano* as being at odds with the Convention.

Additionally, in many cases concerning religious expressions with political aims, the Court has been inconsistent, especially when it comes to the application of Sharia. The most recent decisions by the Court on the topic seem to establish that political parties based on Sharia Law should always be prohibited by Article 17.³⁴³ The Court stated in *Refah Partisi* that ‘sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention’.³⁴⁴ The Court should certainly prohibit political parties that promote violence, but it is manifestly wrong to equate all forms of Sharia with violence. The views of the Court on Sharia are manifestly biased, as Kevin Boyle explains in relation to the *Refah Partisi* case:

the judgment represents an unsympathetic dismissal of what is a central element of a 1400-year-old civilization, comprising today the cultures of in excess of a billion people, and the religion of at least 100 million Muslims in the Council of Europe countries. The Court makes no effort, in its thinking or language, to separate the vast majority of Muslim people and their religious practices from extremists.³⁴⁵

³⁴² *M'Bala M'Bala v France*, para 40.

³⁴³ See eg *Kasymakhunov and Saybatalov v Russia*, para 111.

³⁴⁴ *Refah Partisi (The Welfare Party) and Others v Turkey*, para 123.

³⁴⁵ Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 Essex Human Rights Review 1, 12.

In exceptional cases, some defences of Sharia call for violence, and these expressions could be regarded as an abuse of the right to freedom of expression. We argue, however, that even in more extreme instances, these cases should be decided as a matter of freedom of expression. *Belkacem v Belgium* illustrates this point. Belkacem posted several videos on YouTube calling for the violent establishment of Sharia; as a result, he was arrested for incitement to hatred against non-Muslims, and sentenced to two years in prison.³⁴⁶ The case was decided under Article 17.³⁴⁷ In order to justify this decision, the Court referred to two cases with opposite outcomes, *Refah Partisi* and *Gündüz*, none of which were decided on the basis of Article 17.

In *Refah Partisi v Turkey* the Court considered the case in light of the right to freedom of association; therefore, a strict limitations test was required. After a long deliberation, the Court found that the dissolution of the party did not disclose a violation of freedom of Association.³⁴⁸ In *Gündüz v Turkey*, the Court considered that Turkey violated the right to freedom of expression of a person sentenced to two years in prison after he gave a television interview defending Sharia.³⁴⁹ As former judge Tulkens explains, there is a significant difference between limitations to qualified rights and the application of Article 17:

What is the significance of using Article 17 instead of Article 10? The result is an absence of a balancing process. Article 10 cases take the right to freedom of expression in Article 10 § 1, and weigh this against the

³⁴⁶ *Belkacem v Belgium* App no 34367/14 (ECtHR, 27 June 2017) para 24.

³⁴⁷ *ibid* paras 4 and 34.

³⁴⁸ See eg *Refah Partisi (The Welfare Party) and Others v Turkey*, paras 135–136.

³⁴⁹ *Gündüz v Turkey*, paras 10–15.

interests in Article 10 § 2. There is no such balancing process under Article 17; speech is restricted solely because of its content.³⁵⁰

The main points that impacted the decision of the Court in *Gündüz* were ‘the fact of defending sharia, without calling for violence to establish it, cannot be regarded as “hate speech”’, and that a two-year prison sentence for doing so would likely be considered disproportionate.³⁵¹ If the case were decided under Article 17, no analysis of proportionality would be performed, and the Court would sanction a harsh penalty for a mere TV interview where the author defended a controversial point of view.

Despite the merits of the cases above, one can easily observe that issues regarding Sharia Law demand a more profound appreciation, at least in terms of context, which would benefit from having a proper analysis based on Article 10. Nonetheless, *Belkacem* was dismissed based on Article 17, and his punishment was similar to that applied in the case of *Gündüz*. While in *Belkacem* the expressions were actually calling for violence,³⁵² if the Court had performed an analysis based on freedom of expression, that could lead to more legal certainty regarding the limits of incitement to hatred and the appropriate punishment in such cases. Consequently, it would be better for the Court to explain the reasons why certain expressions are prohibited and the appropriate punishment for incitement to hatred, instead of merely dismissing certain expressions as incompatible with the Convention. The famous quote from Stuart Mill on freedom of expression is a suitable conclusion in this regard:

³⁵⁰ Françoise Tulkens, 'When to Say Is to Do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights' (Seminar on Human Rights for European Trainers, Strasbourg, October 2012) para 3.

³⁵¹ *Gündüz v Turkey*, paras 51–52.

³⁵² *Belkacem v Belgium*, para 4.

The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.³⁵³

6.5 (Un)Necessary Norms Combatting Incitement to Hatred

The necessity of combatting incitement to hatred is unquestionable. We argue, however, that several norms aimed at combatting incitement to hatred are unnecessary. States are often tempted to enact new norms to combat hate speech, but these norms are often detrimental to human rights. Likewise, the manner in which incitement to hatred has been decided by adjudicating bodies has been largely problematic. Consequently, as demonstrated at the end of the previous chapter, we argue that qualified rights are sufficiently capable of tackling cases of incitement to hatred.

This point is made manifest when comparing the cases of *Karaahmed v Bulgaria* and the jurisprudence of the ECtHR on Article 17.³⁵⁴ While deciding certain cases as abuse of rights may be helpful for the sake of judicial economy, this does not lead to more legal certainty nor an enhanced protection of individuals. On the contrary, excessively restricting human rights without proper justification ‘breaks down trust between Governments and belief communities’, as well as individuals and courts.³⁵⁵

³⁵³ John Stuart Mill, *On Liberty* (Batoche Books 2001) 19.

³⁵⁴ Compare Chapter 5.5; with Chapter 6.4.

³⁵⁵ Malcolm Evans, Javaid Rehman, Fabio Petito, and Katharine Thane, *Article 18: From Rhetoric to Reality* (All-Party Parliamentary Group for International Freedom of Religion or Belief, 2017) 36.

Likewise, when comparing the jurisprudence of Article 20(2) of the ICCPR and Article 17 of the ECHR to address incitement to hatred, both present poor legal reasoning and provide no legal certainty for cases regarding incitement to hatred based on religion or belief, or otherwise. In the case concerning Wilders' statements at the Human Rights Committee, the bar was raised so high that it would be virtually impossible to prove incitement to hatred unless systematic violence would take place against Muslims in Denmark. In the ECtHR, the problem was the opposite; as demonstrated in *Norwood v UK*, the Court considered 'Islamophobic' statements so heinous that they would not even be considered by the Court as a matter to be analysed as a limitation to freedom of expression.³⁵⁶ Thus, the creation of a separate category of expressions considered by default as incitement to hatred, hate speech, or abusive expressions, does not help individuals to be better protected either by the ICCPR or the ECHR.

The best way to address incitement to hatred based on religion or belief is by striving to protect all rights involved equally, which in this instance is directly connected to fostering a space where counter-speech can flourish. The joint statement of the Special Rapporteurs dealing with this subject perfectly exemplifies this:

To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. In addition, this set of policy measures should also include strengthening freedom of expression. Indeed, the strategic response to hate speech is more speech: more speech that educates about cultural differences; more speech that promotes diversity; more speech to empower and give voice to minorities, for example through the support of community media and their representation in mainstream media. More speech can be the best strategy to reach out to

³⁵⁶ *Norwood v UK*.

individuals' hearts and minds, changing what they think and not merely what they do.³⁵⁷

From a legal perspective, strengthening human rights as a whole is the key to improving consistency in judgements and fostering a better protection for everyone.³⁵⁸ This understanding could mean, in a case similar to that of Wilders', an approach which would take into consideration both the positive obligations that the State had in relation to the right to freedom of expression, as well as the right to non-discrimination based on ethnicity. This approach could lead to civil reparations, rather than a criminal conviction, regarding the remarks which were discriminatory based on religious belief, ethnicity, and nationality. Naturally, this would not apply to the remarks concerning criticism of religious belief. Conversely, at the ECtHR, a critical appreciation of the *Norwood* case in light of the right to freedom of expression could shed more light on the distinction between criticism of religious beliefs and criticism of believers.

Until recently, there were few normative principles that international human rights courts and treaty bodies could rely on to base their decision. This led to a confusing scenario where courts and treaty bodies struggled to provide consistent guidelines regarding cases of offence to religious belief related to incitement to hatred. Nevertheless, in the last decade, several documents were produced in this area, most notably the Rabat Plan of Action, General Comment 34, and reports from Special Rapporteurs. In light of these documents, there is no reasonable justification for adjudicating bodies to continue producing sub-standard jurisprudence in this area.

³⁵⁷ UN Special Rapporteurs Joint Statement on Freedom of Expression and Incitement to Racial or Religious Hatred 2009, 3

³⁵⁸ See Chapter 5.3.

CONCLUSION

In January 2015, Pope Francis was asked about the horrific attacks on the office of the magazine *Charlie Hebdo* and the limits of freedom of expression. He answered that it was wrong to act violently in the name of God, but then declared that if someone ‘says a swear word against my mother, he’s going to get a punch in the nose. This is normal. One cannot provoke, one cannot insult other people’s faith, one cannot make fun of faith.’¹ By giving this personal example, the Pope was appealing to human nature, thus implying that a violent reaction to insulting religions is ordinary and universal. While we vehemently disagree with the Pope’s remarks on how to react to insult, and his opinion on the limits to freedom of expression for that matter, the universality of the subject is difficult to deny.

Indeed, cases related to offence to religious belief, which in the past were mostly local, can now garner worldwide attention. The trials of Asia Bibi are illustrative in this regard. They concern a woman from a poor Christian family who was accused of blasphemy in her village, and because of that, she spent eight years on death row.² Her acquittal was celebrated internationally, yet many in Pakistan protested the decision, forcing her to flee with her family to Canada.³ In Pakistan, which has one of the world’s most severe penalties for offending religious beliefs, there are several examples of individuals who were killed before even going to prison or trial for alleged

¹ Elizabeth Dias, 'Pope Francis Speaks Out on Charlie Hebdo: "One Cannot Make Fun of Faith"' (*Time*, 15 January 2015) <<https://time.com/3668875/pope-francis-charlie-hebdo/>> accessed 24 April 2020.

² See Chapter 1.4.2.

³ Haroon Janjua, 'Asia Bibi Leaves Pakistan "for Canada"' (*DW*, 08 May 2019) <www.dw.com/en/asia-bibi-leaves-pakistan-for-canada/a-48646259> accessed 24 June 2020.

offences.⁴ These instances of vigilantism have influenced people living in other countries. In 2016, an Ahmadi shopkeeper was killed in the UK because he was considered a heretic; his assassin was influenced by Pakistani radicals who advocated killing those whom they deemed blasphemous.⁵

The UK, in turn, repealed its blasphemy law in 2008; however, it will go down in history as the first State who won an international human rights case against blasphemers.⁶ The case in question is similar in nature to that of the *Last Temptation of Christ*, decided 20 years later by the IACtHR. The IACtHR, by contrast, did not accept the claims of the applicants—acting in the name of Jesus Christ, the Catholic Church, and themselves—that Scorsese’s film tarnished the honour and reputation of Jesus Christ. Another 20 years later, several cases have been brought against a sketch comedy group in Brazil who made a show about Jesus being gay, entitled “The First Temptation of Christ”.⁷ Once again, some believers reacted violently, attacking the office of the group on Christmas Eve with Molotov cocktails. One can only infer that the people involved in these cases assumed that Jesus—whom they believe suffered torture, was crucified, and forgave his assailants—would 2000 years later seek reparations because he could not possibly forgive those who criticise, mock, or portray

⁴ See Chapter 1.4.2.

⁵ Secunder Kermani, 'Why Was Shopkeeper Asad Shah Murdered?' (BBC, 7 July 2016) <www.bbc.co.uk/news/uk-scotland-36732596> accessed 24 June 2020.

⁶ *Gay News Ltd and Lemon v UK*.

⁷ Tim Hume, 'The Comedy Group That Made Brazil's "Gay Jesus" Show Was Firebombed' (VICE, 27 December 2019) <www.vice.com/en_us/article/wxe8n5/the-comedy-group-that-made-brazils-gay-jesus-show-was-firebombed> accessed 24 June 2020.

him as gay.⁸ This logic appears to be the rationale that the Pope was alluding to, which could be summarised as: “turn the other cheek, unless someone insults your faith”. It seems that St Peter is still struggling to understand that violence begets violence,⁹ but this reaction is not exclusive to members of any religion or system of thought.

General Findings

Although it is difficult to make sense of the reasoning mentioned above, adjudicating bodies need to make judicial sense of claims related to offence to religious belief. In order to find answers for this issue, we proposed the following question: what are the normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief?

The first chapter sought to explore the nature of offence to religious belief and its manifestations. This study has only rarely been performed, and they tend to be confined to a small group of expressions related to blasphemy. We decided to explore several expressions found in international and national documents in order to investigate what are the similar characteristics that these offences share. As a result, we found that norms prohibiting offence to religious belief are those created to defend sacred matters, for the sake of orthodoxy, social order, maintenance of power, or a combination of these elements. Given the varied nomenclature related to offence to religious belief, we suggested a taxonomy to better understand the origin and purpose of the different expressions which appear in human rights documents and literature.

⁸ See eg *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*; *Otto-Preminger-Institut v Austria*; *Sekmadienis Ltd v Lithuania*; *Gay News Ltd and Lemon v UK* and *RCL 38782 MC/RJ* (Supreme Federal Court, 9 January 2020) [Brazil].

⁹ Matthew 26:52.

This mapping exercise was also beneficial to separate the terms that can be relegated to the autonomous sphere of religious groups, those who should be ignored, and those that could raise questions for international adjudicating bodies. Therefore, this chapter addressed the first specific objective of this thesis, which was to provide conceptual clarity in the use of international human rights law terms.

Chapters 2, 3 and 4 provided the normative principles that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief involving the right to life, the prohibition of torture, and the principle of *non-refoulement*. The results were staggering, likely because this is a largely unexplored area in debates regarding offence to religious belief. We found that while there are several normative guidelines on how to decide cases related to offence to religious belief—in many instances provided by the same bodies that adjudicate these cases—these guiding principles are frequently overlooked. Furthermore, some of the arguments which have been provided by judges to deny the rights of asylum seekers are borderline anti-human rights. These chapters also demonstrated the duplicitous stance of many Global North countries which publicly condemn violence perpetrated in the name of religion yet have discreetly sought to deport LGBT+ persons and members of religious and non-religious minorities to States where they could endure such violence. We demonstrated numerous cases in which States were allowed to deport vulnerable persons with the approval of the ECtHR and UN treaty bodies to countries in which these persons could suffer for allegedly offending religious beliefs. This chapter aimed at promoting a legal framework that can provide greater protection for vulnerable persons by highlighting their plight and the risks they face when accused of offending religious belief, thus fulfilling the second special objective of this thesis.

Chapters 5 and 6 provided the normative underpinnings that international human rights courts and treaty bodies should take into consideration when deciding cases of offence to religious belief involving qualified rights and incitement to hatred. These chapters focus on the third special objective of this thesis that was to reassess laws against insult to religions in international documents and domestic legislation. The pattern observed in these chapters was similar to the one mentioned above, in that there are clear principles on how courts should approach the subject, but they are overlooked by the ECtHR and treaty bodies. The decisions are also varied; for instance, while some decisions are overzealous in protecting the feelings of Muslims, others ignore the risk that discrimination based on religion or belief and dangerous notions (such as “Replacement Theory”) have for their safety.¹⁰ To make things worse, the ECtHR has created a right to protect religious feelings, which generates unnecessary tension, and amounts to the absence of legal certainty on the matter in Europe.

Consequently, we conclude that the general objective of this thesis—which was to provide a better understanding of the nature of the issue at hand and offer principled arguments to address offence to religious belief in domestic and international law—has been accomplished. However, even though more than 300 cases were analysed, and more than 500 additional sources were referred to, this thesis does not claim to have exhausted this field. The current analysis could be expanded in regard to the historical and religious foundations of offence to religious belief. Additional studies on the subject may also consider a further exploration of cases concerning offence to religious belief related to the right to private life and non-discrimination.

¹⁰ Respectively *ES v Austria*; and *Rabbae v The Netherlands*.

Recommendations

The recommendations are surprisingly straightforward. This just goes to show that high-quality normative guidelines are available in this field; they are simply not applied in practice. The general recommendations for all adjudicating bodies are the following. First, there is an incorrect assumption that offence to religious belief is a medieval or ancient matter. It is not. Such offences are present in several States and a constant reality for countless people. While it is true that in many States the offence has fallen into desuetude, there has been a revival of these offences in the last 40 years, which should certainly not be ignored. This leads to the second general recommendation, which is that offence to religious belief is a phenomenon that needs to be taken seriously. However, that does not mean that these matters should involve courts. In many of these cases, judges could decide that instances of offence to religious belief are not justiciable and dismiss them *de plano*, thus avoiding *ultra vires* decisions on matters that are solely religious in nature. Third, as States are primarily responsible for respecting, protecting, and fulfilling human rights, domestic courts should also take into consideration developments in international law to decide instances regarding offence to religious belief.

The revival of offence to religious belief, as well as its proliferation and perdurance in international domains, is, at least in part, due to the decisions of the ECommHR and ECtHR to protect religious feelings. It is, therefore, imperative that the Court admits its own mistakes before overturning its decisions on the topic.¹¹ These decisions were not acceptable when they were first issued, and they continue to be

¹¹ The ECtHR has changed its jurisprudence in other areas, see eg *Vilho Eskelinen and Others v Finland* App no 63235/00 (ECtHR, 19 April 2007) para 56.

detrimental to human rights. It is not desirable, or responsible, for the Court to continue issuing contradicting decisions on this matter. As we have demonstrated, the Court has issued excellent decisions, but only a firm and decisive admission of past errors will suffice to invalidate previous mistakes and allow for a uniform path forward.

Regarding the UN, the organisation also needs to address its own mistakes in dealing with issues regarding offence to religious belief. First of all, on the political spectrum, the resolutions on combatting defamation of religions were never fully invalidated. While Resolution 16/18 provided a different perspective on the topic, this resolution is comparable with the decisions of the ECtHR, in the sense that the UN and the CoE have both provided perspectives on the subject which are, at the same time, contradictory yet valid.

This contradiction is also evident in the decisions of the Human Rights Committee. Regarding decisions on offence to religious belief and *non-refoulement*, the Committee has raised its own threshold in order to deny protection to vulnerable persons and grant more deference to States. Concerning qualified rights, the Committee's decisions of *Ross v Canada* and the ones regarding Article 20 involving Muslims are plainly incongruous. These decisions could be easily remedied had the body properly addressed which offences should be characterised as incitement to hatred and which ones should not. Furthermore, the body needs to make better use of the soft law documents developed by the UN with the help of experts in the field, especially the Rabat Plan of Action. Likewise, the CAT Committee needs to address its own inconsistencies regarding the prohibition of *refoulement* to States which are not parties to the CAT. Consequently, once again, the only way forward is to address the discrepancies of the past and to proceed by following the normative principles set in international human rights law.

Final Remarks

Based on what has been examined so far, we can confirm that there are sufficient guidelines and instruments to protect the human rights of individuals in cases concerning offence to religious belief. This leads us to five main conclusions. First, laws regulating offence to religious belief must be abolished. They are completely incompatible with international human rights law, and there is no reasonable justification to keep them as legal norms.¹² Fortunately, several States, including those which had severe punishments for these offences, are gradually abolishing these offences.¹³ Since some legislation in this area combines the prohibition to insult religion with discrimination based on religion or belief, such laws must be reformulated to protect only established individual rights.

Second, the lack of clarity of terms regarding offence to religious belief used in UN resolutions and by human rights courts has been denounced by NGOs and academics, thus ‘divisions have re-emerged, in large part, because of conceptual confusion among policymakers.’¹⁴ These divisions can be addressed by employing a terminology that is fully compatible with human rights, namely addressing the human rights which are involved when offence to religious belief is discussed. A terminology compatible with human rights can be beneficial not only for domestic and international

¹² See eg *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society*; para 89(c); and Rabat Plan of Action, para 25.

¹³ See ia Ireland, Norway, Iceland, Malta, Denmark, Canada, New Zealand, Greece, and Sudan Dahir, ‘Sudan Will Scrap Alcohol and Apostasy Laws, and End Flogging’.

¹⁴ Limon, Ghanea, and Power, *Combatting Global Religious Intolerance: The Implementation of Human Rights Council Resolution 16/18*, 5.

courts, but also for organisations involved in the protection of certain religious groups, such as the OIC.

Thirdly, the prohibition of torture and the principle of *non-refoulement* are absolute. Adjudicating bodies should observe this principle in all instances in order to protect persons from the risk of torture in their own States or elsewhere. There is no justification for returning people at risk of torture because of offending religious beliefs,¹⁵ or any other reason. Members of vulnerable minorities are the ones who suffer the most under laws protecting religions from being offended, as such norms tend to target individuals based on their religion, gender, and sexual orientation. Therefore, adjudicating bodies must go beyond a mere due process analysis in these cases in order to protect human rights.

Fourth, a systemic approach to offence to religious belief is required instead of a consequentialist or selective approach. A consequentialist approach to offence to religious belief is often biased. It tends to focus on Islamic countries, to shame them for the severity of punishment—corporal punishments or death—inflicted upon those who are found guilty of apostasy or blasphemy. These penalties should undoubtedly be reprimanded, but for any form of crime, not only abstract ones. Furthermore, this approach ignores the complicity of States that deport individuals who might face these punishments elsewhere. Similarly, while a selective approach may be required to provide an in-depth look at the impact of offence to religious belief concerning a specific right, most cases display a potential violation of several rights. The shortcomings of selective approaches are evidenced by the fact that cases concerning censorship of films considered offensive have received much more academic criticism

¹⁵ CAT/C/GC/4, para 45(k).

than those about offence to religious belief and *non-refoulement* or those regarding the right to assembly and association of LGBT+ persons. A systemic approach is therefore required to examine how the human rights system is impacted as a whole by these norms and, most importantly, how individuals are affected by norms prohibiting offence to religious belief.

Fifth, and also related to a systemic approach to human rights, a more consistent methodology from international adjudicating bodies is required to set a foundation for concrete change. This does not mean creating new rights or new prohibitions. The omission in international law regarding the protection of beliefs is intentional, not accidental. It is, however, impossible to change anything in this field if international bodies are not aligned.

The IACtHR can provide an excellent example in this regard. In the case *The Last Temptation of Christ*, it took seriously the claims of all parties involved, including the freedom of religion or belief of the people who had allegedly offended religious feelings. The Court also referred to the jurisprudence of the ECtHR, but given its conflicting decisions, such jurisprudence was not particularly helpful.¹⁶ Yet, the IACtHR was able to find a violation of freedom of expression based on a simple textual analysis of the American Convention on Human Rights. Judge Cançado Trindade seized the opportunity to issue a concurring opinion, in which he deliberated on the obligations of States for their acts or omissions, and pondered why States are so slow to consolidate international law in their legislations, at the dawn of a new millennium.¹⁷ He then concluded that the problem is not the legislative framework,

¹⁶ *'The Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*, para 69.

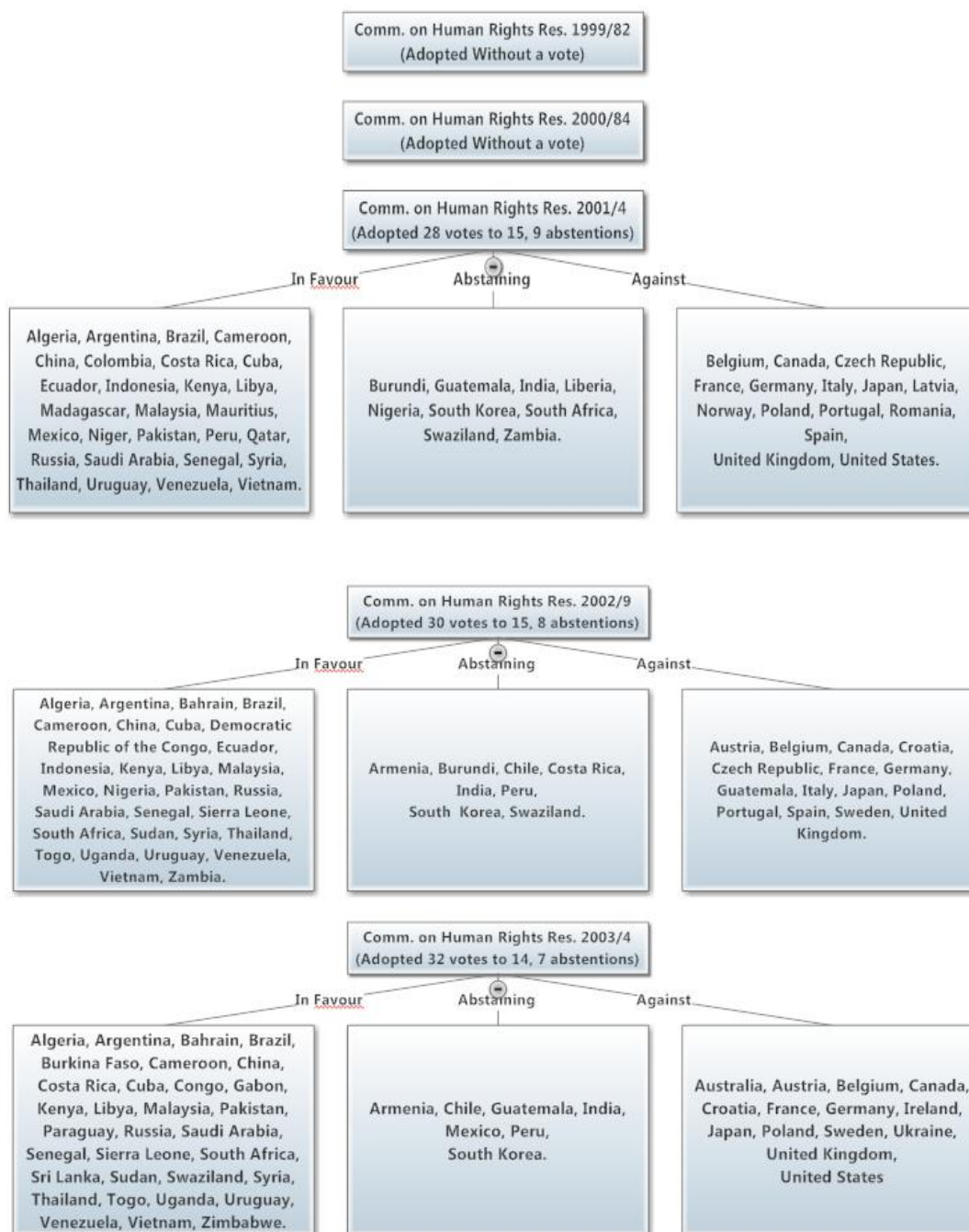
¹⁷ *ibid* concurring opinion of Judge AA Cançado Trindade, paras 1–10.

although it inevitably requires a willingness from public authorities to implement international treaties domestically. In relation to adjudicating bodies, however, he stated that a new mentality is required for them ‘to proceed to the correct interpretation of the applicable norms, whether of international or national origin, so as to secure the full protection of the human being.’¹⁸

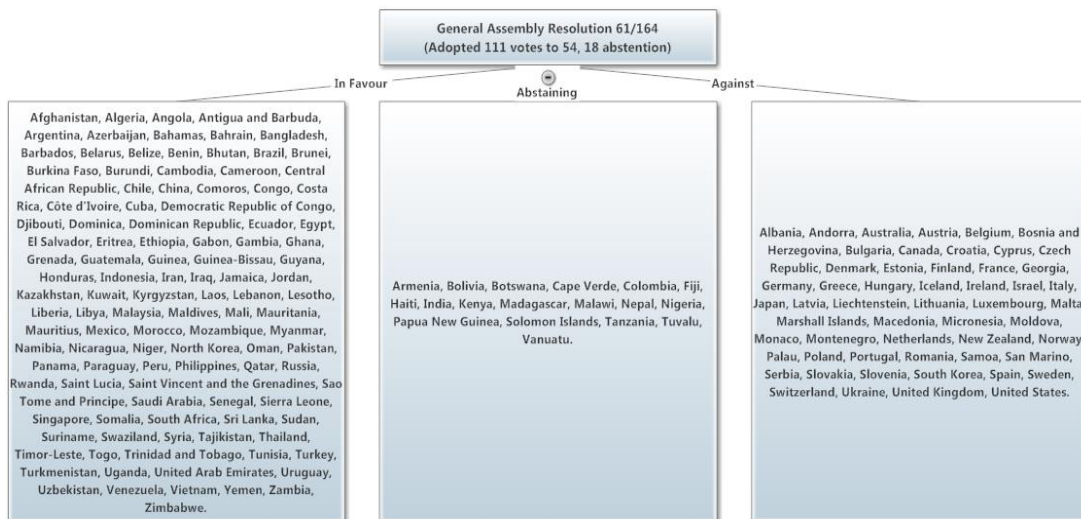
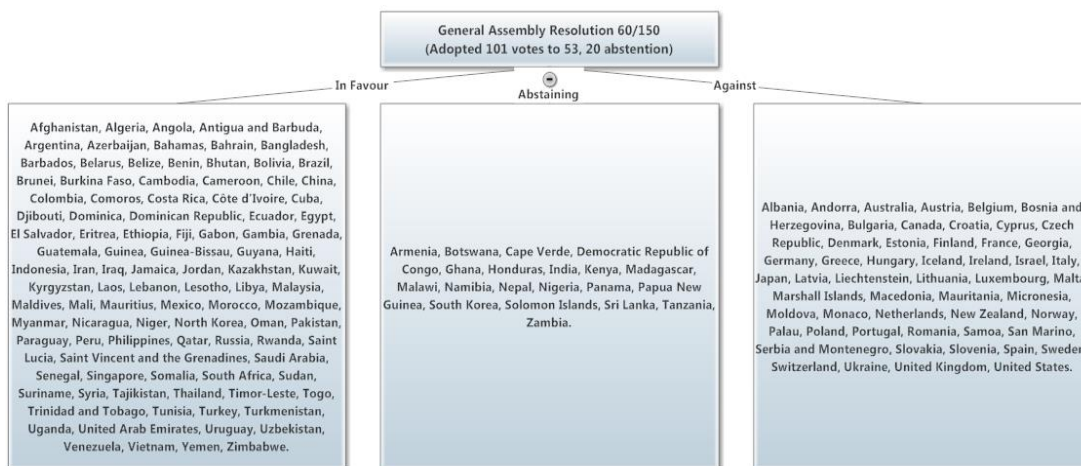
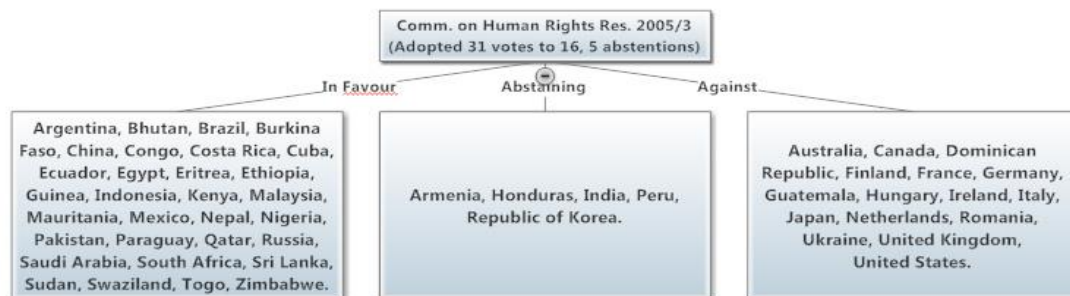
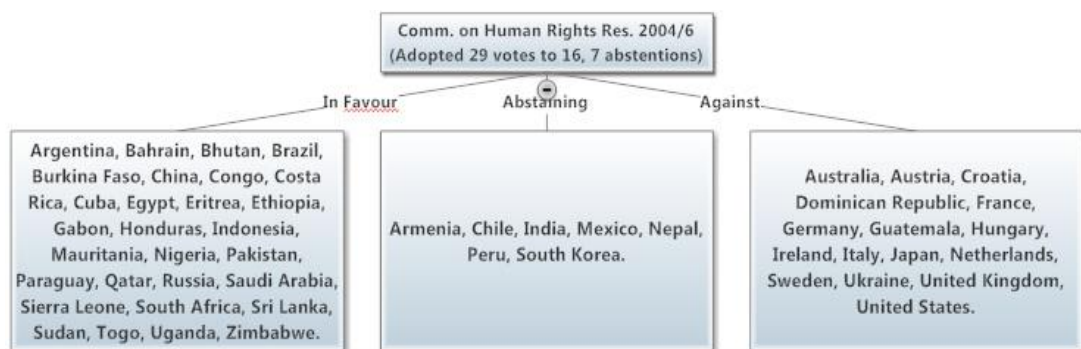
Twenty years have passed since this seminal decision, and even though little has changed in practice, at least now adjudicating bodies have much more normative documents and monographs to rely on. Still, these texts alone will not change the landscape of norms prohibiting offence to religious belief unless courts and treaty bodies interpret them correctly, “to secure the full protection of the human being”.

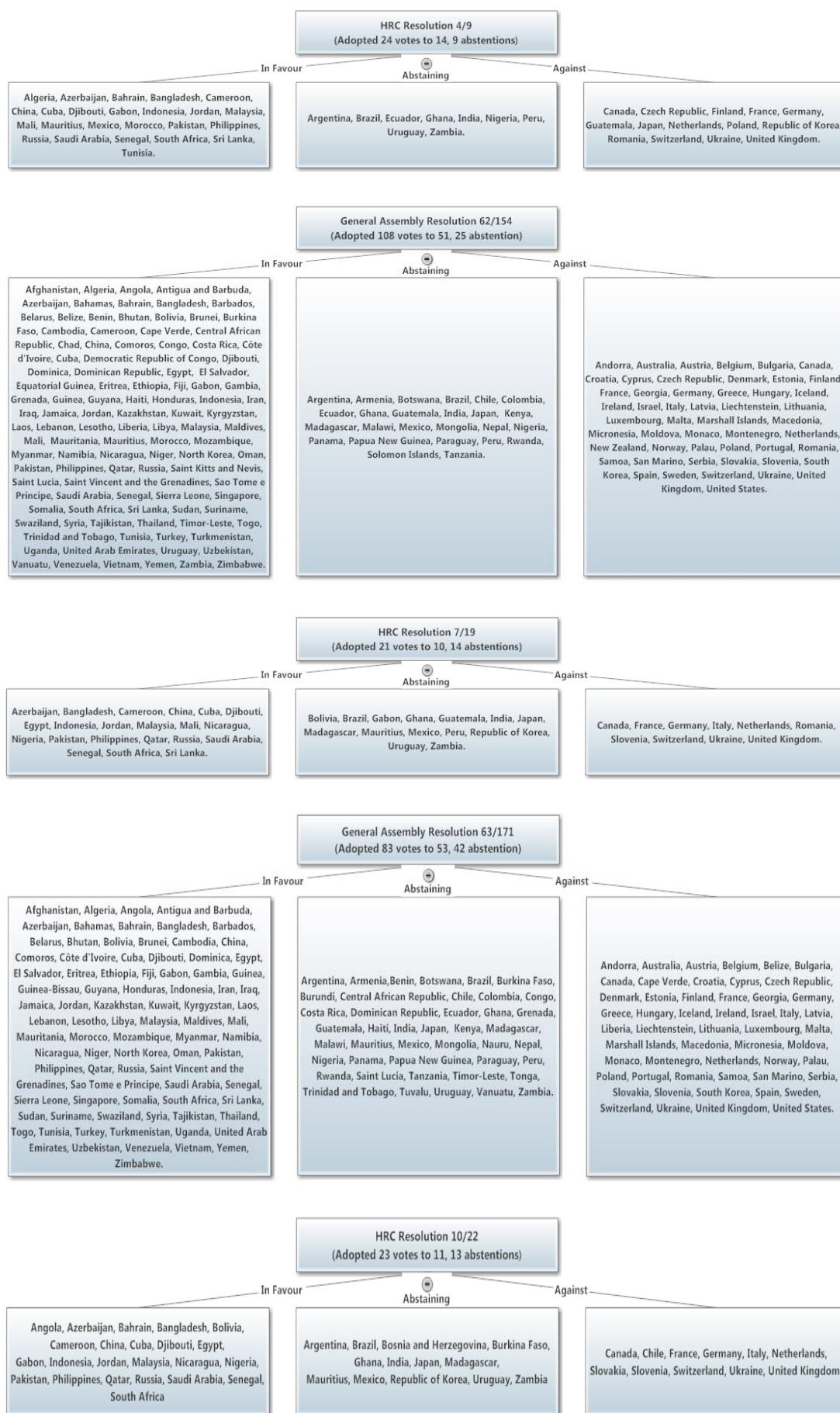
¹⁸ *ibid* concurring opinion of Judge AA Cançado Trindade, para 37.

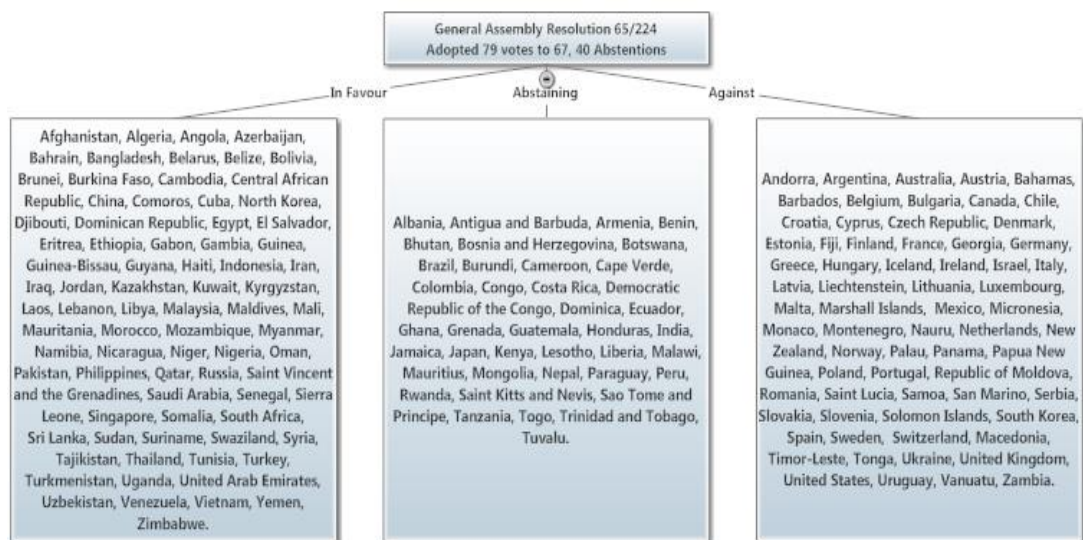
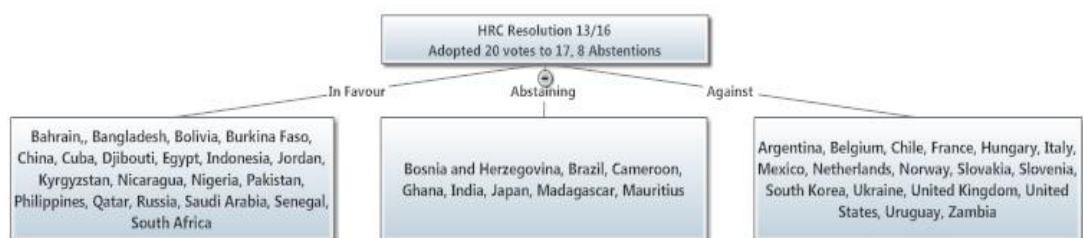
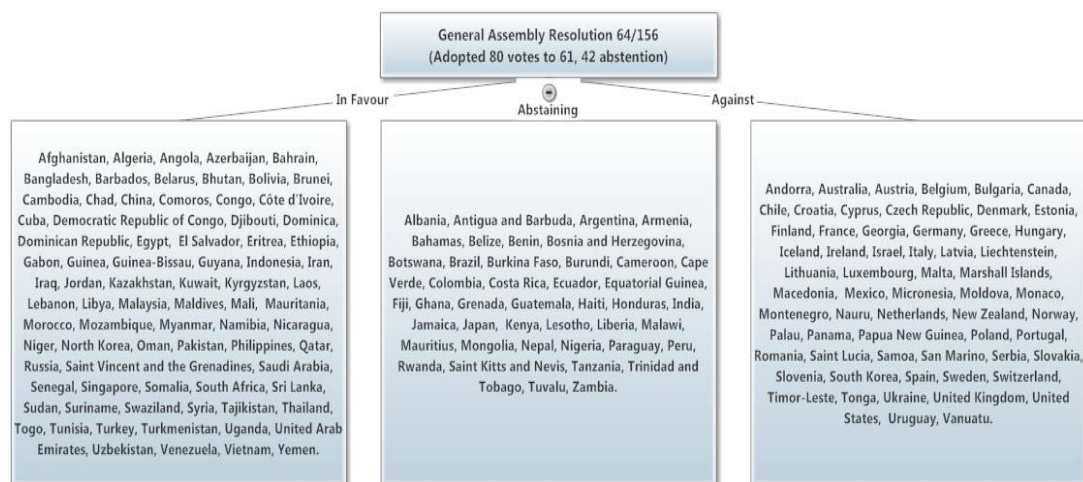
APPENDIX – VOTING RECORDS OF RESOLUTIONS ON COMBATING DEFAMATION OF RELIGIONS AT THE UN¹



¹ Alves Pinto, 'A Critical Assessment of the United Nations Resolutions on Combating Defamation of Religions in the Light of International Human Rights Law', Appendix 3.







HRC Resolution 16/18
(Adopted without a vote)

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