

THE PROTECTION OF FREEDOM OF RELIGION WITHIN THE INSTITUTIONAL SYSTEM OF THE UNITED NATIONS

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On 25 November 2011 the 1981 ‘United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief’ will celebrate its 30th anniversary. It will do so in a time where issues of religion dominate world politics more than probably ever before during these thirty years: Practically all Western European countries are struggling with the integration of growing Muslim communities into their formerly predominantly Christian societies, the Arab Israeli conflict is still on the agenda, the military conflicts in Iraq and Afghanistan are, at least by some, also read in a religious perspective, issues of religion are at the roots of conflicts in India, Indonesia and many other parts of the world, and finally, the uproar created by the Mohammed caricatures demonstrated that the Internet may turn the World into a huge public square where seemingly small incidents in one corner may spread at lightning speed all over the place.

What role do freedom of religion and its protection within the institutional system of the United Nations play in that context? Let me briefly sketch the overall system and place emphasis on one specific institution, namely the UN Special Rapporteur on Freedom of Religion. I will start with a brief description of freedom of religion as an international human right (I.), before turning to the 1981 Declaration (II.), and the existing mechanisms of surveillance (III.). I conclude with an evaluation of the system (IV.).

I. Freedom of religion as an international human right

The history of freedom of religion in international law may be traced back to the Thirty Years’ War and in some early antecedents even beyond.¹ In modern international law freedom of religion was originally included into the general framework of minority protection. While attempts at including a provision concerning freedom of religion into the League of Na-

¹ For details see M. Evans, *Religious Liberty and International Law in Europe*, 1–41.

tions Covenant failed², the system of minority protection established after World War I offered the possibility to include freedom of religion. In fact, the concern to protect the Jewish minority in Poland³ was the triggering factor which finally led to minority treaties not only with Poland, but also with Czechoslovakia, Greece, Romania and the Kingdom of Serbs, Croats and Slovenes.⁴ The advantage of the inclusion of the minority treaties into the system of the League of Nations must be seen in the fact that the League of Nations was involved in the implementation of the protection clauses. The respective commitments were expressly labeled ‘obligations of international concern’.⁵

However, and irrespective of the important achievement of the minority treaty system as regards the protection of religious minorities, it is obvious that minority protection of the type established after World War I and individual human rights protection are fundamentally different concepts. Therefore, the Universal Declaration of Human Rights of December 1948 is the first international document in which freedom of religion as an international individual right is spelled out (Art. 18 UDHR).

Since then, freedom of religion has remained separated from minority rights, although, of course modern anti-discrimination provisions also prohibit discrimination on religious grounds.⁶ Virtually all modern human rights instruments contain provisions protecting freedom of religion and prohibiting discriminations based on religion. Apart from the UDHR one may mention Art. 18 and Art. 2 para. 1 International Covenant on Civil and Political Rights (ICCPR), Art. 9 and Art. 14 European Convention of Human Rights (ECHR), Art. 12 and Art. 1 para. 1 American Convention of Human Rights (ACHR), Art. 8 and Art. 2 African Charter of Human and People’s Rights (ACHPR). Furthermore, a number of specialized human rights instruments contain corresponding provisions for their specific purposes. This holds true, for example for the UN Convention on the Rights of the Child (Art. 14) or the Geneva

² The debate is described by Evans (note 1), 83–103; the proposals discussed differed in scope and in style, but their common ground was that religious persecution and intolerance are ‘fertile sources of war’.

³ Evans (note 1), 105.

⁴ For details of the respective clauses relating to religion see R. Grote, *Die Religionsfreiheit im Spiegel völkervertraglicher Vereinbarungen zur politischen und territorialen Neuordnung*, in: R. Grote/Th. Maruhn (eds.), *Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht – Völker- und verfassungsrechtliche Perspektiven*, Berlin u.a. 2001, 3–52 (23–25).

⁵ Art. 12 Polish Treaty.

⁶ This holds already true for the Universal Declaration, see Art. 2, para. 1 UDHR.

Refugee Convention (Art.4). International humanitarian law protects freedom of religion of the civilian population (Art.27, para.1 GC IV), during occupation (Art. 58 GC IV), concerning prisoners of war (Art. 34 – Art. 37 GC III) and in respect to the protection of civil objects (Art. 52, para. 3 AP 1).

It may generally be said that freedom of religion was an ‘easy case’ during the deliberations on almost all the instruments mentioned. It may also be said that the most important universal and regional instruments of human rights protection have been strongly influenced by the compromise found for the wording of Art. 18 UDHR. The ICCPR and the American Convention furthermore highlight the importance of freedom of religion by including it into the so-called non-derogable rights, i.e. rights which must be respected even in times of a national emergency.

II. The 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief

As was already mentioned, the inclusion of general provisions relating to freedom of religion and to non-discrimination on religious grounds was relatively easy. This may be explained by the fact that with regard to freedom of religion problems arise rather when the norm is applied than at the level of its acceptance in principle: Few would deny a right to freedom of religion generally, but many will differ on limits to the free exercise of religion when it comes to wearing headscarves in schools, ritual slaughtering of animals, missionary activities etc. Freedom and taxes are similar in that regard: what really counts is the remaining net freedom after the deduction of allowed limitations, not the shining gross freedom, which can easily be promised.

For that reason, already in the mid-1960s there was a strong movement in the United Nations to establish a document, either a convention or a declaration, which would spell out the specific guarantees of freedom of religion more in detail.⁷ With regard to a possible convention the attempts failed completely. The last draft for a convention dates back to 1973 and even the UN Special Rapporteurs on Freedom of Religion dropped the issue of a binding document in 1993.⁸

⁷ The General Assembly asked the Human Rights Commission in 1962 to work on a draft declaration and a draft convention against all forms of religious intolerance (GA Res. 1781 (XVIII) of 7 December 1962); for the history of the debates between 1962 and 1981 see N. Lerner, *Toward a Draft Declaration Against religious Intolerance and Discrimination*, *Israel Yearbook on Human Rights* 11 (1981), 82 (84–89).

⁸ The last recommendation in that regard is contained in the report of 1993, see UN Doc. E/CN.4/1994/79, para. 111; the idea was practically abandoned in 1995, when a Convention was labeled as a ‘necessary but premature step’, UN Doc E/CN.4/1996/95, para. 69.

What are the reasons for the problems regarding such a convention? First, and most of all, the reason must be seen in the already mentioned fact that spelling out the details of freedom of religion is much more painstaking than formulating the general principle. There were, however, two concrete issues. One was the communist position that protecting specifically ‘religion’ would imply a discrimination of atheist or non-religious convictions as opposed to religious convictions. Given the fact that Art. 18 UDHR and all other relevant norms protect ‘belief’, this claim was already flawed at the time when it was made. With the end of the East-West block confrontation it has lost its remaining persuasiveness. The 1981 Declaration found a compromise in adding the word ‘whatever’ before the word ‘belief’.⁹

The second point of debate is still of relevance. It relates to the formulation contained in Art. 18 UDHR according to which ‘this right includes freedom to change [...] religion or belief’. There was a growing opposition against this formulation in Muslim countries after 1948, when the UDHR was adopted. Already the ICCPR in 1966 does not contain a similarly clear guarantee. Art. 18 CCPR reads in the respective passage: ‘This right shall include freedom *to have or to adopt* a religion or belief of his choice [...]’. It was commonly understood that the wording ‘adopt’ would also apply in the situation of a pre-existing religion and thus cover the change of religion.

But it is obvious that already this solution is a weakening as compared with the 1948 text and its clear formulation ‘change’.

The 1981 Declaration goes back one step further and does not even indirectly refer to the change of religion. It does not address the issue at all. However, it does contain a salvatory clause in Art. 8 according to which ‘Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights’. On the basis of this clause, the freedom to change one’s religion expressly contained in Art. 18 UDHR and indirectly accepted in Art. 18 CCPR is preserved, even though the 1981 Declaration does not mention it any more.¹⁰ This is also

⁹ The relevant passage in Art. 1 of the Declaration reads: ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or *whatever* belief of his choice [...]’ (emphasis added); see N. Lerner, *The Final Text of the U.N. Declaration Against Intolerance and Discrimination based on Religion or Belief*, *Israel Yearbook on Human Rights* 12 (1982), 185 (186).

¹⁰ See the detailed analysis by P.M. Taylor, *Freedom of Religion – UN and European Human Rights Law and Practice*, Cambridge UK 2005, 27–42.

the position of the UN Human Rights Committee which, in its General Comment No. 22 on Freedom of Religion states: 'The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief'. It must nevertheless be acknowledged that the development of the texts since 1948 shows a continuous weakening of that guarantee.¹¹

What are the strengths and weaknesses of the 1981 Declaration? There is undoubtedly the merit of having spelled out a rather detailed catalogue of what is comprised by freedom of religion.¹² Given the difficulties of detail this achievement should not be underestimated. For example, the list mentions expressly the right 'to worship and assemble in connection with a religion or belief, and to establish and maintain places for this worship'.¹³ Under the European Convention, where it is not expressly mentioned, the right to maintain places of worship and assembly had to be established by the European Court of Human Rights in a Greek case¹⁴ which illustrates the problems for religious minorities (in the case at hand the Jehovah's Witnesses) in that regard. A parallel development took place regarding the free choice of leaders, which is guaranteed in the 1981 Declaration and under the ECHR again had to be established by the Court in a Bulgarian case.¹⁵

On the other hand, it must be acknowledged that the Declaration is not in itself a legally binding document under international law. To be sure, it serves, and will continue to serve as an important and helpful tool in interpreting the formally binding international guarantees of freedom of religion. It is even possible to ascribe to the most fundamental and uncontroversial guarantees of freedom of religion the character of customary international law. But it is certainly too far reaching if – as some authors do – the whole document as such is qualified as an expression of customary international law. The most important weakness must be seen in the softening of the right to change one's religion which the 1981 Declaration tends to induce.

¹¹ See the criticism voiced by Evans (note 1), 237 f. in that regard.

¹² B. Dickson, *The United Nations and Freedom of Religion*, *ICLQ* 44 (1995), 327 (344 f.).

¹³ Art. 6 lit. a) of the Declaration.

¹⁴ Rep. 1996-IV, 1346 – Manoussakis.

¹⁵ Rep. 2000-XI, 117 – Hasan and Chaush.

III. Mechanisms of surveillance

Let me now turn to the mechanisms of surveillance and implementation. There are the general mechanisms which apply with regard to all human rights guarantees. They exist in form of treaty bodies, i.e. mechanisms which are set up for implementing the guarantees contained in a specific treaty, such as the Human Rights Committee established under the ICCPR (1.). In addition there is the Human Rights Council which replaced the former Human Rights Commission in 2005 as a non-treaty based universal surveillance mechanism. Under the new regime of the Human Rights Council the most important mechanism is the so-called Universal Periodic Review Mechanism – UPR (2.). Finally, there is a broad range of so-called Special Procedures, the most relevant of which in the context of freedom of religion is the Special Rapporteur on Freedom of Religion (3.).

1. Treaty bodies

The most important advantage of treaty bodies must be seen in the fact that they operate on the basis of legally binding texts and with formalized procedures. In consequence, such treaty bodies need to be established separately with regard to each human rights instrument. This has become a matter of discussion in itself, because the proliferation of such bodies implies a risk to have different interpretations of similar or even identical norms. Also, since the usual instrument applied by treaty bodies are state reports which the member states have to submit regularly, there is a problem of capacity since states are more or less constantly under reporting obligations to one or the other treaty body. The Office of the High Commissioner for Human Rights has therefore suggested to establish what it called a ‘unified standing treaty body’.¹⁶ However, given the fact that membership in the different instruments is far from uniform, this goal will be difficult to realize.¹⁷

The most well-known among the many treaty bodies is the Human Rights Committee established under the ICCPR. It may serve as an example of how treaty bodies work. All Human Rights treaty bodies consist of independent experts. Under the ICCPR three different procedures are available: state reports which have to be submitted regularly. State reports are the only surveillance instrument which is obligatory under the ICCPR (Art. 40

¹⁶ UN Doc A/59/2005/Add. 3; see also the concept paper of the IHCHR, HRI/MC/2006/2 of 22 March 2006.

¹⁷ For a more detailed criticism see C. Tomuschat, Human Rights Committee, MN 36, in: *MPEPIL*, available at: www.mpepil.com.

ICCPR). After having dealt with the reports, the Committee formulates ‘concluding observations’, which are, however, often cautious and diplomatic.

A second instrument are inter-state communications, i.e. claims by other states parties to the ICCPR and that a member state is in violation of its obligations deriving from the treaty (Art. 41 ICCPR). Under the ICCPR this instrument is only mandatory after the respective state has made a specific declaration. Although the inter-state application stands in the logic of mutually binding treaty obligations, it must be considered of extremely limited value. No such procedure as yet taken place under any of the existing international human rights treaties. There are many reasons for this abstinence of other member states. The most important seem to be diplomatic considerations and, of course, a fear of ‘retaliation’ at some later point in time.

Under the first additional Protocol to the ICCPR the Committee is also competent to receive individual communications and to pronounce its ‘views’ on these communications. These views are, as the term indicates, not formally binding for the member state concerned, although the Committee tends to use more and more a language which one would usually find in Court judgments. Finally, the Human Rights Committee has adopted so-called ‘General Comments’ which either concern specific guarantees such as freedom of religion or systematic issues like reservations to human rights treaties.¹⁸

The different procedures available for treaty bodies must be seen as mutually complementary. At first sight one might be tempted to consider the individual communication as the most effective instrument since it offers the possibility for an individual who feels violated in his or her human rights, to claim the violation directly before an internationally competent human rights body. However, a look at the actual figures of cases reveals that that the practical importance is limited. As of April 2008 (which is the latest date with available figures) the Human Rights Committee had dealt with 1777 individual complaints, which is a remarkably low figure given a membership of 113 states.¹⁹ For comparison: The European Court of Human Rights responsible for complaints emanating from 47 member states has received 61,300 individual complaints only in 2010. At the end of the year 2010 there were almost 140,000 individual complaints pending

¹⁸ For details see E. Klein, General Comments – Zu einem eher unbekanntem Instrument des Menschenrechtsschutzes, in: *Recht – Staat – Gemeinwohl, Festschrift für Dietrich Rauschnig*, Köln u.a. 2001, 301–312.

¹⁹ See the figures available at: www2.ohchr.org/english/bodies/hrc/stat2.htm.

at the ECHR.²⁰ The comparison illustrates that the individual procedure available at the universal level of the ICCPR does not seem to be accepted in a similar way as its European counterpart. The reasons for that difference are manifold. One important factor certainly is that the procedure simply is not well enough known in many parts of the world, others factors are probably a lack of willingness or of ability to lodge such complaint, or even fear of repression.

2. *The Human Rights Council and its Universal Periodic Review Mechanism*

In view of these limits to the existing treaty mechanisms, the new United Nations Human Rights Council, which replaced the former Human Rights Commission, established the so-called ‘Universal Periodic Review Mechanism – UPR’. The mechanism has several advantages: The first and most important is that it applies to all member states of the United Nations, irrespective of whether at all and if so to which human rights treaties they are parties. The second advantage is that it does not require a trigger, for example an individual or an inter-state complaint. Thus, the state concerned is not automatically in a situation of defense. The mechanism is ‘democratic’ in the sense that each member of the United Nations will be reviewed regularly, irrespective of whether the overall human rights record is said to be excellent or terrible.

The main disadvantage of the mechanism must be seen in the fact that it is not operated by independent experts, but by the members of the Human Rights Council, i.e. 47 member states of the United Nations. The review mechanism has inevitably become politicized and the quality of the reports and recommendations does not match the outcome of proceedings before independent experts. It is against this background that the role of the Special Rapporteur on Freedom of Religion must be assessed.

3. *The Special Rapporteur on Freedom of Religion*

In 1986 the then existing Human Rights Commission instituted the ‘Special Rapporteur on Religious Intolerance’ as it was originally named.²¹ The Special Rapporteur was mandated with examining incidents and governmental actions which are inconsistent with the 1981 Declaration on the

²⁰ See the figures for 2010 available at: www.echr.coe.int/NR/ronlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2011_VER-SION_WEB.pdf.

²¹ Res. 1986/20 of 10 March 1986, ECOSOC OR, 1986, Supp. 2, 66.

Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief and with recommending remedial measures against such situations. In 2001, on the occasion of the 20th anniversary of the 1981 Declaration, the title was changed into ‘Special Rapporteur on Freedom of Religion or Belief’.²² The change in title reflects a broader mandate, which was, as it was formulated by Special Rapporteur *Amor*, ‘no longer confined to expressions of intolerance and discrimination based on religion or belief, but extended to all issues relating to freedom of religion or belief [...]’.²³

a) The scope of the mandate and its development in practice

A brief look at the work of the different Special Rapporteurs reveals how the scope and the methods of their work have changed. First, it should be noted that the Special Rapporteur on Freedom of Religion was given broad possibilities of action. Already the 1986 resolution, which created the office, mentions the possibility of dealing with individual complaints. Also, the Special Rapporteurs were given the possibility to receive material not only from official government sources, but also from NGOs and from religious communities concerned. However, a certain development may be discerned as regards the application of the instruments available. Over the last twenty-five years the Special Rapporteurs have moved towards a more intensive dialogue and they have increased the publicity of their actions.

The first Special Rapporteur was the Portuguese lawyer *Angelo Vidal d’Almeida Ribeiro*. He had to establish the mechanism against resistance in many states which had forced a prior Special Rapporteur, who had been instituted provisionally in 1983 by the Sub Commission on Prevention of Discrimination and Protection of Minorities.²⁴ Thus, *d’Almeida Ribeiro* could not press too hard in his actions. In his first report, he only mentioned problematic issues without linking them to specific countries. But already in his second report, *d’Almeida Ribeiro* started mentioning the countries concerned. He described the facts presented in individual complaints but refrained from taking position himself.

In 1994 *Abdelfattah Amor*, a Tunisian lawyer, took over and in 2001 he passed the office on to *Asma Jahangir* from Pakistan. Thus, the two Special Rapporteurs responsible from 1994 until 2010 had a Muslim religious and cultural background. Notably *Asma Jahangir* considerably changed the pre-

²² Res. 2001/42.

²³ UN Doc E/CN.4/2003/66, para. 2.

²⁴ UN Doc E/CN.4/Sub.2/1983/43, 98-99.

existing practice. But already the data submitted by Special Rapporteur *Amor* in his 2001 report show a significant increase in individual complaints addressed to him.²⁵ He distinguishes three phases: 1989–1994: 30 communications on the average; 1995–1999: 56 communications on the average; 2000–2001: 88 communications on the average. The current reports do not give figures by year, but merely mention that since 1986 a total of more than 1,200 communications had been transmitted to the governments of the member states concerned (more than 130).²⁶ As of 2005 Special Rapporteur *Jahangir* started printing the individual complaints and the reaction by the Government of the member state concerned (if there was any...) in a separate document.²⁷

Apart from individual communications there is a second important instrument of operation, namely country visits. While Special Rapporteur *d'Almeida Ribeiro* during his term of office from 1986 to 1993 only visited Bulgaria in 1987, Special Rapporteur *Amor* developed the country visits into a regular instrument, trying to visit two countries each year. Furthermore, the reports on the country visits have been, from the beginning, much more detailed and critical than the reactions to individual complaints. While the 1994 report on China, although mentioning the difficult situation in Tibet expressly, refrained from a critical legal assessment contenting itself with 'recommendations' regarding future practice, later country reports are characterized by a detailed analysis of the legal situation in the member state concerned. For example the 1999 report on a visit to the United States of America contains a rather detailed analysis of the jurisprudence of the U.S. Supreme Court. And also the 1997 visit to Germany gives evidence of an in-depth examination of the national legal situation. The respective passage is worth being quoted, since it underlines the merits of the German system of co-operation:

As regards legislation, the provisions of the Constitution fully guarantee freedom of religion and belief, and the provisions incorporated from the Weimar Constitution governing relations between the State, the churches and the religious communities are very comprehensive. They strike the right dynamic balance between religion and politics, avoiding the extremes of 'anti-religious clericalism' and 'religious cler-

²⁵ See UN Doc. A/56/253, para. 84.

²⁶ UN Doc. A/65/207 of 20 July 2010, para. 54; A/HRC/16/53 of 15 December 2010, para. 11.

²⁷ UN Doc. E/CN.4/2005/61/Add.1 of 15 March 2005.

icalism' and allowing a symbiotic relationship, governed by principles of neutrality, tolerance and equity, between the State and religions. In this respect, it is noteworthy that the status of legal person in public law that may be accorded to cults and entails certain rights and advantages is related not to the religious nature of the cult but to whether it is in the public interest. This status ensures a form of co-operation with the State, but unlike other legal persons in public law, cults are not incorporated into the State structure. Where the principle of neutrality is concerned, and as the question of religion in State schools demonstrates, whether in the case of the crucifix or religious instruction, interpretation of the principle is not rigid and has to take balanced account, within the framework of the provisions of the Constitution, of the minorities and the majority, while respecting the freedom of belief of all.²⁸

What are the strengths of the approach followed by the Special Rapporteurs? The mechanism certainly is 'soft' in the sense that it does not have the possibility to render binding judgments on the question of whether in the individual case presented the right to freedom of religion or not to be discriminated against were violated. Against this weakness there is, however, one important strength to be mentioned which should not be underestimated. This strength must be seen in the possibilities which the dialogue offers which the Special Rapporteurs maintain with the member states.

The concept of country visits includes the necessity of collaboration of the visited state, which must allow the entry into the territory of the delegation of the Special Rapporteur and consent to its traveling schedule. Furthermore, transmitting individual complaints and relying on comments by the government which are then followed by observations of the Special Rapporteur also focuses very much on a dialogue on the relevant issues. Finally, the Special Rapporteurs are increasingly placing emphasis on a follow-up mechanism. Country visits are complemented by a follow-up procedure in which commitments undertaken by the state concerned are monitored. The possibility of such a general follow-up mechanism is an advantage which no 'hard' international surveillance mechanism can offer. Thus, it offers the possibility to induce systematic changes in the law and practice of the state concerned. By contrast, judgments in individual cases rather lead to individual solutions, without approaching the systematic problem that may stand behind an individual complaint.

²⁸ Un Doc. A/CN.4/1998/6/Add.2, para. 84.

b) Controversial substantive issues

In 2011, on the occasion of the 25th anniversary of the office of the Special Rapporteur on Freedom of Religion a ‘Rapporteur’s Digest’ has been prepared which gives a systematic access to controversial issues of freedom of religion.²⁹ The material presented in the digest gives a good overview of controversial issues regarding freedom of religion and the prohibition of discrimination on religious grounds. The following substantive issues are worth being mentioned:

aa) Registration requirements

In a number of states predominantly, but in no way exclusively belonging to the former communist block registration requirements have been found to infringe upon freedom of religion. The 2005 report and different country reports mention among others Byelorussia, Kyrgyzstan, Mongolia, Moldavia, Turkmenistan, Uzbekistan, Azerbaijan and China. The problems of registration requirements are well illustrated by the case of the Moscow Branch of the Salvation Army, which the European Court of Human Rights decided in 2006. In this case the Russian authorities had refused to register the Moscow Branch of the Salvation Army (which had already existed as an autonomous legal person at the time when the registration requirement was introduced) on various grounds. The consequence of non-registration was that the Moscow Branch of the Salvation Army at least partially lost its legal personality which, in turn, had a number of further negative consequences. The reasons for refusing the registration were essentially that the Moscow Branch of the Salvation Army was dominated by foreign members from outside Russia, that, in view of its military structure, it might present a danger to public security, and that it had not properly described the content of its religious convictions.³⁰ The last point is partic-

²⁹ The document is available at: www2.ohchr.org/english/issues/religion/docs/RapporteursDigestFreedomReligionBelief.pdf.

³⁰ ‘The Court points out that, according to its constant case-law, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see Hasan and Chaush, cited above, § 78, and Manoussakis and Others v. Greece, 26 September 1996, § 47, Reports 1996-IV). It is indisputable that, for the members of the applicant branch, using ranks similar to those used in the military and wearing uniforms were particular ways of organising the internal life of their religious community and manifesting The Salvation Army’s religious beliefs. It could not seriously be maintained that the applicant branch advocated a violent change in the State’s constitutional foundations or thereby undermined the State’s integrity or security’.

ularly important since it points to a general problem: To what extent are state organs in a position to judge differences in religious convictions? In increasingly religiously pluralized societies it becomes more and more difficult for the state to take a position on such distinctions. In Germany, the issue has most recently arisen in the context of orthodox and liberal forms of Judaism, but it applies more or less to all religions. The only solution seems to be to leave it to the people concerned whether they feel that they belong to the same community or not.

bb) State religions

State religions are not in themselves incompatible with the concept of freedom of religion as enshrined in the international human rights documents and notably in the 1981 Declaration. This has been said many times, not only by the Special Rapporteurs but also by the former European Commission on Human Rights. However, it cannot be denied that state religions or structures that come close to a state religion, like the situation in Greece, tend to create problems of non-discrimination. In, again, a registration case the European Court of Human Rights decided that it violated Art. 9 ECHR if the registration of a place of worship and assembly for Jehovah's witnesses was made subject to an authorization from the local ecclesiastical authorities of the Greek Orthodox Church.³¹

A similar situation of a quasi-official status is described by Special Rapporteur *Amor* with regard to Turkey when he writes that '[...] despite the proclaimed secular nature of the State, the treatment of Islam in Turkey, [...], tends to give a quasi-official status, or at least a sufficiently prominent position, to Hanafi Islam'.³²

In sum, it seems that, although at the general level of principle systems with a state church or an official religion do not necessarily present a problem of freedom of religion, in practice the preference of one religion very often not only leads to problems of equal treatment of religions but also to unjustified interferences with the right to freedom of religion.

cc) Sects

Special Rapporteur *Amor* placed great emphasis in his reports on the difficulties relating to the treatment of so-called 'sects'. The position is best reflected in the 1997 report:

³¹ ECHR Rep. 1996-IV-1346.

³² UN Doc. A/55/280/Add.1, para. 129.

In actual fact, the fairly widespread hostility towards sects can be largely explained by the excesses, the breaches of public order and, on occasion, the crimes and despicable conduct engaged in by certain groups and communities which trick themselves out in religion, and by the tendency among the major religions to resist any departure from orthodoxy. The two things must be treated separately. Sects, whether their religion is real or a fiction, are not above the law. The State must ensure that the law – particularly laws on the maintenance of public order and penalizing swindling, breach of trust, violence and assaults, failure to assist people in danger, gross indecency, procurement, the illegal practice of medicine, abduction and corruption of minors, etc. – is respected. In other words, there are many legal courses open and they afford plenty of scope for action against false pretences and misdirection. Beyond that, however, it is not the business of the State or any other group or community to act as the guardian of people's consciences and encourage, impose or censure any religious belief or conviction.

dd) Missionary activities

The problem of missionary activities has already been dealt with when describing the general characteristics of the 1981 Declaration as compared to other international guarantees of freedom of religion. The right to inform others of one's own religious convictions and try to convince them is protected under the European Convention as 'teaching' within the meaning of Art. 9 ECHR.³³ A similar position has been taken in literature regarding Art. 18 ICCPR.³⁴ The reports of the Special Rapporteurs frequently refer to situations where missionary activities are limited by coercion, sometimes even against family members.³⁵

It should not be overlooked in that context that limiting missionary activities is not in itself unlawful. There are a number of good reasons, the most important certainly being the protection of rights of others who may feel molested or even risk to become victims of fraudulent activities. Furthermore,

³³ ECHR Rep. 260-A-Kokkinakis, para. 31: '[Art. 9] includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter'.

³⁴ Nowak, ICCPR-Commentary, Art. 18, para. 24.

³⁵ See for instance, UN Doc. E/CN.4/2006/5, para. 149, 219 ff.; 237; and most extensively in 2005 report to the UN General Assembly, UN Doc. A/60/399, para. 55-68.

depending on the concrete circumstances of the society concerned it cannot be excluded that intensive missionary activities lead to critical destabilization. Therefore, limitations often pursue a legitimate aim. However, specifically with regard to the Greek situation one may ask the question whether this was the case. It seems clear that the Greek prohibition on proselytism was intended to protect the orthodox majority. Against this background there are good reasons to assume that it lacked a legitimate aim.³⁶

ee) Further issues

There are further important issues, notably relating to religion in schools (religious symbols and religious education) and to autonomy of religious communities regarding family law which cannot be dealt with in this paper. With respect to religion in public schools, the approach taken by the Grand Chamber of the European Court of Human Rights in the *Lautsi* case indicates the right direction. Member states enjoy a broad margin of appreciation, which – of course – is subject to supervision by international human rights bodies such as the European Court of Human Rights, the Human Rights Committee or the UN Special Rapporteur on Freedom of Religion, but gives the necessary leeway for appropriate solutions on the basis of national traditions.

IV. Evaluation

The practical implications of freedom of religion as an international human right depend to a large extent on the social and legal conditions existing in the different member states of the United Nations. The great challenge for international surveillance must be seen in the fact that, on the one hand, these different conditions cannot be ignored, but that, on the other hand, its task is to develop universally applicable international standards.

The analysis of the annual and country reports of the UN Special Rapporteurs on Freedom of Religion shows that a ‘soft’ mechanism, i.e. a mechanism operating without legally binding instruments, copes pretty well with this challenge. After an initial period characterized by cautious activities, the Special Rapporteurs have developed working methods which allow them to take concrete and substantive positions regarding more or less all essential and controversial issues relating to freedom of religion. It should be highlighted

³⁶This was the position of a minority opinion in the former European Commission of Human Rights, see the Partially Dissenting Opinion of Mr. Frowein, joined by Mr. d’Almeida Ribeiro, ECHR Rep. A- 260, 52; see also Taylor (note 10), 49-50.

that their reports not only refer to the 1981 Declaration as their main document of reference, but include positions on whether or not certain measures or activities of the member states are in violation of binding treaty obligations stemming from the relevant international human rights instruments. As a 'soft' mechanism the Special Rapporteurs must rely on publicity as their main sanction. While it is true, that this may often not immediately produce the desired results, the analysis of their activities creates hope that in a mid-term perspective broadly accepted universal standards can be developed which may lead to an integrative international law of religion.