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### Religious and Religiously-Affiliated Actors in International Law : Snapshots of Collaboration

Whittney Barth

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# Religious and Religiously-Affiliated Actors in International Law: Snapshots of Collaboration

Whittney Barth\*

## Abstract

*This paper seeks to synthesize the many ways in which diverse religious and religiously-affiliated actors (RRAAs) have worked together to influence international law. This paper begins by presenting three ways in which RRAAs have been, and continue to be, involved in the formation of international law beyond litigation. Then, as an example of RRAA's engagement and influence in international human rights litigation, this paper then explores three ways in which religious institutions and religiously-affiliated NGOs engage with the European Court of Human Rights (ECtHR). Although this paper benefits from existing scholarship, additional questions ripe for future exploration are presented.*

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\* J.D. Candidate, 2019, The University of Chicago Law School; M.Div., 2011, Harvard Divinity School; B.A., 2008, Miami University (Oxford, Ohio). This paper was produced as part of the author's participation in the University of Chicago Law School's 2019 International Immersion Program. For the opportunity to participate in IIP, the author would like to thank Ms. Aican Nguyen, Director of International Programs at the University of Chicago Law School, and the Program Selection Committee. Any errors are, of course, my own.

## I. Introduction

This paper began with a desire, broadly speaking, to understand the ways in which religious and religiously-affiliated actors (RRAAs)<sup>1</sup> collaborate to affect change in international law. Collaboration between RRAAs is, of course, not new,<sup>2</sup> nor is it cabined to one particular political persuasion; Interreligious partnerships very often coalesce on all sides of contentious public debates.<sup>3</sup> Furthermore, the reality of intrareligious diversity, that is, diversity *within* religious traditions, makes it not uncommon for coreligionists to find themselves on different sides of a particular issue.<sup>4</sup> At the same time, the identity of the partners in a collaboration impacts the degree of access to and influence<sup>5</sup> on the formation of law.

There are a number of reasons why analysis of the role of religious and religiously-motivated actors in international law is timely. The growing trend of secularism in Europe, differing national responses to increased religious diversity because of migration, and the evolution of religion-related jurisprudence in international courts like the European Court of Human Rights' (ECtHR) are but three.<sup>6</sup> The growing frequency of RRAAs based in one jurisdiction seeking to intervene in ECtHR litigation taking place in another and in favor of a state party, rather than an individual claimant, is another.

Part II provides a brief overview of the ways RRAAs have influenced the development of international law outside of litigation. This part includes a brief discussion of religious influence over the potential origins of international law and the enshrinement of substantive protections for the freedom of religion, belief, and conscience, as well as manifestation. It also discusses instances where coalitions of religious and religiously motivated actors came together to shape the

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<sup>1</sup> This paper uses both religious and religiously affiliated actors to differentiate between religious individuals and institutions (churches, denominational bodies, etc.) (religious actors) and NGOs engaged in advocacy on issues related to religious freedom (religiously affiliated actors). As used here, these terms are also intended to cover states with established religious identities. Where the shorthand, RRAAs, would be confusing, this paper explicitly differentiates between the types.

<sup>2</sup> See *infra* notes 11-23 and accompanying text.

<sup>3</sup> See *infra* notes 25-29 and accompanying text.

<sup>4</sup> Indeed, such diversity poses a formidable challenge to those who argue that religious identity, because of its transnational nature, has the potential to rival the supremacy of the state. See generally Ran Hirschl & Ayelet Shachar, *Competing Orders: the Challenge of Religion to Modern Constitutionalism*, 85 U CHI. L. REV. 425 (2018).

<sup>5</sup> See *infra* notes 74-78 and accompanying text.

<sup>6</sup> See Matthias Koenig, *The Governance of Religious Diversity at the European Court of Human Rights*, in INTERNATIONAL APPROACHES TO GOVERNING ETHNIC DIVERSITY (JANE BOULDEN & WILL KYMLICKA, EDS., 2015).

development of particular issues, often with co-religionists on all sides. Neither normative or descriptive accounts of this relationship are uncontested, notably when it comes to answering questions of inspiration, aspiration, and foundation. Although engaging and important as background, those debates fall outside the scope of this paper and are therefore referenced without conclusive evaluation of the merits of any particular claim.<sup>7</sup> Finally, this part concludes by briefly mentioning at least one way in which representatives from diverse religious traditions and communities are convened by the Council of Europe for dialogue and knowledge-sharing.

Part III explores the ways in which RRAAs, specifically religious institutions and religiously-affiliated NGOs, seek to influence international human rights litigation. Specifically, this paper looks at the European Court of Human Rights (ECtHR), the tribunal responsible for adjudicating claims brought under the European Convention. The Convention is one of many international human rights instruments that directly protect the freedom of religion and belief. Almost all of these instruments also include religion as a protected ground within a non-discrimination clause.<sup>8</sup> Thus, this focused examination is a small glimpse at a much larger picture.

Religion remains a dynamic and motivating force informing large and small interactions between individuals, institutions, and states across the globe. Dr. Mashood Baderin, chair of the Centre for African Studies at SOAS University of London, argues that if international law is to develop “a legal framework that emphasizes our common humanity and dignity,” international lawyers and scholars “can no longer afford to ignore the importance that religion plays for many individuals and many societies.”<sup>9</sup> But recognizing importance need not come at the expense of recognizing challenges, nor does it preclude balancing an individual or group’s right to manifest religion with other pressing rights and concerns.<sup>10</sup>

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<sup>7</sup> That being said, the contours of the debate are themselves of historiographical interest for what some scholars see as at stake in the framing. *See, e.g.* IOANA CISMAS, RELIGIOUS ACTORS AND INTERNATIONAL LAW 18 (2014) (explaining that two narratives have developed in scholarship describing the relationship between religion and international law: scholars who wish to “recuperate” the role of religion to forge legitimacy in international law and scholars who to maintain international law as a separate discipline).

<sup>8</sup> MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 3-4 (1997).

<sup>9</sup> *See* Mashood A. Baderin, *Religion and International Law: Friend or Foe?*, Euro. Hum. R. L. Rev. 637, 658 (Oct. 2009) (quoting Janis and Evans).

<sup>10</sup> *Cf.* Article 9.2, European Convention on Human Rights. Ideally, limits on religious exercise are not imposed lightly, but after careful balancing of various interests, including (but not limited to) those of the religious actor, third parties, and the state. Particular attention should be paid to the protection of religious minorities, especially when limits are the product of animus. *See S.A.S v. France*, 48335/11 Grand Chamber ¶ 128 (Jan. 7, 2014) (“Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views

## II. RRAAs and the Formation of International Law

Religious and religiously-motivated actors influence the formation of international law in a number of ways. The first is through coalition-building, which has occurred since the founding of the modern human rights regime. The results of these collaborations can sometimes be traced in the drafts and final versions of international legal instruments. The second way in which RRAAs influence the formation of international law is through convenings of experts and representatives. This avenue is, in some instances, narrower because it is often by invitation only and yet broad in that it includes different departments with the Council of Europe.

### *i. Formation of international law & substantive protections of religious freedom*

Scholars debate the extent to which the concept<sup>11</sup> and contours of international law were influenced by certain religious traditions.<sup>12</sup> For instance, Dr. Baderin highlights scholarly literature that points to early examples of interstate relations in the histories of various traditions, including Christianity, Hinduism, Islam, Judaism, and Jainism, to name a few.<sup>13</sup> Dr. Karen Murphy, a consultant on human rights and humanitarian policy, traces different conceptions of religious freedom to a number of different religious and philosophical traditions.<sup>14</sup> Murphy notes that, “although the concept of freedom of thought, conscience[,] and religion emerged in the early centuries, recognition of this freedom in domestic law and policy was a gradual process and the human right to religious freedom is a relatively recent invention, enshrined in human rights declarations and conventions that are less than, or little more than, 50 years in existence.”<sup>15</sup>

Whatever influences RRAAs and traditions may have had on the development of international law, the adoption of the U.N.’s Universal Charter for Human Rights in 1945 was the “climax in the formal substantive secularization

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of the majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.”).

<sup>11</sup> See Baderin, *supra* note 9, at 637 (Oct. 2009) (“Modern international law is generally perceived as a secular international legal system but the debate about its relationship with religion is an old and ongoing one.”).

<sup>12</sup> *Id.* at 640-641 (noting scholars who have identified early examples of interstate relations, precursors to international law, in the histories of various traditions, including Christianity, Hinduism, Islam, Judaism, and Jainism).

<sup>13</sup> *Id.*

<sup>14</sup> KAREN MURPHY, STATE SECURITY REGIMES AND THE RIGHT TO FREEDOM OF RELIGION AND BELIEF: CHANGES IN EUROPE SINCE 2001 14-16 (2013).

<sup>15</sup> *Id.* at 16.

and positivism of modern international law.”<sup>16</sup> The freedom to have and manifest religious beliefs, along with freedom of thought and conscience, came under protection of international law as fundamental rights in Article 18 the U.N. Declaration of Human Rights.<sup>17</sup> It was the first of three major international legal instruments to substantively protect freedom of religion. A year later, in 1949, a draft of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) was completed. The draft included protection of the freedom of religious belief, practice, and teaching.<sup>18</sup> Drafters anticipated a supplementary agreement would develop and define certain standards, a task that would be given to the Council of Europe.<sup>19</sup> However, the supplementary agreement approach was abandoned in favor of putting flesh on the bones sooner rather than later and drafters borrowed language from Article 18 of the U.N. Declaration of Human Rights.<sup>20</sup> The European Convention was signed in 1950<sup>21</sup> and came into force in 1953.<sup>22</sup> Sixteen years later, the U.N. General Assembly adopted the International Covenant on Civil and Political Rights, which protects religious belief and expression in Article 18, and it went into force in 1976.<sup>23</sup>

Article 9 of the European Convention will be the focus of Part II (although with the caveat that RRAAs are involved in ECtHR litigation that spans numerous articles). Article 9.1 protects the freedom of thought, conscience, and religion, including the right to change religion or belief, and freedom to “manifest” that religion or belief in “worship, teaching, practice, and observance,”

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<sup>16</sup> Baderin, *supra* note 9, at 641 (noting that none of the Charter’s provisions refer to religion as “a legal or normative source of international law, except for its provisions on prohibition of religious discrimination”).

<sup>17</sup> United Nations, *The Universal Declaration of Human Rights*, Art. 18, G.A. Res. 217 A (adopted Dec. 10 1948), [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf). For a discussion of a precursor within the Covenant of the League of Nations, see MURPHY, *supra* note 14, at 17.

<sup>18</sup> EVANS, *supra* note 8, at 263.

<sup>19</sup> *Id.* at 264.

<sup>20</sup> *Id.* According to Professor Sir Malcolm Evans, professor of public international law at the University of Bristol, a number of countries lobbied for certain amendments. Turkey and Sweden did not want to upset existing national laws relating to religious institutions and foundations or membership of certain groups. *Id.* at 268. The U.K. sought to limit the extent to which laws could be used to limit the freedom to manifest religion or belief. *Id.* at 269.

<sup>21</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI. 1950, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>22</sup> Javier Martínez-Torrón, *The European Court of Human Rights and Religion*, in *LAW AND RELIGION: CURRENT LEGAL ISSUES*, VOL. 4 186 (RICHARD O’DAIR & ANDREW LEWIS, EDS. 2001).

<sup>23</sup> United Nations, *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) (adopted Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

either alone or in community. Article 19.2 limits the right to manifest one's religion or belief when "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others." Article 14 also prohibits discrimination on the basis of religion, among other qualities. Thus, religion turned out not to be just "something that once had mattered," but a substantive subject matter for rights in the late twentieth and early twenty-first centuries.<sup>24</sup>

RRAAs—including states, religious institutions, and NGOs—were involved in the articulation of these fundamental rights in the early twentieth century and they remain active in shaping international law norms.<sup>25</sup> Dr. Ioana Cismas, Senior Lecturer at the Center for Applied Human Rights at the University of York, documented this involvement in a portion of her 2014 book, *Religious Actors in International Law*. For example, Cismas points to collaboration between some Catholic states, the Holy See, and some Muslim states during the 1990s in preparation for and response to international conferences on women, gender, and reproduction.<sup>26</sup> Later initiatives touching on gender, reproduction, and rights related to sexual orientation brought forth coalitions on both sides of the debate, a line that did not cut across, but through, religious traditions. On one side, NGOs, mostly based in the U.S., from the Catholic, Evangelical, and Mormon traditions found common ground with the Russian Orthodox Church, the Holy See, and some Muslim states in opposition to changes in the scope of rights.<sup>27</sup> On the other, Catholics for Free Choice, Ecumenical Women (Anglican, Presbyterian, Lutheran, Methodist) partnered with secular NGOs and a few governments lobbied for progressive changes.<sup>28</sup> But coalitions are not static; they can and sometimes do shift, depending on the issue.<sup>29</sup>

## *ii. Experts and Representation*

Experts and NGOs continue to play a role in monitoring the status of human rights, including religious freedom, within individual states and regions. The Committee of Ministers is responsible for overseeing the enforcement of ECtHR decisions. The Department of the Execution of Judgments of the European Court of Human Rights "assists the Committee of Ministers in its function of supervision of the implementation of the Court's judgments" and

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<sup>24</sup> Baderin, *supra* note 9, at 642.

<sup>25</sup> See generally EVANS, *supra* note 8 (detailing the influence of religious actors on the development of international legal instruments and institutions).

<sup>26</sup> See CISMAS, *supra* note 7, at 59-60.

<sup>27</sup> *Id.* at 59-60.

<sup>28</sup> *Id.* at 61.

<sup>29</sup> See *id.* at 62-64.

“provides support to the member States to achieve full, effective and prompt execution of judgments.<sup>30</sup> In addition, since 2008, the Committee of Ministers has hosted annual exchanges on the interreligious dimension of intercultural dialogue, often foregrounding a particular issue.<sup>31</sup> In 2017, for instance, the exchange centered on migrants and refugees included inter alia experts from the Council of Europe, diplomats from particular member states, as well as representatives from the Commission of the Bishops’ Conferences of the European Community (Catholic), the Church of England’s National Refugee Welcome Center, the European Buddhist Union, the Director of the Liaison Office of the Orthodox Church to the European Union, the theology department of l’Université de Strasbourg, and the Caucasus Muslims Board.<sup>32</sup>

In contrast to litigation strategies discussed in Part II, the convening of experts and/or coalitions in the process of drafting legal instruments or discussing of a particular issue may involve discussion of multiple perspectives and nuances. These kinds of encounters also happen with varying degrees of formality and with potentially more options available in terms of outcomes. In other words, encounters outside of litigation (i.e. non-adversarial encounters) may provide opportunities for expanding possibilities. Of course, organizers may always face challenges to decisions about who is or is not, and who should be, in the room when decisions are made. And Dr. Ran Hirschl, professor of political science and law at the University of Toronto, and Dr. Ayelet Shachar, director of the Max Planck Institute for the Study of Religious and Ethnic Diversity, point to “transnational activism on behalf of religious causes,” including participation in regional and specialized international bodies, as potential rivals to the supremacy of the constitutional state.<sup>33</sup> At the same time, the breadth of interests in the room could prove to be a mechanism that encourages the inclusion of diverse voices,

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<sup>30</sup> Council of Europe, *Presentation of the Department: Department for the Execution of Judgments of the European Court of Human Rights*, <https://www.coe.int/en/web/execution/presentation-of-the-department> (last accessed June 2019).

<sup>31</sup> See Council of Europe, *Council of Europe Exchanges on the Religious Dimension of Intercultural Dialogue*, <https://www.coe.int/en/web/cm/exchanges> (last accessed June 2019).

<sup>32</sup> 2017 Council of Europe Exchange on the Religious Dimension of Intercultural Dialogue, “Migrants and Refugees: Challenges and Opportunities – What Role for Religious and Non-Religious Groups?,” [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=0900001680764eba](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680764eba) (last accessed June 2019).

<sup>33</sup> Cf. Hirschl & Shachar, *supra* note 4, at 454 (explaining that “transnational activism on behalf of religious clauses . . . is also visible in the role played by international religious experts in constitutional drafting in the former Soviet bloc countries and in countries as diverse as Nepal, Thailand, or Iraq,” and also manifests itself in “interfaith advocacy efforts to promote religious freedom through specialized regional and international bodies”). Hirschl and Shachar argue these “transnational and boundless characteristics of religion,” which includes the mobilization of diasporic communities across borders, “presents a structural advantage vis-A-vis the territorially bounded constitutional state in the early twenty-first century.” *Id.*

rather than the advancement of a particular viewpoint through litigation, a comparatively more insulated channel.

### III. RRAAs at the ECtHR

Although the role of NGOs at the ECtHR has been characterized as limited,<sup>34</sup> there are several ways in which NGOs are active at the Court.<sup>35</sup> Like other NGOs, religious institutions and religiously-affiliated NGOs may track human rights abuses to raise awareness of an issue in the first instance, and submit amicus curiae briefs on behalf of petitioners. They may also appear before the Court as claimants in limited circumstances.

#### *i. Religious institutions as claimants*

Religious institutions may submit applications to the ECtHR alleging Article 9 infringements upon religious freedom, although Cismas points out that it is not at all clear that all religious organizations have always had this capacity.<sup>36</sup> She explores, for instance, some of the intricacies of ECtHR jurisprudence that were not at all a given when it comes to dealing with state-sponsored religious entities since, by definition, ECtHR claimants must be non-state actors (i.e. NGOs, thus

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<sup>34</sup> HEIDI NICHOLS HADDAD, THE HIDDEN HANDS OF JUSTICE: NGOS, HUMAN RIGHTS, AND INTERNATIONAL COURTS 49 (2018). Cf. Christine Bakker & Luisa Vierucci, *Introduction, in* NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? 8 (PIERRE-MARIE DUPUY & LUISA VIERUCCI, EDS. 2008) (explaining a 2002 study that found the frequency of engagement between NGOs and international tribunals as much less common than the engagement of NGOs with international governmental organizations).

<sup>35</sup> See Laura Van den Eynde, “The Multifaceted and Crucial Role Played by NGOs at the European Court of Human Rights,” *Strasbourg Observers Blog*, August 4, 2014, <https://strasbourgobservers.com/2014/08/04/the-multifaceted-and-crucial-role-played-by-ngos-at-the-european-court-of-human-rights/>; Luisa Vierucci, *NGOs Before International Courts and Tribunals, in* NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? 157 (Pierre-Marie Dupuy & Luisa Vierucci, eds. 2008) (explaining amicus briefs as aimed at offering technical expertise and subject matter competence to help shape jurisprudence); Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT’L L. 911 (2010-2011). Third party NGOs may participate in the proceedings of the ECHR under Article 36(2) of the European Convention, which allows for written or oral comments from “any person concerned” when “the interest of proper administration of justice” invites such input. LOVEDAY HODSON, *NGOS AND THE STRUGGLE FOR HUMAN RIGHTS IN EUROPE* 37 (2011).

<sup>36</sup> See CISMAS, *supra* note 7, at 87-88; Iona Cismas & Stacy Cammarano, *Whose Right and Who’s Right: The US Supreme Court v. the European Court of Human Rights on Corporate Exercise of Religion*, 34 B.U. INT’L L. J. 1, 8-9 (2016) (explaining the ECtHR’s development on this question, beginning with a set of cases involving the Church of Scientology in the late 1960s-1970s).

creating some ambivalence around the status of state-sponsored churches<sup>37</sup>) and be the victims of a rights violation cognizable under the Convention.<sup>38</sup>

The ECtHR was established in 1959, alongside the European Commission of Human Rights (ECHR). At the time, individuals and private groups, with agreement of applicable member states, would first file complaints with the ECHR alleging a violation of his/her/its rights and then the Commission could bring a case before the ECtHR “if it deemed the complaint admissible and irresolvable by friendly settlement.”<sup>39</sup> After 1994, NGOs and individuals could go directly to the ECtHR after the Commission had issued a report and no referral was needed, although the Court could refuse to consider the complaint.<sup>40</sup> But the real change, according to Professor Lloyd Hitoshi Mayer, professor of law at Notre Dame Law School, came in 1998 when Protocol 11 eliminated the Commission and “expanded the entities that had a right to bring a case before the [ECtHR]” by amending Article 34 (see former Article 25) so as not to require state recognition of the ECtHR’s competence as a threshold matter.<sup>41</sup>

At the same time, efforts by individual applicants “seeking to represent the interests of a broader group or class have generally proven unsuccessful” in international human rights tribunals, including the European Court of Human Rights.<sup>42</sup> According to Article 34, applicants must be victims of an alleged violation of one of the rights articulated in the European Convention.<sup>43</sup> However, as of 2014, NGOs may sometimes be permitted to represent the interests of parties who cannot represent themselves.<sup>44</sup>

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<sup>37</sup> *Id. See, e.g. Holy Monasteries v. Greece*, Application Nos. 13092/87 and 13984/88, Judgment of 9 Dec. 1994 (rejecting Greece’s argument that a claim by monasteries of the Greek Orthodox Church was inadmissible because of the Church’s status as a state church and emphasizing the “non-participation in government powers” as key to admissibility).

<sup>38</sup> *See CISMAS, supra* note 7, at 90-93.

<sup>39</sup> Mayer, *supra* note 35, at 915.

<sup>40</sup> *Id.* at 916.

<sup>41</sup> *Id. See also* Council of Europe, *Explanatory Report*, ETS 155, Human Rights (Protocol No. 11), ¶¶ 85-87, Nov. 11, 1998, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000016800cb5e9> (last accessed June 2019).

<sup>42</sup> William J. Aceves, *Actio Popularis – The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353, 355 (2003).

<sup>43</sup> *See* Nina Vajic, *Some Concluding Remarks on NGOs and the European Court of Human Rights*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 94 (TULLIO TREVES ET. AL., EDS. 2005).

<sup>44</sup> *See The Centre for Legal Resources On Behalf of Câmpeanu v. Romania* App. No. 47878/08 (July 17, 2014), the case in which the Court first granted an NGO standing as third-party to represent a young Roma person who had died under mysterious circumstances while in the custody of the state. This expansion comes at a time when member states within the Council of Europe have noted with concern a growing number of state-based restrictions on NGO activity. *See* Parliamentary Assembly Committee on Legal Affairs and Human Rights, *New Restrictions on*

The capacity of religious institutions to bring claims on their own behalf recently became important in the case of *Magyar Keresztény Mennonita Egyház and Others v. Hungary*.<sup>45</sup> In that case, religious communities in Hungary, including Mennonite and various Evangelical churches, member congregations of the European Union for Progressive Judaism, and Buddhist communities, challenged changes to a national law that, inter alia, gave preferential treatment to “incorporated churches,” a designation granted by Parliament that required proof of 100 years of international existence or 20 years of organized operation in Hungary and membership of at least 0.1 percent of the population.<sup>46</sup> In finding a violation of Article 11 (freedom of association) “in light of Article 9,” the ECtHR determined that the withdrawal of benefits in this instances amounted to an encroachment “upon the neutrality and impartiality required of the State,” which acts as a limit upon its regulatory power.<sup>47</sup>

*ii. Impact of, and benefits to, third party intervenors*

If not participating directly as a claimant, RRAAs can shape ECtHR jurisprudence through intervening as a third party with the aim of providing perspective on the implications of a particular decision. Third party NGOs may participate in the proceedings of the ECtHR under Article 36(2) of the European Convention, which allows for written or oral comments from “any person concerned” when “the interest of proper administration of justice” invites such input.<sup>48</sup> Scholars have documented at least two ways in which third party intervention can impact litigation: 1) NGOs can provide technical expertise to help complainants prepare for the adjudication; and 2) NGOs provide subject-matter competence that can ultimately help shape jurisprudence.<sup>49</sup> Although

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NGO Activities in Council of Europe Member States, AS/Jur (2018) 24, <http://website.pace.net/documents/19838/4246196/20180523-RestrictionsActivitiesNGOs-EN.pdf/4fe88e6b-8659-47d6-9f4a-836ae8bdea7b>. See also Hungarian Civil Liberties Union, *14 Hungarian NGOs Bring ECHR Case Against New Anti-Civil Society Bill*, Civil Liberties Union for Europe Blog, Jan. 31, 2018, <https://www.liberties.eu/en/news/fourteen-hungarian-ngos-have-brought-an-action-before-the-ecthr/14186> (detailing case before ECHR challenging Hungary’s delay in adjudicating domestic case fighting country’s “foreign funding” act).

<sup>45</sup> 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, and 56581/12 (April 8, 2014).

<sup>46</sup> *Id.* at ¶ 24. See also Renáta Uitz, ECHR Blog, *Violation of Religious Rights in Hungary Judgment*, Aug. 11, 2014, <http://echrblog.blogspot.com/2014/08/violation-of-religion-rights-in-hungary.html>.

<sup>47</sup> See *id.* at ¶ 111.

<sup>48</sup> HODSON, *supra* note 36, at 37.

<sup>49</sup> Luisa Vierucci, *NGOs Before International Courts and Tribunals*, in *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?* 157 (Pierre-Marie Dupuy & Luisa Vierucci, eds. 2008); Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*,

relatively inexpensive, NGOs may not pursue intervention because it is difficult to control outcome, they may not find out about the case in sufficient time, or may think non-legal arguments will not be persuasive to judges.<sup>50</sup>

As a general matter, in her analysis of sample cases, Dr. Loveday Hodson, associate professor at Leicester Law School, found little data to suggest that the “affected group” hypothesis (the more briefs filed, the more impact, thus the more likely to win) impacted the outcome of ECtHR litigation.<sup>51</sup> Instead, she observes that the NGOs may submit briefs to the ECtHR with the impression it bolsters credibility, especially when coming from a coalition of experts, not because NGOs’ proximity to public opinion will sway public opinion.<sup>52</sup> Still, involvement is higher in cases heard before the Grand Chamber.<sup>53</sup>

But there may be other benefits. Professor Christopher McCrudden, professor of human rights and equality law at Queen’s University, Belfast, points out that NGOs seeking to influence international courts can benefit from the “cascade” effect of international jurisprudence—favorable developments in one tribunal may influence developments elsewhere, including in domestic courts.<sup>54</sup> In writing on what he calls the “transnational cultural wars,” he notes that sometimes this advocacy is not so much about making change but about stopping or reversing it. The intervention by a diverse coalition of third parties, including religiously affiliated NGOs and states, in response to *Lautsi v. Italy*<sup>55</sup> is an example.

In *Lautsi I*, the General Court determined that the display of crucifixes in Italian public school classrooms, the subject of a complaint by a secular parent, did amount to a violation of Article 9.<sup>56</sup> A coalition of religious institutions and NGOs, along with a handful of states found common ground in protesting the decision. The coalition included Evangelical Christians from the U.S., the Russian Orthodox Church, and the Vatican, along with the Russian Federation, Armenia,

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88 AMER. J. INT. L. 611 (1994). Some studies suggest that NGO involvement is quite low. Mayer found that the ECHR rendered 10,067 decisions on the merits between January 1, 2000-December 31, 2009 and 394 of those decisions had direct NGO involvement. Mayer, *supra* note 36, at 923. Loveday Hodson’s study involved 149 test cases decided in 2000 and only 32 included direct involvement of an NGO and some involvement possibly identified in 19 others. There were 8 third party interventions and NGOs participated informally in 26 of the cases.

HODSON, *supra* note 35, at 46.

<sup>50</sup> *Id.* at 55.

<sup>51</sup> *Id.* at 51.

<sup>52</sup> *Id.* See Marco Frigessi di Rattalma, *NGOs Before the European Court of Human Rights: Beyond Amicus Curiae Participation? in CIVIL SOCIETY, INTERNATIONAL COURTS, AND COMPLIANCE BODIES* (TULLIO TREVES ET AL, EDS. 2005).

<sup>53</sup> *Id.* at 62.

<sup>54</sup> Christopher McCrudden, *Transnational Culture Wars*, 13 INT’L J. CONST. L. 434, 442 (2015). For a discussion of the monetary costs of such advocacy and whether such engagement is “cheap,” see *id.* at 443 n.55 and accompanying text and HADDAD, *supra* note 34, at 82.

<sup>55</sup> 30814/06 (March 11, 2009), Grand Chamber decision, March 18, 2011.

<sup>56</sup> *Id.* See also Hirschl & Shachar, *supra* note 4, at 452.

Bulgaria, Greece, Cyprus, Malta, Monaco, Romania, San Marino, and Lithuania.<sup>57</sup> In *Lautsi II*, the Grand Chamber reversed and held that the displays did not amount to a violation, relying on the doctrine of the margin of appreciation.<sup>58</sup>

Coalitions of this kind raise questions about the future of religious freedom litigation and the scope and direction of its protections. Dr. Pasquale Annichino, fellow at the Robert Schuman Centre for Advanced Studies at the European University Institute, argues that the reliance on states to “protect and defend religious majorities and their privileges” might carry risks, some political and others theological.<sup>59</sup> McCrudden has noticed two trends in recent years: First, religiously-affiliated NGOs “based in one jurisdiction, and seeing themselves as primarily interested in issues within that jurisdiction, are nevertheless increasingly intervening in jurisdictions other than their own.”<sup>60</sup> Second, there are more NGOs that see themselves as global in scope and interests, although located in one jurisdiction, and frequently adopt a vision of “constitutional and human rights that is universalist and cosmopolitan in orientation and this has the effect of encouraging a view that violations of rights in one country are as much the NGO’s business as violations in any other country.”<sup>61</sup> As McCrudden notes, this trend, coupled with the benefits of the “cascade effect,” discussed above, transplants some of the dynamics of domestic disagreements about the scope of religious freedom claims, into an international context. These trends, coupled with the doctrine of the margin of appreciation, raise salient questions about which voices are most likely to shape the ever-evolving jurisprudence related to Article 9.

### *iii. Religions within the margin of appreciation*

Scholars have observed that the ECtHR’s Article 9 jurisprudence is not well-developed because there have been few opportunities to rule in such cases, especially when compared to other articles,<sup>62</sup> and because the few cases that were heard fell into specific areas such as prisoners’ rights and conscientious objectors.<sup>63</sup> Still, Hirschl and Shachar note that the ECtHR has been one of “the main centers of transnational religious activism, evident in the areas of reproductive freedom, the right to die, denominational education, the wearing or

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<sup>57</sup> *Id.* at 452-453.

<sup>58</sup> See *Lautsi I*. See also *Osmanoğlu and Kocabaş v. Switzerland*, 29086/12 (Jan. 10, 2017) (finding no violation for imposition of fine on Muslim parents who refused to allow their pre-pubescent daughters to attend their school’s compulsory mixed swimming lessons).

<sup>59</sup> Pascale Annichino, *Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity*, 6 REL. & HUM. RTS. 213, 219 (2011); Hirschl and Shachar, *supra* note 4, at 452.

<sup>60</sup> McCrudden, *supra* note 54, at 442.

<sup>61</sup> *Id.*

<sup>62</sup> EVANS, *supra* note 8, at 281.

<sup>63</sup> *Id.* at 282.

banning) of religious attire, and exhibition of religious symbols in various settings.”<sup>64</sup>

At the same time, the ECtHR has applied the doctrine of the margin of appreciation in high profile Article 9 cases such as *S.A.S. v. France*<sup>65</sup> and *Lautsi v. Italy II*. The doctrine of the margin of appreciation gives broad deference to states in fulfilling their duties under the Convention.<sup>66</sup> In *S.A.S.*, a case challenging France’s ban on full face veils, the Court rested its decision to afford a wide margin of appreciation on the argument that the law protected a concept the state referred to as “living together.”<sup>67</sup> As Tania Pagotto, PhD candidate at Università Ca’ Foscari Venezia, explains, there are two aspects to the Court’s justification of the “living together” rationale. The first is the perception of the importance of the “proposed benefits of people being able to communicate face to face, which is argued to be an essential aspect of verbal and non-verbal exchanges.”<sup>68</sup> The second is an understanding of face-to-face communication as “a minimal precondition for building mutual trust, for a peaceful cohabitation in society” and as “an essential ingredient for ethical behavior.”<sup>69</sup> In *Lautsi II*, a case challenging the display of crucifixes in Italian state schools, the Grand Chamber relied on the margin of appreciation to overturn the decision of the Second Section of the Strasbourg court and found no violation had occurred.

Dr. Asim Jusic, assistant professor of law at Kuwait Law School, considers the doctrine of the margin of appreciation “a result of the Court’s understandable preference for conflict aversion, a manifestation of the Court’s partially secondary and supervisory role in the face of pluralism of state interests, and the variety evident within states’ institutional and social backgrounds.”<sup>70</sup> At the same time, Jusic argues that the Court’s use of the margin of appreciation is strategic and “rarely balanced the interests of states and the rights of individuals.”<sup>71</sup> Its application “varies within the status of states, and the social status and distance of religious

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<sup>64</sup> Hirschl & Shachar, *supra* note 4, at 451. For a discussion of the contours of this mobilization in contexts outside of Europe, see *id.*

<sup>65</sup> 48335/11 Grand Chamber (Jan. 7, 2014)

<sup>66</sup> See Council of Europe, Judicial Professions/The Lisbon Network, *Margin of Appreciation Doctrine*, [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp) (undated). Note: The Lisbon Network was integrated into the European Commission for the Efficiency of Justice in January 2011.

<sup>67</sup> See also *Dakir v. Belgium*, 4619/12 (July 11, 2017); *Belcemi and Oussar v. Belgium*, 37798/13, (July 11, 2017) (finding that a Belgium law prohibiting clothing that covered the face, and, unlike the French law, could include a prison sentence, did not amount to a violation of Article 9).

<sup>68</sup> Tania Pagotto, *The Living Together Argument in the European Court of Human Rights, Case-Law*, 20 *STUDIA Z PRAWA WYZNANIOWEGO* 9, 13 (2017).

<sup>69</sup> *Id.* at 14.

<sup>70</sup> Asim Jusic, *Damned If It Doesn’t and Damned If It Does: The European Court’s Margin of Appreciation and the Mobilizations Around Religious Symbols*, 39 *U. PA. J. INT’L L.* 561, 566 (2018).

<sup>71</sup> *Id.* at 565.

symbols from the mainstream social norms.”<sup>72</sup> The result is that law can simultaneously become a way of “mobilizing loyalties”<sup>73</sup> while deference to certain states and symbols can result in disincentives for “socially distant” groups to litigate.<sup>74</sup>

If the cascade effect theory is correct,<sup>75</sup> the repercussions from cases involving the margin of appreciation may influence religious freedom jurisprudence in other jurisdictions. Put differently: When RRAAs that may not enjoy close proximity to state power in their “home” jurisdictions<sup>76</sup> side with states in ECtHR litigation and then use that litigation success to influence jurisprudence at home, important questions are raised. In light of the non-litigation strategies discussed in Part II that have more dialogic aspects, this influence might seem even more out of step with democratic norms.

#### IV. Conclusion

This paper highlights a number of ways in which RRAAs have been and continue to be engaged in the development of international law and in ECtHR jurisprudence related to religious freedom. It does so in snapshots, although connections between them are readily seen. Different strategies of cooperation between RRAAs (i.e. drafting of legal instruments, consultation of experts, litigation advocacy) produce different effects.

Hirschl and Sachar contend that the transnational, boundless characteristics of religion and its demonstrated potential to create and perpetuate “us versus them” frameworks challenge liberal constitutional narratives.<sup>77</sup> But Hirschl and Sachar’s analysis may not fully appreciate the effects of diversity *within* religious groups. For instance, theological disagreements often accompany policy disagreement, contributing to internal fracturing that could weaken the strength of the transnational connections they claim. At the same time, religious actors may find common ground not in theology but in policy goals, thereby

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<sup>72</sup> *Id.* at 567.

<sup>73</sup> *Id.* at 599.

<sup>74</sup> *Id.* at 606. However, Jusic’s conclusion, that parties should perhaps engage in self-censorship and refrain from litigation given the potentially adverse outcomes, *id.* at 613, is not one this author necessarily shares, although it highlights the potential role for alternative dispute resolution in some instances. *See also* generally McCrudden, *supra* note 54 (arguing for a marketplace of ideas approach); Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Rights Regime*, 19 *EURO. J. INT. L.* 125, 130 (2008) (arguing provocatively for additional “embeddedness” of the ECtHR in national legal systems to bolster remedies).

<sup>75</sup> *See supra* note 54 and accompanying text.

<sup>76</sup> Contrast, for instance, with state-established or sponsored churches and other religious institutions.

<sup>77</sup> Hirschl & Sachar, *supra* note 4, at 454.

strengthening the potential for inter-religious collaboration. This reality leaves open the question: Who is the “us” and who is the “them”? Although Hirschl and Sachar acknowledge that some religious groups are not opposed to the “hallmarks of the current liberal constitutional-rights jurisprudence,”<sup>78</sup> this slight nod gives too little attention to the fact that many RRAAs find at least some of their common ground in those very hallmarks.

At the same time, Hirschl and Shachar’s analysis, along with concerns about the range of expert voices consulted and the cascade effect theory—especially in instances where RRAAs side with states—raise important questions about the depth and direction of current and future influence of RRAAs on international and domestic legal regimes.

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<sup>78</sup> *Id.* at 426.