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THE TREATY PROTECTION OF RELIGIOUS RIGHTS: U.N. DRAFT CONVENTION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF

John Claydon*

INTRODUCTION

For centuries intolerance and discrimination rooted in religion have had considerable impact on the course of international affairs. Indeed, the inception of the present nation-state system in the Peace of Westphalia of 1648 resulted from a series of religious wars fought to fill the void created by the breakdown of the monolithic Christianity of international society in the medieval period. Even a cursory survey of matters considered by the United Nations in the past twenty-five years demonstrates the extent to which religious differences continue to contribute to major and minor problems of world order. Such a list might include the following items: religious persecution in Bulgaria, Hungary, and Rumania, 1949; the Kashmir dispute between India and Pakistan; the treatment of Buddhists in South Vietnam, 1963; the actions of the People's Republic of China in Tibet, 1959-61; the Cyprus problem; the continuing Middle East crisis; and the current situation in Northern Ireland. In all of these cases the religious factor has operated in varying degrees either to precipitate or to exacerbate an international crisis; in most violence has been a component.

In recent years there has been an upsurge in multilateral treaty-making aimed at providing more adequate international protection for human rights, but recourse to treaties for the protection of individuals from religious intolerance and discrimination is not a new phenomenon. As early as the Peace of Augsburg of 1555 the principle of religious tolerance achieved unprecedented international expression.\(^1\) The Treaty of Osnabruck, part of the Peace of Westphalia, ensured international protection for religious minorities

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1 See 2 D. Hill, A HISTORY OF DIPLOMACY IN THE INTERNATIONAL DEVELOPMENT OF EUROPE 479-80 (1906).
against their sovereigns by granting signatories the right of intervention to enforce its provisions. Moreover, it has been argued that the majority of humanitarian interventions to protect Christians in the Near and Middle East in the nineteenth century were undertaken on the basis of treaties.

The advent of comprehensive international organization in the League of Nations institutionalized through treaties international protection of religious minorities. The Versailles peace negotiations of 1919-20 fostered a system of multilateral treaties dealing with minorities. Subsequently, other states joined the system through declarations made to the League Council. The availability of the Permanent Court of International Justice to adjudicate legal disputes concerning obligations contained in these instruments reinforced the traditional dispute settlement methods of diplomatic negotiation, mediation, conciliation, and good offices, as well as the supervisory task of the League Council, all of which provided alternatives to forcible intervention. Furthermore, the opinions of the Court served to articulate and clarify the purposes of the treaties on minorities and the reasons for the protection of religion on the international level. As the Court stated in one case:

[*]he idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.*

While the League system may have achieved these goals for some groups, it was limited in scope to areas where minority problems were thought to exist, and the major European powers were not brought within it. Since Germany was not part of the system, the German Jew was denied protection. In spite of the defects inherent in a limited regional approach, the Paris Peace Treaties of 1947 emulated the Versailles system by imposing human rights guarantees on the defeated states of Bulgaria, Finland, Italy, Hungary, and

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2 Id. at 602. See also Gross, The Peace of Westphalia, 1648-1948, 42 AM. J. INT'L L. 20, 21-22 (1948).
4 I. Claude, Jr., NATIONAL MINORITIES 16 (1955) [hereinafter cited as Claude].
Although these treaties formed the basis of generally unsuccessful United Nations attempts to combat religious persecution in Bulgaria, Hungary, and Rumania in 1949, they constituted only a slight variation of the League system and failed to contain comparable measures of international enforcement and supervision.

Prior to the establishment of the United Nations, international concern for the protection of religious rights focused geographically on the politically unstable states of southern and eastern Europe and the Near and Middle East, and substantively on intolerance and persecution. European power configurations had much to do with restricting protection in this way, but the legal concept of sovereign equality also played an important role. For instance, not only were the humanitarian interventions of the nineteenth century undertaken by the major European powers, but sovereignty was so highly respected that action was normally taken only when religious oppression had caused widespread loss of life. Similarly, religious guarantees in peace treaties were dictated by the victor against the vanquished, and even then only the weakest of the vanquished were forced to succumb. The League minority treaties sought to widen the scope of protection by defining the right of religion to include the prohibition of religious discrimination in the enjoyment of civil and political rights.

The United Nations

Since its formation the United Nations has worked to extend the principle of nondiscrimination and to establish the concept of universal and general institutionalized international protection for religion. In seeking to achieve these goals the United Nations has relied primarily on the treaty.

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6 For the texts of the various peace treaties, see 42 AM. J. INT'L L. 47-142, 179-278 (Supp. 1948).
7 See The Charter and the Trials of Churchmen, 6 UNITED NATIONS BULLETIN, No. 9, at 416 (May 1, 1949).
8 See CLAUDE, supra note 4, at 125-44.
9 A survey of humanitarian interventions undertaken to protect religious minorities is found in GANJI, supra note 3, at 22-38.
10 CLAUDE, supra note 4, at 17-20.
11 The basic human rights jurisdiction of the United Nations is set out in the U.N. CHARTER. The Preamble reaffirms "faith in fundamental human rights, in the dignity and worth of the human person . . ." U.N. CHARTER, Preamble. A purpose of the United Nations is the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . ." Id. art. 1, para. 3. Respect for human rights and fundamental freedoms on a non-discriminatory basis is a condition necessary for "peaceful and friendly relations among nations . . ." Id. art. 55. Members are bound to "take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Id. art. 56.
The initiatives of the United Nations in the human rights area since 1945 represent efforts to achieve the general goals formulated in the Charter by defining the rights to be protected and by establishing international procedures for implementation. The 1948 Universal Declaration of Human Rights prohibits, inter alia, discrimination on the basis of religion in the areas of legal process, universal and equal suffrage, the right to work, the right to adequate housing, and the right to life. Additionally, for our purposes, the Declaration proclaims a right to religion, which includes the freedom to change religion and the freedom to manifest religion or belief either individually or collectively in teaching, practice, worship, and observance. Although technically not a binding instrument, the Declaration has become increasingly authoritative because of its widespread acceptance.

Subsequent efforts have ranged from protection of the right to life in the Genocide Convention to the expansion of the right to employment and its protection under the aegis of the International Labor Organization. The 1966 Covenants on Civil and Political Rights and Social, Economic, and Cultural Rights have clarified the Universal Declaration and have provided remedial procedures. The Covenants recognize a wider range of rights than any other international agreement. Continuing manifestations of discrimination and intolerance based on race resulted in an International Convention on the Elimination of all Forms of Racial Discrimination. Finally, reference should be made to parallel regional arrangements for the protection of human rights in Europe and the inter-American system.

12 Id.
18 [European] Convention on Human Rights and Fundamental Freedoms. The
In light of this history of international concern, it is not surprising that the United Nations should seek to enact a convention to clarify the right to religious practice and to provide safeguards for its protection. However, the lack of action by the General Assembly and the protracted nature of its deliberations is surprising, even allowing for the considerable amount of time devoted by the Third Committee to both the Racial Discrimination Convention and the two Covenants. After more than a decade of activity the Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief has not yet progressed beyond draft form. Before analyzing some of the more important provisions of the draft convention, this article will discuss briefly its background and provide a general overview of its contents.

BACKGROUND OF DRAFT CONVENTION

The origin of the convention is found in two resolutions of the General Assembly. The first of these is Resolution 1510 of 1960, in which the General Assembly condemned all manifestations and practices of racial, religious, and national hatred in the political, economic, social, educational, and cultural spheres of society as violations of the Charter and the Universal Declaration of Human Rights. Initially, efforts were directed toward the adoption of a convention aimed at eliminating racial discrimination. The second resolution occurred in 1962, when the General Assembly requested that the Economic and Social Council prepare a draft declaration and draft convention on the elimination of religious intolerance. This resolution was transmitted by the Council to the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The General Assembly made its eighteenth session the deadline (1963) for the preparation of a declara-

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20 See generally Note by the Secretary-General: Elimination of All Forms of Religious Intolerance, U.N. Doc. A/7930 (1970) [hereinafter cited as Note by the Secretary-General].
23 See also the 1961 European Social Charter, Europ. T.S. No. 35 (1961); American Declaration of the Rights and Duties of Man, [1948] U.N.Y.B. ON HUMAN RIGHTS 44. See also The American Convention on Human Rights (San Jose Pact), signed in 1969, the text of which may be found in 9 INT'L LEGAL MATERIALS 99 (1970); Thomas & Thomas, Human Rights and the Organization of American States, 12 SANTA CLARA LAW. 319 (1972).
tion and its twentieth session (1965)\textsuperscript{24} the deadline for a convention, in the hope that the convention would be open for signature and ratification by 1968, the International Year for Human Rights.

Prior to the Resolution of 1960, the Sub-Commission conducted an investigation and published a "Study of Discrimination in the Matter of Religious Rights and Practices" in which it recommended draft principles for consideration by the Commission.\textsuperscript{25} The Commission neglected to consider these principles, instead it requested in 1963 that the Sub-Commission prepare a draft declaration.\textsuperscript{26} The Commission, "owing to lack of time," was unable to adopt this declaration. Therefore in 1964 the Sub-Commission's preliminary draft declaration was forwarded to the Economic and Social Council along with the report of the working group set up by the Commission.\textsuperscript{27} In the same year the Economic and Social Council referred these documents to the General Assembly.\textsuperscript{28} The General Assembly did not consider the preliminary draft declaration; rather, it requested the Economic and Social Council to invite the Commission to have both the draft convention and the draft declaration ready for submission to the Assembly at its twenty-first session.\textsuperscript{29} At that time, both the Commission and the Sub-Commission were involved in preparing the convention. The Commission, however, has not considered any text of the declaration since 1965.

A draft convention prepared by the Sub-Commission in 1965 was transmitted by the Commission in 1967 to the Economic and Social Council to be forwarded to the General Assembly.\textsuperscript{30} The General Assembly's deadline had already passed and the Commission was unable to complete its task, again "owing to lack of time." The Sub-Commission's recommended provisions concerning implementation were not considered, but were sent to the Council and transmitted to the General Assembly in the "hope that the General Assembly will decide upon suitable measures of implementation."

\textsuperscript{24} G.A. Res. 1781, \textit{supra} note 22.
\textsuperscript{26} See 22 U.N. GAOR, Third Comm., 1468th meeting at 113-114, U.N. Doc. A/C. 3/SR.1486 (1967), the statement by Mr. Schreiber of the Secretariat to the Third Committee. The text of the draft declaration formulated by the Sub-Commission is contained in Annex I to Note by the Secretary-General, \textit{supra} note 20.
\textsuperscript{27} Note by the Secretary-General, \textit{supra} note 20, at 4, para. 5. For the report of the working group, \textit{id.} at Annex II.
\textsuperscript{31} \textit{Id.} at 14.
Thus, at its twenty-second session the General Assembly had before it part of the draft convention but no draft declaration which had been considered by the Commission.

At the twenty-second session of the General Assembly, its Third Committee devoted twenty-nine meetings to consideration of the convention, but "owing to its heavy agenda and lack of time" the Committee adopted only a new title, a preamble, and a first article. In Resolution 2295 the General Assembly decided to accord priority to the convention at its twenty-third session. In December, 1968 the General Assembly decided to further postpone consideration of the convention and to give it high priority at its twenty-fourth session. There were additional postponements in 1969 and 1970, again on the recommendation of the Third Committee and because of lack of time. Finally, the General Assembly on December 18, 1971 deferred consideration of the matter until its twenty-seventh session.

THE DRAFT CONVENTION

The draft convention may be divided into two parts: (1) a preamble and twelve articles containing substantive provisions adopted by the Commission on Human Rights, and (2) eighteen articles dealing with implementation proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The draft preamble consists mainly of general principles expressing the desirability of eliminating religious discrimination and intolerance. The preamble also refers to other instruments which proclaim the principle of nondiscrimination and the right to freedom of thought, conscience, religion, and belief. Finally, the preamble notes the continuing existence of manifestations of intolerance and affirms the resolve of the states parties "to adopt all necessary measures for eliminating speedily such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief."

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34 Id. at 39.
38 For the text of the draft convention, see Note by the Secretary-General, supra note 20, at Annexes III, V-VI.
Article I defines the terms “religion or belief,” “discrimination,” and “religious intolerance” and provides that neither the establishment of a religion nor the recognition of a religion or belief by a state nor the separation of Church from State shall by itself be considered intolerance or discrimination. In Article II, discrimination and intolerance are condemned and the parties promise to “promote and implement policies” designed to ensure tolerance, to protect freedom of thought, conscience, religion, or belief, and to eliminate discrimination. In Article III the “right to freedom of thought, conscience, religion, or belief” is defined as a personal right to choose to adhere or not to adhere to any religion or belief. The definition also includes freedom of manifestation and expression concerning religion or belief, i.e. freedom to worship, teach, and disseminate; freedom to establish charitable and educational institutions relating to a religion or belief; freedom to organize “local, regional, national, and international associations” in connection with religion or belief; and freedom from compulsion to take a religious oath.

In Article IV states undertake to permit parents to raise their children according to the religion or belief of their choice. When a child is raised by someone other than a parent, the wishes of the parent are to be respected, although the best interests of the child are considered paramount. Article V stipulates that states shall ensure freedom to exercise all human rights without discrimination on the ground of religion or belief. Article VI is the only provision in the Convention in which states pledge themselves to “adopt immediate and effective measures” and consists of the obligation to combat prejudice and promote tolerance, mainly through education. Article VII complements Articles II and V by obligating states to take measures to eliminate discrimination and intolerance, including the enactment and abrogation of laws.

Articles VIII-X guarantee equal protection of the law in the exercise of the freedoms enumerated in the previous articles. Equal protection, as defined in Article IX, includes protection against promotion of or incitement to religious intolerance or discrimination. The final substantive provisions restrict the exercise of all the rights contained in the convention, except the freedom to adhere or not to adhere to any religion or belief. Even this right is circumscribed when the exercise of it involves “activities aimed at prejudicing national security, friendly relations between nations or the purposes and principles of the United Nations” (Article XI). Other freedoms are additionally subject to “such limitations as are necessary to protect public safety, order, health or morals, or the individual rights and

89 Id. art. XI.
freedoms of others, or the general welfare in a democratic society” (Article XII).\textsuperscript{40}

The implementation measures contained in Articles XIII-XXX establish a procedural system, modeled on the Racial Discrimination Convention,\textsuperscript{41} that comprises: 1) a regular reporting obligation (to the Economic and Social Council) with respect to legislative or other measures which states have adopted to give effect to the substantive provisions of the convention (Article XIII); 2) the establishment of a Good Offices and Conciliation Committee to settle disputes between states concerning the application and interpretation of the convention; 3) a provision for publication of the report of the Committee in the event that an “amicable solution” cannot be reached (Articles XIV-XXV); 4) the right of individual or group petition to the Committee through the Secretary General, provided that the state against which a claim is lodged recognizes the competence of the Committee to receive such petitions (Article XXVI); 5) recourse by the Committee to the International Court of Justice for an advisory opinion on any legal question concerning a matter with which it is dealing (Article XXVII); and 6) the capacity of states parties to submit any dispute arising out of the interpretation or application of the convention to the International Court of Justice, even if the matter is within the competence of the Committee (Article XXX).

\textbf{Comments on the Convention}

If the convention is ultimately adopted and a dispute arises with respect to interpretation of its provisions, the decision-maker is likely to invoke the aid of \textit{travaux préparatoires} to carry out his task.\textsuperscript{42} Normally the starting point for interpretation will be the text of the convention, and the subsequent practices under it may also be relevant to the decision. Of course, since the convention has not yet been adopted there has been no practice, nor is there a definitive text. However, a draft convention does exist and the Third Committee has made some changes in the original version of the title, preamble, and first and sixth articles. Furthermore, the general debate in the Third Committee provides a guideline to other areas of controversy concerning the convention which are likely to engender problems in future deliberations. The following section of this article will discuss briefly some of the more important areas of controversy

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\textsuperscript{40} Id. art. XII.

\textsuperscript{41} See note 17, supra.

and evaluate the convention generally. The concluding remarks will focus on the limitations of the treaty approach to the protection of religion.

The Issue of Priority: Declaration or Convention

In addition to affecting the process for negotiation for this particular convention, this decision on priority may also influence the future course of multilateral agreement-making for the international practice of human rights in general. This decision on priority will affect not only the process of negotiation for this particular convention, but also the course of multilateral agreement-making for the international protection of human rights. In this case, however, sound considerations favor prior adoption of a declaration.

First, a declaration would provide a consensual foundation for a subsequent convention. The continuing widespread existence of religious intolerance and discrimination strongly suggests that states disagree on the nature of religious rights deemed worthy of protection and the extent of protection desirable. Religious discrimination, unlike racial discrimination, is not universally condemned; indeed, there may be little genuine consensus at all. A prior declaration, therefore, might provide a point of departure for the convention in the context of widely divergent national policies and attitudes toward religion, and also, for some states, the optimum extent of obligation which they are willing to assume. Consequently, a declaration would have wider acceptability than a convention, with the result that some states unwilling to adhere to a convention might, nevertheless, vote for the declaration. Since a declaration is consensual, it has the potential to progress along the spectrum of obligation, either on the basis of its origin in a quasi-legislative organ of the United Nations or as customary international law, to the point of authoritativeness now enjoyed by the Universal Declaration of Human Rights.

Secondly, United Nations practice normally involves the formulation of a declaration before the adoption of a convention. This practice reflects a comprehensive approach to the protection of human rights, in which the convention and declaration are interrelated in a logical manner. This method seems to have worked well in the past, and one would expect any departure to be based on sound considerations in favor of change.

Finally, there is the explicit view of the General Assembly, expressed in Resolutions 1781 and 2020, that priority should be accorded a declaration.

43 See note 14, supra.
These are persuasive arguments and the debates in the Third Committee demonstrated that a significant number of states were influenced by them. Moreover, it was not seriously argued that a convention should precede a declaration as a rule of general policy. Arguments against following the usual practice centered rather on the circumstances surrounding this particular convention. For instance, it was suggested that there was no need for a declaration to provide an "ideological basis" for the convention, since the principle of religious tolerance was neither revolutionary nor innovative. However, the verbal confrontations during the debate, especially between Israel and the Arab states and India and Pakistan, reflected the extent to which ideological factors had intruded, and served as a reminder of continued intolerance, manifested both domestically and internationally. In fact, the only serious argument for adopting a convention first was based on expediency. The Committee had before it a convention sanctioned in part by the Commission on Human Rights and a preliminary declaration considered only by the Sub-Commission; some states thought it still possible to complete the convention in time for the International Year for Human Rights in 1968 if the declaration were placed in abeyance.

The most unfortunate result of this controversy was not the cavalier manner in which the Committee treated policies favoring the prior adoption of a convention, but the method by which the decision was reached. The Official Records of the Third Committee show that its 1497th meeting "was suspended at 4:50 p.m. and resumed at 5:15 p.m.," at which time the Chairman suggested that if there were no opposition, the Committee should proceed to discussion of the draft convention. This suggestion was approved and the Committee went on to consider the convention. In spite of the previous opposition of many states to this ordering of priorities, no vote was taken. Nevertheless, the controversy had not ended. At the conclusion of the Committee's deliberations on the convention, two draft resolutions were submitted respectively according priority to the declaration and the convention at the next session. The Ceylonese draft resolution according priority to the declaration noted the Committee had only completed consideration of the preamble and first article. The final meeting adjourned without resolving the issue.

Although the public nature of deliberations in an international "parliamentary" area tends to encourage wasteful ideological squab-

45 Third Comm., supra note 32, at Meetings 1486-97.
46 Id. 1494th Meeting at 160, Guatemala.
47 Id. 1497th Meeting at 176.
bbling, private multilateral diplomacy may result in illusory agreement. However, in this instance, valid reasons motivated those states which urged that priority be given to a declaration. The subsequent debates and the short period of time required to produce a wholesale turnabout in position on the part of many states lend support to the conclusion that it is very unlikely that consensus was reached on anything other than the desire to get on with the convention. This decision does not represent the victory of private compromise and conciliation over obstructive propaganda in the open forum. Rather, it is a postponement of the search for general consensus to a time when its discovery and articulation will be superfluous. Rather than expediting the convention, bypassing the declaration stage may prolong the process of negotiation. While it is too early to evaluate the long-term impact of this decision on the deliberations, it is possible that the chances for conclusion and adoption of a convention in the near future have been seriously impeded.

Alterations in the Draft Convention by the Third Committee

Before analyzing the preamble and the draft convention as a whole, the Third Committee considered objections to the only specific example of religious prejudice in the convention, the reference to anti-Semitism in Article VI. The United States, the United Kingdom, and Israel, among others, thought the inclusion of anti-Semitism justifiable as the classic example of religious intolerance, comparable to the specific condemnation of apartheid in the Racial Discrimination Convention. Not surprisingly, the Arab states, joined by some of the Soviet bloc, argued that anti-Semitism represented political and racial, rather than religious, prejudice. This argument does not augur well for fulfillment of the primary purpose of the convention, for it provides an escape-clause which encompasses virtually every form of intolerance and oppression. For instance, the argument permits the claim that oppressive treatment of Hindus in Pakistan and Moslems in India, Catholics in Northern Ireland, and Buddhists in South-Vietnam should be regarded as “political” in nature and consequently outside the scope of the convention. The
same argument could be made to exclude the "racial" characteristic of anti-Semitism from the protection provided by the Racial Discrimination Convention. While it may be difficult to establish with certainty the primary basis of any specific example of intolerance, this type of argument serves only to defeat the goal of international protection of human rights. It may not be necessary to list in this convention all known forms of religious oppression, nor to include anti-Semitism. It is certainly necessary to apply conscientiously the instrument in light of its purposes, and to formulate criteria for identifying discrimination and intolerance based on religion.

In any event, a majority of the states favored the Republic of China’s contention that, since the convention was of world-wide significance, including any specific example of religious intolerance would alter its nature and impact and might impede its acceptability. The Committee, by a vote of 87-2 with 7 abstentions, decided not to mention any specific example of intolerance. Thus, future interpreters faced with a claim involving anti-Semitism must be prepared to make careful use of the travaux préparatoires and to adopt sufficiently broad definitions of the phrases ultimately used—“discrimination on the ground of religion or belief” and “religious intolerance”—to fulfill the purposes of the convention.

The original title formulated by the Commission on Human Rights was also a subject of controversy. The title, “International Convention on the Elimination of All Forms of Religious Intolerance” was disputed because it granted special protection to religion, above other beliefs, and because of the vagueness of the term “intolerance.” The first objection does not withstand close scrutiny, for the clauses of the draft convention employ the term “religion or belief,” and Article I defines that expression as including “theistic, non-theistic, and atheistic beliefs.” Neither the Universal Declaration of Human Rights nor the Covenant on Political and Civil Rights attempts definition, although they refer to “religion or belief.” These instruments also condemn discrimination based only on “religion or other opinions, national or social origin, property, birth or other status,” Universal Declaration of Human Rights, note 13, supra, art. 2. A similar problem arises with respect to the definition of “religious group” under Art. II of the Genocide Convention, note 15, supra.

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52 Third Comm., supra note 32, 1489th Meeting at 129.
53 Id. 1497th Meeting at 178.
54 A clear example of the potential dangers surrounding the use of travaux préparatoires is provided by the Chilean statement that “[t]he Committee had decided not to mention anti-Semitism, on the ground that the discrimination in that case was racial and not religious . . . .” Id. 1501st Meeting at 196.
55 Id. 1498th Meeting at 179, Italy; id. 1488th Meeting at 126, Czechoslovakia.
56 Id. 1498th Meeting at 179-80, U.S.S.R.
57 See notes 16, 51, supra, at art. 18.
gion." Arguably, therefore, the present convention broadens the content of religion-related rights. Consequently, the contention of the Soviet Union and East European states that intolerance was historically manifested particularly toward those who had no religion, and therefore, "religion" ought not receive preferential protection, was not supported by the text as a whole. The objection to the title emphasized form rather than substance.

Since, there was little opposition to a title change that would emphasize both intolerance and discrimination, by a vote of 89-0 with 1 abstention, the Committee adopted the title "International Convention on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief." The definitional provisions and Article IV make it clear that the term "belief" was not intended to encompass political beliefs, but this distinction may be difficult to apply. On the other hand, the term "intolerance" is not clarified in the convention and, as will be pointed out later, may indeed cause problems.

The greatest amount of time spent on an integral part of the Convention was devoted to the preamble: eight of the twenty-nine meetings of the Third Committee. Much of this time was spent on a Soviet proposal to include in the preamble a guarantee that "religion would not serve as a pretext for intervention in the domestic affairs of a State and would not be an obstacle to the holy war against colonialism." This proposal was generally supported by the East-European and Afro-Asian states and opposed by the Western states. For example, the United States argued that the principle of freedom of conscience would not impede the elimination of colonialism, itself a struggle for freedom of conscience; the danger was that authoritarian regimes might exploit the proposed restriction. Israel contended that all specific references to religion should be excluded.

The claim that the Western religions had interfered in African
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domestic affairs was countered with the argument that the Soviet proposal would prohibit a progressive role for religion in international affairs. It might, for instance, prevent churchmen from supporting the fund for political prisoners in South Africa. However, the provisions in Article XI, which subordinate freedoms guaranteed in the convention to national security, friendly relations between nations, and the purposes and principles of the United Nations, constitute a more fundamental objection to the Soviet proposal. Article XII provides further limitations, permitting a state party to take whatever measures are necessary to "protect public safety, order, health or morals, or the individual rights and freedoms of others, or the general welfare in a democratic society." Ample scope is thus provided for the prevention of interference in domestic affairs and for the curtailment of colonialism.

It is probably more accurate to say that the real "pretexts" are found in these two articles because of their restrictions on the exercise of rights under the convention. The Third Committee adopted the gist of the Soviet proposal by stipulating in its preamble that states parties note that "manifestations of religion or belief had served and are still serving as a means or as an instrument of foreign interference in the internal affairs of other States and peoples" and are convinced that "the right to freedom of religion or belief should not be abused so as to impede any measures aimed at the elimination of colonialism and racialism." This may undermine the acceptability of the convention by displacing the compromise preamble adopted by the Commission on Human Rights.

The accusation that the convention was biased toward the West, provided at least part of the impetus for the changes made in the title and preamble, and also prompted the controversy in the general debate over timing for fulfillment of specific commitments. Thus, a number of developing states took the position that the obligations in the convention were premature and some initial discrimination was necessary in order to effect social and economic progress. However, the obligations in question are not stringent. The only requirement for immediate and effective action by the states is found in

68 Third Comm., supra note 32, 1501st Meeting, at 195, United Arab Republic. This claim was based on U.N. Doc. ST/TAO/HR/25, para. 123, which is the report of the Seminar on Human Rights in Developing Countries, held at Dakar in 1966. In the General Debate a similar objection, premised on the role played by missionaries in colonization, was made to the guarantee in art. III(2)(g) of the freedom to organize "international associations." See, e.g., Third Comm., 1491st Meeting at 142, Syria; id., 1487th Meeting at 120, U.S.S.R.


70 See Note by the Secretary-General, supra note 20, Annex III, at 7-8.

71 Id., at 1-2.

72 See, e.g., Third Comm., supra note 32, 1486th Meeting, at 116, India.
Article VI. It only imposes a duty to adopt vague educational and informational methods to combat prejudice. With respect to the more important provisions, the commitments are merely to "ensure" (Articles V, IX, X) or "undertake to ensure" (Articles III, VIII) their fulfillment. Moreover, an additional draft article submitted by Jamaica stipulated that no provision of the convention should be "interpreted as to require or to authorize any derogation from any provision in the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights." Under the latter instrument a state is obligated merely to realize the guaranteed economic and social rights "progressively" and to the extent possible with its "available resources." If adopted, the Jamaican article would eliminate unequivocally the claim that certain states do not have the capabilities of meeting their obligations under the convention.

The Problem of "Intolerance"

By adopting Article I without defining "religious intolerance," the Committee has exacerbated the problem which surfaced in the debate over the inclusion of a reference to anti-Semitism. That debate indicated that the absence of criteria to determine the meaning of "religion or belief" might impede the elimination of discrimination or intolerance grounded in these factors. The problem is perhaps not so acute with respect to discrimination because of the protection accorded in this and other instruments against nonreligious discrimination. But equivalent protection is not available elsewhere with respect to intolerance, which has traditionally been connected with religion. By failing to define the term "intolerance" other than tautologically as "intolerance in matters of religion or belief," the Committee has complicated the problem.

As the title clearly indicates, the convention encompasses both intolerance and discrimination, and this distinction is adhered to throughout its substantive provisions. Article I(b) provides a workable and detailed formula for determining "discrimination," but unfortunately intolerance has not been accorded the same clarity.

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73 Note by the Secretary-General, supra note 20, at Annex IV.
75 See the argument of France on this point. Third Comm., supra note 32, 1498th Meeting at 180.
76 Note by the Secretary-General, supra note 20, at 8, para. 20(c).
77 "The expression 'discrimination on the ground of religion or belief' shall mean any distinction, exclusion, restriction or preference based on religion or belief which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
This confusion gives rise to several questions. Does any violation of the extensive "right to freedom of thought, conscience, religion or belief" delineated in Article III amount to intolerance? If this question is answered affirmatively, then compulsion to take an oath of a religious nature would be proscribed on this basis. The real difficulty is found in the reference to intolerance elsewhere in the convention, e.g. Articles II, VI, and IX; compulsion to take a religious oath would fall under Article III in any event. When do states contravene the obligation in Article IX to ensure protection of the law against "promotion of or incitement to religious intolerance"? This obligation is meaningful only if such protection is directed toward the freedoms set out in Article III, yet this nexus is not made explicit in the convention. While it may be undesirable to limit protection against intolerance to the rights guaranteed in Article III, the present formulation presents the more serious danger that the term may be devoid of any content whatsoever.

A Bulgarian amendment would have defined intolerance broadly as "manifestations of intolerance in matters of religion or belief reflected in actions contrary to the provisions of this convention." This definition arguably would have included discrimination as a component of intolerance, thereby confusing the matter unnecessarily because of the clear meaning of discrimination. It also would have created a *circulus inextricabilis* by defining intolerance in terms of the provisions of the convention, rather than by providing a means whereby the provisions could be interpreted in light of the definition. However, the proposed amendment stimulated little serious discussion and was easily defeated. No other attempts were made to rectify the terminological obscurities inherent in the nondefinition of religious intolerance. If in the application of the convention a dispute should arise on this point, the interpretative process will face the task of sorting out what is actually a drafting defect.

**Enforcement Measures**

The Third Committee debates on the issue of enforcement are likely to reflect past arguments over enforcement procedures in other conventions. Thus, the Afro-Asian and East European states strongly opposed extending the implementation measures of the Racial Dis-

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78 Article VII(2), whereby states undertake "not to pursue any policy or enact or retain laws or regulations restricting or impeding freedom of conscience, religion or belief or the free and open exercise thereof, nor discriminate against any person . . . ," may be interpreted as supporting this connection as may be a preambular reference to the proclamation of the principle of non-discrimination and the right to freedom of thought, conscience, religion and belief in the Universal Declaration of Human Rights. See Note by the Secretary-General, *supra* note 20.


80 Third Comm., *supra* note 32, 1511th Meeting at 241.
There is a basic difference in the enforcement powers granted under the Covenant on Civil and Political Rights and Convention on Racial Discrimination. The Human Rights Committee set up under the 1966 Covenant can only receive and study reports from individual states and transmit its reports and general comments to the states parties and to the Economic and Social Council. The same provision obligates states parties to submit to the Committee reports on measures giving effect to the rights in the Covenant. A report is required within one year after the Covenant enters into force and thereafter at the request of the Committee. If the Committee is to receive, consider, and act on communications claiming that a state party is in violation of the Covenant, both the state complaining and the state against which a complaint is brought must make declarations recognizing its competence. The competence of the Committee to receive petitions from individuals is prescribed in an Optional Protocol to the Covenant. On the other hand, under the Racial Discrimination Convention states are required to report regularly (every two years) to the Committee on the Elimination of Racial Discrimination and are subject to the competence of that Committee to consider and act on claims alleging violation of the Convention. A declaration by the participating state endows this Committee with the competence to receive petitions from individuals, and any party may submit a dispute to the International Court of Justice for decision.

It has been noted that the preliminary draft on implementation measures placed before the Third Committee copied substantially the Racial Discrimination model, and that these measures, formulated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, had not been considered by the Commission on Human Rights. Statements made in the general debate concerning implementation measures indicate that the Third Committee is prepared to start from the beginning, partly because the Commission on Human Rights failed to take any action on this matter. As a result, New Zealand, although basically in agreement

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83 Id. art. 41, at 57.
85 Id. art. 11.
86 Id. art. 14.
87 Id. art. 22.
88 See notes 41 and 28-31, and accompanying text, supra.
with the Racial Discrimination model, suggested the establishment of a working group to study implementation measures. A small group of Afro-Asian states proposed an alternative model based largely on the 1966 Covenant.

The crux of the debate over implementation was whether to adopt strong measures similar to those of the Racial Discrimination model, or less strict requirements like those in the 1966 Covenant. As might be expected, the Western states led the drive for strict measures, emphasizing the similarity between discrimination based on race and on religion, and arguing that with strong implementation clauses, this convention would supplement and strengthen the Racial Discrimination Convention. It was also pointed out that these two areas of human rights were "specific" in contrast to the "wide variety" of rights protected in the 1966 Covenant. The adoption of less stringent measures for this convention would, therefore, constitute the establishment of a hierarchy of race over religion, with religious discrimination consequently regarded the less reprehensible. However, it was argued in favor of the Covenant model that Afro-Asian states should not be expected to adhere to the strict measures desired by the Western states. Additionally, the Covenant’s measures were viewed as more compatible with the principles of national sovereignty and independence. A variation on this position pointed to the Covenant method as a compromise solution that would better ensure widespread acceptance. Finally, variations on both sides opposed the proliferation of implementation systems that would result if each convention had its own separate system, and suggested that the approach adopted here should facilitate transition to a single enforcement procedure in the human rights area. However, there was disagreement on whether the Covenant or the Racial Discrimination model would best serve the goal of uniform enforcement machinery, although the former was favored by most advocates of the single system.

Judging from the general debate, it appears that when the Committee finally undertakes the task of adopting implementation measures it will be difficult to choose a system acceptable to all.

90 Third Comm., supra note 32, 1490th Meeting at 137, United Kingdom.
91 Id. 1491st Meeting at 140, New Zealand; id. 1494th Meeting at 162, Ireland.
92 Id. 1491st Meeting at 140, New Zealand.
93 Id. 1496th Meeting at 173, Nigeria.
94 Id. 1492nd Meeting at 146, Romania.
95 Id. 1493rd Meeting at 152-53, Pakistan.
96 Id. 1487th Meeting at 120, Turkey; id. 1489th Meeting at 132, Poland; id. 1492nd Meeting at 146, Romania; contra, 1495th Meeting at 167, Ghana.
Whatever the motivations behind the positions assumed by various states may be it is clear that some form of compromise will be necessary to reconcile all parties to the debate. For this reason the chances of adopting the Racial Discrimination model appear slim. It is also apparent that the General Assembly has indeed established a hierarchy of protecting race over religion. The Assembly adopted the Racial Discrimination Convention first, and this priority has continued throughout the activities of the General Assembly. Irrespective of its merits, this ordering of priorities is strengthened by general uncertainty regarding the components of religious intolerance and discrimination in contrast to the relative ease with which it is thought discrimination based on race can be identified. This hierarchy will almost certainly affect the acceptability of measures of implementation.

**Conclusion**

The negotiations and actions of the Third Committee lead to the conclusion that the final product will leave much to be desired, especially when compared with the Racial Discrimination Convention. The convention will probably suffer from weaker implementation measures, a much greater potential for derogation from the rights guaranteed, and a substantial amount of terminological confusion. Concessions on implementation, the timing of obligations, and the capacity to derogate seem necessary in order to ensure a minimum degree of acceptance of the convention. Whether the failure to perceive infringement of religious rights as a pressing matter of international concern, reflected to some extent in the delays which have plagued the process of negotiation, is the major factor underlying the type of instrument likely to be produced, remains an open question. Certainly other factors grounded in general ideological divisions have contributed to the problem. The cumulative effect of this controversy has been reluctance on the part of many states to assume stringent obligations in the absence of any consensus concerning ultimate goals and the best methods to achieve them. Viewed from this perspective, the decision to adopt the convention before formulating a declaration may have a prejudicial impact on the result which will outweigh any potential time-saving benefits. It is, of course, possible that no greater consensus could have been reached in any event. Some of the shortcomings in the convention may constitute the minimum concessions required for acceptability.

Regardless of the nature of the convention that will ultimately emerge from the General Assembly, it is important to place the agreement-making task in the context of the general limitations on the treaty approach to protecting religious rights. Where discrimination and intolerance based on religion are deeply rooted in the social and psychological fabric of many hundreds of years, even the strictest
and most perfectly drafted convention will not solve all problems. In the absence of genuine efforts at communication among conflicting groups, the legislation risks futility. Moreover, any convention must balance all legitimate claims. In this respect, a convention aimed at protecting religious rights must reconcile permitting the dissemination and practice of religion with preventing religious prejudice, intolerance, and discrimination. The application of this balancing process to a concrete situation demonstrates the difficulty encountered when a line must be drawn between permissible and impermissible activity. For example, at least part of the intolerance and discrimination in Northern Ireland today stems from past recognition of the right to disseminate and practice religion, manifested to some extent in a system of education which has served to accentuate religious differences and thereby to indirectly lend support to religious conflict.

Finally, in view of the weaknesses of this convention, the limitations inherent in any treaty approach, and the failure of the United Nations to provide effective remedies, it is relevant to inquire briefly whether religious oppression may be rectified through recourse to forcible unilateral or collective noninstitutionalized intervention—a modern version of the "humanitarian intervention" practiced in the nineteenth century. Scholars are divided as to whether this remedy is available in light of the general prohibition on the use of force contained in the Charter of the United Nations. However, there appears to be increasing readiness to recognize the continuing permissibility of this remedy in the absence of effective international or regional alternatives, provided that adequate safeguards are available to prevent its abuse. The oppression which an intervention for humanitarian purposes seeks to rectify usually involves loss of life or at least serious danger to life requiring immediate response. The convention approach, therefore, does not provide an alternative to intervention, but rather a concurrent method of dealing with human rights violations in the absence of emergency. Perhaps the answer on the international level is the establishment of a dual system: the creation of a United Nations humanitarian force that could remedy acts or threats of severe oppression by taking immediate and extraordinary action, supplemented by a strong convention that would have greater long-term impact. However, given present political realities, the foreseeable future holds little promise for either.

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100 For some suggested criteria to test the legitimacy of interventions to protect human rights, see Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 Va. J. Int'l L. 205, 263-64 (1969).