TOAEP

Religion, Hateful Expression and Violence

Morten Bergsmo and Kishan Manocha (editors)

E-Offprint:

Ioana Cismas, "The Relevance of International Law Standards to Religious Leaders", in Morten Bergsmo and Kishan Manocha (editors), *Religion, Hateful Expression and Violence*, Torkel Opsahl Academic EPublisher, Brussels, 2023 (ISBNs: 978-82-8348-141-9 (print) and 978-82-8348-142-6 (e-book)). This publication was first published on 17 July 2023.

Front cover: *Segment of the painting 'St. Yves Administering Justice' by Maestro di Sant'Ivo (1405–1410), the original of which can be seen in Galleria dell'Accademia in Florence (one block from where the project-conference took place). St. Yves (1253–1303), patron saint of lawyers, turns his attention to the poor and victimized. Similarly, religious leaders should protect victims of hate speech by their members or in the name of their community.*

Back cover: *Detail of the ancient* pietra serena *frame of the entrance to the CILRAP Bottega in Via San Gallo in Florence. Diametrically opposed to hateful expression (the topic of this book), the hand-carved surface is a loving expression of the meticulous work of the stone mason. The modest* pietra serena *stone has been quarried from hills outside Florence for centuries. All volumes in this Publication Series display a picture of publicly accessible ground (or frame that leads to the ground) on the back cover. Photograph: © CILRAP 2022.*

13

The Relevance of International Law Standards to Religious Leaders

Ioana Cismas*

13.1. Introduction

Madame Cissé Zeinab Keita, *Chargé d'affaires* at Mali's Ministry of Religious Affairs, recalls that she was one of only three women religious leaders invited, "at the very last minute", to a legal training on conflict-related violence against women organized by the United Nations ('UN') Multidimensional Integrated Stabilization Mission in Mali ('MINUSMA'). One hundred and five imáms were also invited to participate. When she challenged the under-representation of female religious leaders at the event, which was focused on the experiences of and legal protection for Malian women, the organizers explained that the training was intended for 'imáms'. Madame Cissé observed:

> Il n'y a pas des [femmes] imams dans l'Islam, mais il y a des prédicatrices, ou bien des prêcheuses […]. Toujours on a ces problèmes – ils essayent de mettre les femmes de côté.[1]

This opening anecdote should, at the broadest level, invite reflection on the importance of context-sensitive conceptualization. Specifically, it portrays how the way we define religious leadership may result in excluding – in this case, along gender lines – actors to which international legal standards may be

* Dr. **Ioana Cismas** is Co-Director of the Centre for Applied Human Rights and Reader at the York Law School, University of York. The present chapter draws on research conducted for the project *Generating Respect for Humanitarian Norms: The Role of Religious Leaders in Influencing Parties to Armed Conflict* ('the Generating Respect Project'). Funded by the United Kingdom's Economic and Social Research Council, the project was developed in partnership with the humanitarian organization Geneva Call between 2020–2022. The views expressed in this article do not necessarily reflect those of project partners or affiliated institutions. The author wishes to thank Dr. Ezequiel Heffes, Dr. Piergiuseppe Parisi and Dr. Katharine Fortin for fruitful discussions or reading earlier drafts. Any errors remain the author's own. For an audio-visual recording of Dr. Cismas' statement to CILRAP's conference in Florence in April 2022 on the topic of this anthology, please see https://www.cilrap.org/cilrap-film/220409-cismas/.

[1] "There are no [female] imams in Islam, but there are [female] preachers, or even priestesses […]. We always have this problem – they try to set women aside" (author's translation). The recollection is part of the digital story: Generating Respect Project, "GRP digital story: 'Madame Cissé, prédicatrice de l'équité'", 31 October 2021 (available on YouTube).

relevant and the action of whom may, in turn, be relevant for international law. Inspired by Madame Cissé's recollection, this chapter engages in a reflexive effort to unearth and problematize preliminary assumptions about the concepts employed in international legal scholarship and practice, in encounters with religions, with the aim of providing a more holistic understanding of the relevance of international law to religious leaders.

Reflexivity is commonly described as the "process of a continual internal dialogue and critical self-evaluation of [the] researcher's positionality as well as active acknowledgement and explicit recognition that this position may affect the research process and outcome".[2]

Whilst reflexivity is nowadays expected in research in social and health sciences, its utility (although seldom its use)[3] extends to legal sciences, including international legal scholarship and practice. Relevant elements that influence the positioning of international law scholars and practitioners in encounters with religion include personal characteristics, such as gender, race, nationality, age, beliefs, personal experiences, linguistic traditions and professional affiliations.[4] Importantly, this chapter will demonstrate that the methodological and theoretical background and preferences of legal scholars and practitioners, as elements of positionality, condition the analysis of which international standards are applicable to religious actors; whether, how and why such standards are (or can be) used and abused by them; and what accountability mechanisms are available to address violations. The chapter, thus, makes a case for informed, reflexive engagement between legal scholars and practitioners and religious leaders as a step change in enhancing the relevance of international law.

Structurally, the chapter is divided in seven sections. Section 13.2. examines how doctrinal, socio-legal methods and constructivist theory can shape the analytical inquiry into international law standards of relevance to religious actors. Section 13.3. delves into empirical, doctrinal and sociological approaches to defining religious leadership, so as to understand the 'actorhoods' they embody, the variety of affiliations they can have with religion, belief or spirituality, and the special legitimacy they claim. Section 13.4. explores the international legal standards applicable to religious leaders and the consequences of the various actorhoods they embody on their enjoyment of rights and obligations. A

2 Roni Berger, "Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research", in *Qualitative Research*, 2015, vol. 15, no. 2, p. 220.

3 For a welcome exception, or rather an invitation to reflexive practice in international law, see Julia Emtseva, "Practicing Reflexivity in International Law: Running a Never-Ending Race to Catch Up With the Western International Lawyers", in *German Law Journal*, 2022, vol. 23, no. 5, pp. 756–768.

4 This enumeration draws on Berger, 2015, pp. 219–234, see *supra* note 2.

specific focus will be the legal regime applicable to religious personnel under international humanitarian law ('IHL') and the conditions and implications of the loss of this protective status. The accountability avenues available to challenge abuse by religious leaders and increase their positive influence on third parties are examined in Section 13.5. Section 13.6. discusses the interaction between religious leaders, international human rights law ('IHRL') and IHL, beyond compliance with or abuse of these standards. The conclusion ties the argumentative threads of the chapter together and makes a plea for greater engagement between international law scholars and practitioners and religious actors as a norm compliance-generation strategy.

13.2. On Methods, Theories and Their Relevance

In approaching a legal problem, the first decision that lawyers make – including those writing on and practising international law – concerns the methods that they will utilize to study the problem. Curiously, law schools (still) often do not equip their students with the understanding that this decision is a conscious one, which, in turn, requires clear articulation and justification. Avid readers of legal literature would be more surprised to stumble upon articles that include a methodology section than upon those omitting such a discussion altogether.[5] Hutchinson and Duncan observe that many doctrinal legal scholars consider it "unnecessary to verbalise" their chosen methods.[6] This may well be because of the overwhelming dominance of doctrinal legal methodology in the study and practice of law – it is as if legal scholarship and the doctrinal method have gone hand in hand for such a long time that they cofound and confound each other.[7]

Along similar lines then, due to the dominance of legal positivism in international law scholarship,[8] specialist literature appears to conflate theory ("a

[5] For a similar observation in the context of doctoral studies in international law, see Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law*, Bloomsbury Publishing, London, 2011, p. 2.

[6] Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", in *Deakin Law Review*, 2012, vol. 17, no. 1, p. 99.

[7] Westerman, for instance, notes that "[t]he legal system is not only the subject of inquiry, but its categories and concepts form at the same time the conceptual framework of legal doctrinal research", Pauline Westerman, "Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law", in Mark van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Hart Publishing, London, 2011, pp. 87–110. For a critique of doctrinal legal methodology which assumes the "identity of subject and theoretical perspective", see Jan Vranken, "Methodology of Legal Doctrinal Research: A Comment on Westerman", in *ibid*., pp. 111–122.

[8] In their article which aims to outline "a modern and, we hope, enlightened view of positivism as the core of international legal discourse", Simma and Paulus also observe that "in reflecting on our day-to-day legal work, we realized that, for better or for worse, we indeed employ the

systematic knowledge-resource [that] informs the selection of a particular methodology"), methodology ("the theory of methods which explains and justifies the method(s) used in a particular instance"), and method ("a technique of acquiring knowledge").[9] Perhaps this is so because recognizing that positivism is just one legal theory among many, with its 'doctrine of sources' and its 'doctrine of treaty interpretation' as predilect, yet not sole methods, could be seen as a defeat in the hard-fought battle to achieve recognition for international law as a scientific and an objective discipline.[10] A simpler explanation is provided by Kammerhofer: "for the most part, 'default positivism' is semi-conscious and half-reflected, more part of one's legal socialisation and culture than of a conscious choice and reflection".[11] In contrast, D'Aspremont notes that "[o]ne's refusal to unpack one's modes of meaning" – which is how he defines methods – "does not mean that there are no modes of meaning at work, let alone that there is no awareness of such refusal".[12] The submission made in this chapter is that methodological and theoretical preferences are a central feature of a researcher's positionality, which therefore require open discussion: refusal to enter into such discussion is, at the very least, methodologically problematic. In the context of the present study, the chosen mix of methods and the underpinning theory significantly shape the thinking and the meaning of 'relevance' of international law standards to religious leaders – and, as demonstrated in Section 13.3. of this chapter, they also shape the definition of religious leadership.

Allow me then to switch to the (unusual in legal writing) first-person address and discuss the theoretical and methodological foundations of this chapter. As an international lawyer schooled in legal positivism, faced with the task at

tools developed by the 'positivist' tradition", Bruno Simma and Andreas L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", in *American Journal of International Law*, 1999, vol. 93, no. 2, pp. 302–303.

9 The introduction to a recent and much-needed edited volume on *Research Methods in International Law* distinguishes between theory, methodology and methods, as the above citations illustrate, yet it appears to conflate these categories when it comes to what the authors call "doctrinal methods". See Rossana Deplano and Nicholas Tsagourias, "Introduction", in *id*. (eds.), *Research Methods in International Law*, Edward Elgar Publishing, Cheltenham, 2021, pp. 1–2. This is so, perhaps, because they use Ratner and Slaughter's work as an example – in that work, confusingly, method is defined as theory and methodology is understood as method. See Steven Ratner and Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers", in *American Journal of International Law*, 1999, vol. 93, no. 2, pp. 291–292.

10 See Richard Collins, "How to Defend International Legal Method?", in Deplano and Tsagourias (eds.), 2021, p. 11, see *supra* note 9.

11 Jörg Kammerhofer, "International Legal Positivist Research Methods", in *ibid*., p. 97.

12 Jean d'Aspremont, "International Legal Methods: Working for a Tragic and Cynical Routine", in *ibid*., p. 48.

hand, I am bound to engage in an analysis of the international legal sources that seek to regulate the rights and obligations of these actors. As such, taking Article 38 of the Statute of the International Court of Justice as a starting point, I will be aiming to offer an assessment of which hard law – and, since I am not a strict positivist, soft law – standards are applicable to religious leaders, and where claims of breaches by and against them can be brought. Sections 13.4. and 13.5. of this chapter propose this sort of analysis. Yet, this study goes further *because* it is underpinned by social constructivist theory and draws on qualitative and socio-legal methods.[13]

Social constructivism, whilst not a unitary theory, starts from the premise that states *and* non-state actors,[14] as norm entrepreneurs, epistemic communities and communities of practice, participate in social interactions that result in intersubjective meaning or shared understandings, which, in turn, lead to the "emergence, maintenance, development, fading, and diffusion" of norms.[15] Thus, "[c]onstructivism helps explain how international law can exist and influence behavior".[16] Landefeld, drawing on Finnemore and Toope, explains the particular utility of a constructivist lens to international legal analysis as follows:

---

13 For an overview of the turn towards socio-legal methods in international law, see Gregory Schaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship", in *American Journal of International Law*, 2012, vol. 106, no. 1, pp. 1–46; see also Ingo Venzke, "International Law and its Methodology: Introducing a New Leiden Journal of International Law Series", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 185–187.

14 Famously, in his 1992 seminal article, Wendt remarked that "[a]narchy is what states make of it": Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics", in *International Organization*, 1992, vol. 46, no. 2, pp. 391–425. Social constructivist thinking has evolved to focus in a much more pronounced and systematic manner on the role of non-state actors in the emergence, development and implementation of norms, including international law norms. For classic texts, see Martha Finnemore, *National Interests in International Society*, Cornell University Press, London, 1996; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", in *International Organization*, 1998, vol. 52, no. 4, pp. 887–917; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, 2010, especially p. 36. For a more recent application, see Jacqueline Eggenschwiler and Joanna Kulesza, "Non-State Actors as Shapers of Customary Standards of Responsible Behavior in Cyberspace", in Bibi van den Berg and Dennis Broeders (eds.), *Governing Cyberspace: Behavior, Power and Diplomacy*, Rowman & Littlefield, Lanham, 2020, pp. 245–262.

15 Sarina Landefeld, "The Evolution of Norms and Concepts in International Law: A Social Constructivist Approach", in Rossana Deplano (ed.), *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods*, Edward Elgar Publishing, Northampton, 2019, pp. 49, 55.

16 Jutta Brunnée and Stephen J. Toope, "Constructivism and International Law", in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, 2012, p. 120.

> Constructivists regard international law […] as 'a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies'. It is thus influenced by a variety of non-legal factors and dynamics which a doctrinal international law approach may fail to understand due to its conceptual and methodological limits.[17]

The social constructivist grounding of this chapter allows us to complexify our understanding of 'relevance' beyond that of *which* posited norms of international law are applicable to religious actors. Three specific features deserve emphasis at this stage. First, constructivism encourages an examination of what state and non-state religious leaders say and practise in respect to these international law standards and with what effect. The analytical effort here specifically draws on the critical constructivist insight that "local actors actively reconstruct foreign ideas, creating greater congruence with local beliefs and practices".[18] They may also ignore 'foreign ideas', or contest them, creating a buy-out. Acharya, for example, shows how changes in norm acceptance could be explained by "the differential ability of local agents to reconstruct [international] norms to ensure a better fit with prior local norms, and the potential of the localized norm to enhance the appeal of some of their prior beliefs and institutions".[19]

Second, norms (including legal norms) understood as social constructs "constrain, enable, and constitute actors in their choices".[20] At the same time, actors are not at the mere mercy of social structures, they retain agency to shape norms – in particular, "actors with the ability to influence intersubjective meaning are considered as being in a position of power".[21] As religious leaders are often societally influential, one could assume that they are powerful norm-shapers. This assumption is often, yet not always, true, as discussed in Section 13.3. of this chapter.

Third, the discourse and practice of religious leaders – shaped and reshaped, as they are, through interaction with third parties, including legal

---

17 Landefeld, 2019, p. 50, see *supra* note 15. See also, Martha Finnemore and Stephen J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics", in *International Organization*, 2001, vol. 55, no. 3, p. 743.

18 Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism", in *International Organization*, 2004, vol. 58, no. 2, p. 239.

19 *Ibid*.

20 John Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge", in *International Organization*, 1998, vol. 52, no. 4, p. 875.

21 Landefeld, 2019, pp. 48–49, see *supra* note 15.

scholars and practitioners – encapsulate the possibility or the promise for change.[22] The argument that will be pursued in the conclusion of the chapter is that the engagement between legal scholars, practitioners and religious leaders can result in forging shared understandings to, on the one hand, increase the relevance of international law to religious leaders, and, on the other hand, legitimize legal standards in local contexts.

Consistent with its social constructivist theoretical inclination, the chapter embraces a socio-legal approach[23] and draws on empirical qualitative research methods. In particular, it relies on data collected as part of the Generating Respect Project, an applied research project that sought to examine the role of religious leaders in influencing parties to armed conflict towards greater (non-)compliance with IHL and IHRL norms.[24] Data was collected by the research team through over 250 semi-structured interviews with legal and religious scholars, humanitarian practitioners, experts on conflict dynamics, journalists, religious leaders, current and former members of armed actors and members of conflict-affected communities in Colombia, Libya, Mali, Myanmar, Syria and Yemen (the project's case study countries), as well as through digital stories and reflexive diarizing. This chapter will draw on some of this primary data to discern if, how and why international law standards are considered by religious leaders and whether, in turn, religious leaders can contribute to norm-compliance.

In brief, the employed doctrinal and socio-legal methods and the social constructivist theoretical insights create a three-pillared examination of the 'relevance of international law standards' to religious leaders:

1. Applicability
    i. Which hard and soft law standards seek to regulate the conduct of religious leaders?
2. Accountability
    ii. What avenues exist to pursue accountability for violation of rights and obligations of religious leaders?

---

22 Note that, whilst social constructivism was often regarded as an optimist theory because of the potential for change which it holds, scholars have demonstrated that change need not necessarily be positive. See Brunnée and Toope, 2012, p. 137, *supra* note 16.

23 A socio-legal approach views law not "as an autonomous force to which society is subjected, but rather shapes and is shaped by broader social, political and economic logics, contexts and relations". See Darren O'Donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls", in Laura Cahillane and Jennifer Schweppe (eds.), *Legal Research Methods: Principles and Practicalities*, Clarus Press, Dublin, 2016, p. 108.

24 See the home page of The Generating Respect Project's web site (https://www.generatingrespectproject.org/) and the biographical note above.

3. Discourse and practice
   iii. Do religious leaders use international law standards in their discourse or activities?
   iv. If they do, why, how and with what effect? If they do not, why?

Armed with this set of research questions, we turn next to the term 'religious leadership' to explore how its conceptualization interacts with the identified elements of 'relevance of international legal standards'.

13.3. Defining Religious Leadership

Religious leadership – unlike religious personnel, as we shall see in Section 13.4. – is not a legal concept. Posited international law does not, as such, define the term. Thus, an empirical approach to defining religious leadership may be a useful starting point instead. Let us take the United Nations Development Programme ('UNDP') Guidelines on Engaging with Faith-based Organizations and Religious Leaders as a reference, which note that "priests, imams, rabbis, clerics, monks, nuns, lamas, traditional indigenous spiritual guides such as shamans and sukias, and lay religious leaders" are religious leaders.[25]

Three questions immediately arise. First, would an atheist or a humanist actor be included in this definition? Interpretative practice[26] and jurisprudence on freedom of religion or belief[27] answer in the affirmative, irrespective of the fact that calling an atheist or a freethinker a *religious* leader may be somewhat grating for the individual in question. Certainly, the practice of the European Court of Human Rights ('ECtHR') has sought to ensure that Article 9 of the European Convention on Human Rights protects philosophical convictions which attain "a certain level of cogency, seriousness, cohesion and importance".[28] In brief, it would be difficult to argue that we should exclude any leaders whose beliefs meet this threshold, despite the uneasiness we, or they, may have with the attribute 'religious'.

---

25 UNDP, "UNDP Guidelines on Engaging with Faith-based Organizations and Religious Leaders", 1 October 2014, p. 5 ('UNDP Guidelines, 2014').

26 See, for example, United Nations Human Rights Committee, CCPR General Comment No. 22: Article 18: The right to freedom of thought, conscience and religion, UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 2 (https://www.legal-tools.org/doc/9df763/).

27 See, for example, ECtHR, *Kokkinakis v. Greece*, Judgment, 25 May 1993, Application no. 14307/88, para. 31 (https://www.legal-tools.org/doc/c550f8/); European Commission on Human Rights, *Union des Athées v. France*, Commission's report, 6 July 1994, Application no. 14635/89, para. 79 (https://www.legal-tools.org/doc/ba4agm/).

28 See, for example, ECtHR, *Union des Athées v. France*, *Leela Förderkreis e.V. and Others v. Germany*, Judgement, 6 November 2008, Application no. 58911/00, para. 80 (https://www.legal-tools.org/doc/altgaj/).

Turning to the second and third questions: Since the above enumeration includes only individuals, could religious leadership be exercised by formal and informal groups or organizations and institutions? What forms of actorhood do these entities take: are they non-state or also state actors? Both questions can be answered doctrinally – Sections 13.4. and 13.5. of this chapter do just that, by providing an overview of the implications of various actorhoods that religious leaders can embody for their rights and obligations under international law and the available accountability avenues. A purely doctrinal approach, however, does not fully capture the distinctiveness of religious leaders, which goes a long way to explain their potential to enhance or diminish the relevance of international law standards in local contexts.

As such, in an effort to achieve greater analytical rigour, researchers involved in the Generating Respect Project have sought to identify the definitional contours of religious leadership by drawing on an extensive, interdisciplinary literature review, analysing critically the terminology employed in guidelines or strategies for engagement between various UN bodies and faith-based actors as instantiations of relevant practice,[29] and relying on doctrinal legal analysis and empirical data. We have proposed that religious leaders are actors who:

1. Have a formal or informal affiliation to religion, spirituality or belief;
2. Make a claim of special legitimacy – anchored predominantly in charisma or tradition – to interpret religion and to persuade or command obedience from followers, communities and other actors;
3. Exercise leadership individually or collectively, through formal or informal groups, networks, organizations or institutions;
4. Can operate as state or non-state actors;
5. Are most often institutionally external to armed actors, yet can also be part of their political or military structures.[30]

This definition distinguishes itself through three main features: first, it introduces the new element "claim of special legitimacy"[31] as a core definitional

[29] See, for example, Joint United Nations Programme on HIV/AIDS, "Partnership with Faith-based Organizations: UNAIDS Strategic Framework", December 2009; UNDP Guidelines, 1 October 2014, see *supra* note 25; United Nations High Commissioner for Refugees, "Partnership Note on Faith-based Organizations, Local Faith Communities and Faith Leaders", 6 June 2014; United Nations Environment Programme, "Engaging with Faith Based Organizations. UN Environment Strategy", 20 July 2018.

[30] Ioana Cismas *et al*., *Considerations and Guidance for the Humanitarian Engagement with Religious Leaders*, University of York, 2023, p. 14.

[31] This element is taken from Ioana Cismas, *Religious Actors and International Law*, Oxford University Press, 2014, pp. 51–57.

concept; second, it recognizes informal types of affiliation to religion; and third, it includes collective forms of leadership within the definition of religious leadership itself, as opposed to separating them (artificially) into a new category of faith-based organizations.[32] At this stage, it is useful to examine these elements and their implications for achieving greater relevance for international law standards in various contexts.

13.3.1. A Claim of Special Legitimacy

This definitional feature assumes that religious leaders' legitimacy is 'special' because of the specific sources of legitimation upon which these actors draw when they put forward religious interpretations, including those that have a positive or negative bearing on international law standards. As argued elsewhere, the relationship between religious leaders and their followers, members or adherents can be regarded as one of complex command–obedience between an authority or power-holder and power-subjects.[33] This command-obedience can be equally evidenced in the case of a secular (or non-religious) democratic legislature and citizens. However, in the latter case, it is the legal-rational aspect of the law and governance structure that confers legitimacy to the authority and generates compliance with its commands. In contrast, the legitimate authority of religious leaders is primarily (whilst not necessarily exclusively) grounded in two other sources of legitimation, tradition or charisma.[34] As such, power-subjects follow a specific religious command or rule, because religious leaders are perceived to have legitimate authority by virtue of tradition or charisma to issue it.[35] These sources of legitimation upon which religious leaders draw are particularly important to the topic of this chapter due to their ability to localize international legal norms, as shall be argued in Section 13.6 of this chapter. Let us pause at this point to explore the concept of 'claim', which we have used to qualify the special legitimacy of religious leaders.

Much in keeping with constructivist thought, the 'claim' element seeks to portray power-subjects as agents, and not merely as objects, of commands. In

[32] Contrast with the definition in the UNDP Guidelines, 1 October 2014, p. 5, see *supra* note 25 ("Religious leaders (RLs) are men and women with a *formal* affiliation to a religion or spiritual path who play influential roles within their communities and the broader civil society" (emphasis added)).

[33] See, *ibid*., and Ioana Cismas and Ezequiel Heffes, "Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance", in Terry D. Gill, Robin Geiß, Heike Krieger and Christophe Paulussen (eds.), *Yearbook of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2021, vol. 22, pp. 138–139.

[34] Clearly, the analysis draws on Max Weber's work, see *ibid*., and Max Weber, *Economy and Society*, Roth and Wittich (eds.), University of California Press, Berkeley, 1978, p. 215.

[35] *Ibid*.

other words, not all religious leaders, not all the time, and not in respect to all matters will actually *enjoy* the special legitimacy which they claim, because power-subjects may choose not to comply with their commands for a variety of reasons. This observation is important because it recognizes that religious leaders may be influential – including in generating compliance with international law – but they need not necessarily be so. Findings of the Generating Respect Project suggest that we cannot assume that religious leaders' societal influence necessarily translates into an influence on norm acceptance and compliance among parties to an armed conflict. The Colombian context provides an apt illustration. In Colombia, the Catholic Church and many individual religious leaders command significant respect in society and enjoy a measure of legitimacy among some non-state armed groups and members of the Colombian Armed Forces. Whilst they have made strong appeals urging respect for humanitarian norms and urgent calls for peace,[36] these have not always been heeded by parties to conflicts.[37] Another illustration comes from Libya. Here we have examples of *Madkhali*[38] armed actors "acting on religious interpretation or using such interpretation to justify whether they should participate in hostilities, on which side, how to behave during the conflict and how to govern populations under their control".[39]

Yet, these groups have also been documented to engage critically with religious advice or *fatwás*, when these appear to discount the contextual reality of Libya or their political and economic interests.[40] The conclusion cannot be escaped: whilst the claim to special legitimacy is a necessary definitional element of religious leadership, the ability (or power) of religious leaders to act as

[36] See, for example, Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict*, Cambridge University Press, 2015, p. 112.

[37] There are, of course, examples where they have been heeded. See Cismas and Heffes, 2021, p. 137, *supra* note 33; Jonathan Zaragoza *et al*., "Mapping of Armed Conflicts and Religious Leaders in Colombia", The Generating Respect Project, 7 September 2020 (on file with the author); Mohammed Assaleh *et al*., "Religious Leaders as Brokers of Humanitarian Norm-Compliance: Insights from the Cases of Colombia, Libya, Mali and Myanmar", in *Armed Groups and International Law*, 21 October 2020 (available on its web site).

[38] Madkhalism is described as a quietist stream of the Salafist movement, drawing on the teachings of the Saudi cleric Rabiyy' al-Madkhali. See George Joffé, "The Trojan Horse: The Madkhali Movement in North Africa", in *The Journal of North African Studies*, 2018, vol. 23, no. 5, pp. 739–744.

[39] Hasnaa El Jamali and Ioana Cismas, "The Multifactorial Influence of Madkhali Salafism on Libyan Armed Actors", in *Journal of Human Rights Practice*, 2023 (forthcoming).

[40] *Ibid*.

norm-shapers or compliance-inducers is not always secured and a finer-grained analysis is required.[41]

In reference to the context of armed conflict, our research has shown that the influence of religious actors on humanitarian norm compliance should be seen as a relational process shaped by endogenous factors to both religious leaders and armed actors (such as values, objectives and ideology; religious, social and ethnic background; organizational structure, including financing; access and communication channels; position on IHL and IHRL norms), and contextual factors (such as conflict dynamics, security situation, applicability and clarity of IHL and IHRL norms, societal position or perception of religious leaders and armed actors, and involvement of third parties).[42]

13.3.2. Informal Affiliation to Religion and Collective Forms of Religious Leadership

Informal affiliation to religion, belief or spirituality and collective expression of religious leadership are analysed together in this section, because their inclusion in the definition of 'religious leadership' pursues the same aim. That is, we seek to capture the complex empirical reality of religious leadership on the ground more closely, and to correct for intra- and extra-religious exclusionary patterns, which manifest themselves, generally, in respect to women and minorities (ethnic, religious and youth).

This broadening exercise is the direct result of a process of reflexivity within the Generating Respect Project research team. In an early article, in which we articulated the conceptual framework of the project, we acknowledged the 'elephant' in the analysis: all the religious leaders discussed therein were men.[43] We asked ourselves where the women religious leaders were in our case study countries, namely, Colombia, Libya, Mali, Myanmar, Syria and Yemen? One of the project's local researchers, with deep knowledge of the country context, suggested that women tend to be excluded from religious leadership positions due to the reproduction of patriarchal societal patterns within the formal hierarchical religious structure. Whilst agreeing that this may be a plausible

41 One final observation relating to the 'claim' aspect is in order. Note also that the commands of religious leaders may also be heeded because power-subjects fear "the prospect of punishment for non-compliance" or are motivated by "rewards for compliance". See Craig Matheson, "Weber and the Classification of Forms of Legitimacy", in *The British Journal of Sociology*, 1987, vol. 38, no. 2, p. 200. This serves to underscore that in addition to, or alternatively to, legitimate authority, religious leaders' influence could rest on coercive or reward-based authority.

42 See Cismas *et al*., 2023, pp. 22–30, see *supra* note 30; Cismas and Heffes, 2021, pp. 133–138, 143–144, see *supra* note 33.

43 Cismas and Heffes, 2021, p. 136, see *supra* note 33.

explanation, we also recognized that we may have not 'seen' women (and other 'minorities') because of the methods of data collection employed up to that stage – largely doctrinal and involving document analysis[44] – or because of the manner in which we had defined the concept of religious leadership. Embarking on in-depth, in-country interviews, relying on snowball sampling and ensuring that our interview guides were tailored to capture gender aspects, revealed a much more complex empirical reality on the ground. That reality, in turn, shaped our conceptualization of religious leadership and resulted in the definition proposed in Section 13.3.

Literature also supports the broad scope of the definition of religious leadership. As Gingerich *et al*. noted: "While women are leaders in some faiths, they are often not part of the traditional hierarchy"[45] – this observation could be normatively described as reflecting an intra-religious exclusionary pattern. As such, 'traditional definitions' of religious leadership, which "have tended to identify people with theological or ceremonial authority",[46] have often obscured or made invisible the leadership roles performed by women. Recall Madame Cissé's observation that women in Mali, whilst not being able to become imáms, certainly can and are preachers and priestesses. Another example encountered during fieldwork in relation to Myanmar is powerful. The woman we had interviewed did not possess formal religious authority, but solely indirect authority through her kinship with a pastor; yet, her discourse, actions, charisma and how she was perceived by societal and armed actors placed her firmly in the category of religious leaders with influence to shape behaviour.[47]

In many settings, including conflict contexts, women's religious leadership is expressed collectively, such as in the form of faith groups – whether sanctioned or not by the official religious authorities – and these forms of leadership tend to be "less publically visible".[48] For example, church groups formed of women were instrumental in the tensions that engulfed the Solomon Islands between 1998–2003. The Catholic Daughters of Mary Immaculate Sisters

44 See Ioana Cismas, "Religious Leaders' Influence on Parties to Armed Conflict: Reflexive Early Considerations on the Design and Implementation of the Generating Respect Project", presented at the Conference on Rules and Laws in Protracted Conflict: Concurrence, Negotiation and Friction, 28 October 2020 (on file with the author).

45 Tara R. Gingerich, Diane L. Moore, Robert Brodrick and Carleigh Beriont, "Local Humanitarian Leadership and Religious Literacy: Engaging with Religion, Faith, and Faith Actors", Harvard Divinity School Religious Literacy Project and Oxfam, 31 March 2017, p. 7.

46 Elena Fiddian-Qasmiyeh (ed.), "Gender, Religion and Humanitarian Responses to Refugees", UCL Migration Research Unit Policy Brief, 19 October 2016, p. 12.

47 See Chris Rush and Ioana Cismas, "Interview with Religious Leader", 2022 (on file with the author).

48 Fiddian-Qasmiyeh (ed.), 2016, p. 12, see *supra* note 46.

brought food to fighters of opposing parties in the armed conflict as a mediation tool and to alleviate the suffering of affected communities.[49] Distributing food to fighters is one of the "'low key' methods and 'self-effacing ethos'", which has allowed "women to pursue progressive, and often courageous, social agendas, in spite of their marginalization in national politics".[50] This kind of leadership – which, it should be noted, spilled over into key leadership roles in disarmament initiatives and transitional justice advocacy[51] – is less visible than poignant public statements made by bishops and other (usually male) high-ranking religious authorities. Yet, as the example discussed demonstrates, it may be no less important in terms of its potential to influence behaviour in armed conflict and post-conflict contexts.

The inclusion of 'informal' forms of affiliation to religion in the definitional scope of religious leadership captures various other local realities. Some social groups or organizations choose not to formally affiliate themselves with religion in order to preserve a certain independence from religious hierarchical authorities. Types of informal affiliation should also resonate with those local contexts where "religion remains interwoven with public life and local culture".[52] As Fiddian-Qasmiyeh notes, in such settings,

> many local organisations do not deem it necessary to explicitly identify themselves as 'faith-based'. This is even the case when their values and actions are understood through religious frameworks, which are effectively the norm in their local context. While this may be unproblematic in itself, when this is translated through a secular humanitarian framework, the 'faith' and 'religious' elements of the local organisation and the impact that 'religion' has on its work with refugees, remains invisible and unanalysed.[53]

The observation made by the author in the context of refugee protection is equally valid in relation to other areas of international legal practice. The

[49] John Braithwaite, Matthew G. Allen and Sinclair Dinnen, *Pillars and Shadows: Statebuilding as Peacebuilding in Solomon Islands*, Australian National University EPress, Canberra, 2010, p. 31.

[50] Elizabeth Snyder, "Waging Peace: Women, Restorative Justice, and the Pursuit of Human Rights in the Solomon Islands", in *Refugee Watch*, 2009, vol. 32, p. 773, pp. 67–79. See also, Bronwen Douglas, "Why Religion, Race, and Gender Matter in Pacific Politics", in *Development Bulletin*, no. 59, 1 October 2002, p. 12.

[51] See Snyder, 2009, p. 72, *supra* note 50. See also discussions in Ioana Cismas, "Reflections on the Presence and Absence of Religious Actors in Transitional Justice Processes: On Legitimacy and Accountability", in Roger Duthie and Paul Selis (eds.), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, International Center for Transitional Justice, New York, 2017, pp. 316–318.

[52] Fiddian-Qasmiyeh (ed.), 2016, p. 12, see *supra* note 46.

[53] *Ibid*.

impact of religion on the potentiality of such groups to influence other actors in society, including armed actors, remains invisible, unless one acknowledges the 'informal' religious element underpinning their mission, activities and methods.

This 'informal affiliation' should be understood to extend to those groups or organizations whose affiliation to a certain religion is disputed or rejected by religious or state authorities due to legitimate or illegitimate reasons. For example, in Myanmar, the radical ultra-nationalist Buddhist organization known as Ma Ba Tha claims a strong affiliation to Theravada Buddhism despite having been disbanded by the State Sangha Maha Nayaka Committee.[54] Ma Ba Tha and monks associated with it continue to exercise religious leadership and significant influence on communities and some parties to armed conflicts in the country (possible even among the Myanmar military, or Tatmadaw).[55] According to scholars, the incitement to hatred and violence propagated by this organization paved the way for the serious rights violations of the Rohingya in Rakhine State.[56] Put differently, Ma Ba Tha's influence had a markedly negative bearing on IHRL and IHL protection, irrespective of the fact that the organization had been pushed into 'informality'.

Libya provides another example and an opportunity to reflect on the various connotations of 'informality'. The Nawasi Brigade, a Salafist-inspired armed group, which was nominally affiliated with the Ministry of the Interior of Libya's Government of National Accord, is alleged to have been involved in the destruction of *Ṣúfí* places of worship in 2011–2013 and again in 2017,[57] reflecting perhaps those Salafist interpretations which consider *Ṣúfism* heterodox.[58] Effectively, thus, *Ṣúfí* groups were pushed in the realm of 'informality' in the country.

---

54 See Chris Rush *et al*., "Mapping of Armed Conflicts and Religious Leaders in Myanmar", *Generating Respect Project*, 3 October 2020 (on file with the author).

55 *Ibid*.

56 Zo Bilay, "The Characteristics of Violent Religious Nationalism: A Case Study of Mabatha against Rohingya Muslim in Myanmar", in *Journal of Human Rights and Peace Studies*, 2022, vol. 8, no. 1, pp. 86–106; Md. Ali Siddiquee, "The Portrayal of the Rohingya Genocide and Refugee Crisis in the Age of Post-Truth Politics", in *Asian Journal of Comparative Politics*, 2020, vol. 5, no. 2, pp. 89–103; International Crisis Group, "Buddhism and State Power in Myanmar", Crisis Group Asia Report No. 290, 5 September 2017; Htet Min Lwin, "Politicized Religion as Social Movement in a Nascent Democracy: The MaBaTha Movement in Myanmar", Master's dissertation, Central European University, 2016.

57 El Jamali and Cismas, 2023, see *supra* note 39; Wolfram Lacher and Peter Cole, "Politics by Other Means: Conflicting Interests in Libya's Security Sector", in *Small Arms Survey*, October 2014, pp. 77–78, note 53; Human Rights Watch ('HRW'), "Libya: New Wave of Attacks Against Sufi Sites", 7 December 2017 (available on its web site).

58 Katherine Pollock and Frederic Wehrey, "The Sufi-Salafi Rift", *Carnegie Middle East Centre*, 23 January 2018.

The term 'informality' in the above illustrations is used as an element of the analytical category 'religious leadership'. As such, it does not aim to pass value-judgements relating to the internal legitimacy of religious convictions or beliefs.[59] Equally, the element does not aim to assess whether the affiliation with religion, being informal, is less real or less strong compared to formal affiliation. As shown above, context may often explain why groups choose, or are forced into, an informal relationship, as opposed to a formal one.

13.4. The Consequences of Actorhood(s) and Special Legitimacy

The previous section argued that religious leaders can embody different state and non-state actorhoods, and that irrespective of variations in terms of religion, belief or spirituality and of formal or informal affiliations with religion, what binds these actors together is the claim that they make to enjoy special legitimacy to interpret religion and command obedience from followers. Let us now turn to the legal standards applicable to them to verify whether their claim to special legitimacy has any consequences on their enjoyment of rights and obligations under international law.

13.4.1. Legal Standards Applicable to State and Non-State Religious Leaders

Recognizing that religious leaders can occupy any point on the state–non-state continuum allows us to understand that their specific type of actorhood will likely determine which international law standards apply to them. What emerges is a matrix. When religious leadership takes the shape of a state (or a state-like construct), it will enjoy the full panoply of rights, privileges and obligations of states; when an inter-governmental organization conforms to the definition of religious leadership, legally it will be treated in a similar fashion to secular (or non-religious) international organizations; when religious leadership is expressed through a non-state legal entity, this will have rights and obligations analogous to non-religious organizations; and finally, individual religious leaders will enjoy rights and be subject to international legal obligations just like any other individuals. What needs to be verified is whether this matrix remains accurate, when we account for the special legitimacy that religious leaders claim. In other words, does their special legitimacy translate in a special legality regime

[59] This would appear to be consistent with international jurisprudence which requires a certain neutrality to be observed by state authorities in assessing the legitimacy of religious beliefs. ECtHR, *Eweida and Others v. the United Kingdom*, Judgement, 15 January 2013, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 81 (https://www.legal-tools.org/doc/aee735/); ECtHR, *Ancient Baltic religious association "Romuva" v. Lithuania*, Judgement, *8 June 2021, Application no. 48329/19,* paras. 118–119 (https://www.legal-tools.org/doc/8714um/).

under international law? Do they have special rights and lesser obligations compared to their non-religious peers? Previous work set out to systematically answer these questions by comparing like-for-like in terms of actorhood, with the only variable being the religious/non-religious aspect.[60] The analysis concluded that religious actors do not enjoy a special legality regime under international law due to their religiosity, but that some grey areas or qualifications exist. Some examples are in order at this stage.

The most complex case among religious states (or state-like constructs) – and perhaps among religious actors more broadly – is the Holy See.[61] Whilst personifying the apex of Catholic leadership, the Holy See invokes a dual personality under international law.[62] Over the years, the Holy See has sought to shift between its international legal personality as a state, so as to enjoy state privileges, including treaty-making powers and immunity from foreign jurisdiction in the context of clerical child sexual abuse litigation, and its personality *qua* church to enjoy the human right to freedom of religion.[63] This selective practice has been decidedly challenged in more recent years by UN treaty bodies and domestic courts.[64] The Holy See was called upon to acknowledge its 'state'

60 Cismas, 2014, see *supra* note 31; Ioana Cismas, "The Child's Best Interests and Religion: A Case Study of the Holy See's Best Interests Obligations and Clerical Child Sexual Abuse", in Elaine Sutherland and Lesley-Anne Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being,* Cambridge University Press, 2016, pp. 310–325; Ioana Cismas and Stacy Cammarano, "Whose Right and Who's Right? The US Supreme Court v. The European Court of Human Rights on Corporate Exercise of Religion", in *Boston University International Law Journal*, 2016, vol. 34, no. 1, pp. 2–44.

61 I have advanced the argument that the Holy See is a state-like construct, which enjoys a single personality grounded in two sources: international custom (that recognizes the religious legitimacy of the Holy See) and the Lateran Treaty (which confers upon it a resemblance of statehood through the grant of the Vatican territory). Cismas, 2014, Chapter 4, see *supra* note 31.

62 See Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Addendum: Holy See, Fifteenth Periodic Reports of States Parties due in 1998, UN Doc. CERD/C/338/Add.11, 26 May 2000, para. 4 (https://www.legal-tools.org/doc/wbb7px/); United States District Court, Western District of Kentucky, *O'Bryan et al. v. Holy See*, 2007, 490 F.Supp.2d 826 ('*O'Bryan*').

63 See Cismas, 2014, pp. 185–237, *supra* note 31.

64 Contrast the early practice of the Committee on the Rights of the Child with more recent one. Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Holy See, Tenth Session, UN Doc. CRC/C/15/Add.46, 27 November 1995, para. 14 (https://www.legal-tools.org/doc/phstl7/); *id*., Concluding Observations on the Second Periodic Report of the Holy See, U.N. Doc. CRC/C/VAT/CO/2, 25 February 2014, paras. 29–30 (https://www.legal-tools.org/doc/kjpol6/). See also *O'Bryan*, *supra* note 62.

obligations under international human rights treaties, including, or in particular, when these have extra-territorial effects.[65]

The Cairo Declaration on Human Rights in Islam, developed by the Organisation of Islamic Cooperation ('OIC') in the early 1990s, could be regarded as an effort by this inter-governmental actor with "religious contours" to opt-out from the customary rules of treaty interpretation, and build instead, a 'religionalism', that is, a self-contained human rights regime entirely subject to (differing) *Sharí'ah* interpretations.[66] The Cairo Declaration has attracted significant critical attention from scholars and among states – the Parliamentary Assembly of the Council of Europe made a formal request to member states who are also members of the OIC to disavow the instrument.[67] A doctrinal lens allows us to put the document into context: the Cairo Declaration is a non-binding declaration that does not supersede the OIC member states' binding obligations under international human rights treaties.[68] A socio-legal approach that examines the actual practice of member states in relation to the Cairo Declaration would suggest that "the attachment of the OIC member states to the Cairo Declaration appears to have been minimal, at least when these were acting in UN fora".[69] In social constructivist terms, we may argue that OIC member states have not reached a shared understanding of 'human rights in Islám'. The new OIC Declaration on Human Rights adopted in 2020 would suggest that the religionalism project, outlined by the Cairo Declaration, has been, at least partly, abandoned.[70]

What then can be said about the international law standards applicable to non-state religious legal entities, such as churches and other religious organizations? Their rights, or rather their ability to claim breaches of their rights, depend on the admissibility criteria stipulated by various regional and international

65 Cismas, 2016, see *supra* note 60.

66 Cismas, 2014, Chapter 5, see *supra* note 31. For more recent work combining various disciplinary perspectives, see Turan Kayaoglu, *The Organization of Islamic Cooperation: Politics, Problems, and Potential*, Routledge, Abingdon, 2015; "The OIC's Human Rights Regime" and "The OIC and Children's Rights", in Marie Juul Petersen and Turan Kayaoglu (eds.), *The Organization of Islamic Cooperation and Human Rights*, University of Pennsylvania Press, Philadelphia, 2019.

67 Parliamentary Assembly of the Council of Europe, "Sharia, the Cairo Declaration and the European Convention on Human Rights", 22 January 2019 (available, along the reports of the various committees, on the Council of Europe's web site).

68 Cismas, 2014, pp. 253–284, see *supra* note 31.

69 *Ibid*., p. 279.

70 Confusingly, the 2022 Declaration seems to be referred to both as the OIC Declaration on Human Rights and the Cairo Declaration of the Organisation of Islamic Cooperation on Human Rights, 2022, see OIC's web site. See also, Mohammad Hossein Mozaffari, "OIC Declaration on Human Rights – Changing the Name or A Paradigm Change?", Raoul Wallenberg Institute, December 2020.

treaties and the interpretation of their supervisory bodies. The regimes established by the European Convention on Human Rights ('ECHR'), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights allow non-state religious actors, including religious legal entities, to seek redress for violations of their rights.[71] Successful claims were made in respect to the rights to freedom of religion, expression, association and assembly, property and fair trial.[72] In contrast, the *locus standi* provisions of the Optional Protocol to the International Covenant on Civil and Political Rights, and the restrictive interpretation of the Human Rights Committee, bar such access to legal entities.[73] Frustratingly, but similarly to other non-state legal entities, religious organizations have only limited *direct* obligations under international law. Yet, case-law provides some grounds for optimism. The procedural and substantive limitations placed on the right to church or religious autonomy can be understood to delineate a duty of religious legal entities to respect – if not protect and fulfil – the human rights of third parties.[74]

Two nebulous areas arise in relation to legal entities that claim to have religious objectives. The first refers to established or state churches. Were these actors to be considered state organs, they would trigger a state's responsibility for their actions or omissions in breach of international obligations. In its jurisprudence, the ECtHR has equated established churches with non-governmental organizations *stricto sensu*, as in organizations that do not participate in the exercise of governmental powers.[75] In *Holy Monasteries v. Greece*, this approach should be read as an effort to ensure that these organizations have the capacity

[71] ECHR, text as amended by Protocols No. 11 and No. 14, 4 November 1950, Article 34 (https://www.legal-tools.org/doc/8267cb/); American Convention on Human Rights, 22 November 1969, Article 44 (https://www.legal-tools.org/doc/1152cf/); African Charter on Human and Peoples' Rights, 1 June 1981, Article 55 (https://www.legal-tools.org/doc/f0db44/); and the African Commission on Human and Peoples' Rights, "Information Sheet No. 3: Communication Procedure", 1987.

[72] For an extensive discussion of religious entities rights under the ECHR regime, see Ioana Cismas, 2014, pp. 85–118, *supra* note 31. See also, Ioana Cismas, "Freedom of Religion or Belief and Freedom of Association: Intersecting Rights in the Jurisprudence of the European Convention Mechanisms", in Jeroen Temperman, Jeremy Gunn and Malcolm Evans (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis*, Brill, Leiden, 2019, pp. 260–281.

[73] First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, Articles 1 and 2 (https://www.legal-tools.org/doc/7b6b02/). See also, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl, 2005, pp. 830–831.

[74] For the development of this argument, see Cismas, 2014, pp. 119–152, *supra* note 31.

[75] ECtHR, *Holy Monasteries v. Greece*, Judgment, 9 December 1994, Application nos. 13092/87 and 13984/88 (https://www.legal-tools.org/doc/b8427e/).

to hold and invoke rights under the ECHR against the state, since the alternative would leave them without redress for perceived violations. This approach, which equates established churches with non-state legal entities, however, needs to rest on a careful and contextualized analysis of the religion-state relations in a given state. Subsequent jurisprudence of the ECtHR failed to conduct such analysis.[76]

> As a consequence of *Hautaniemi v. Sweden*, it would seem that established churches are automatically considered to fulfil the non-governmental requirement without a contextual analysis; in this sense, the direct state responsibility framework under the ECHR was weakened. [The remaining option is indirect accountability]. The presumption being that a state would incur responsibility only if it fails to prevent or punish human rights abuses by established churches, under the positive obligations doctrine.[77]

A second development relates to domestic courts' more recent practice of affording freedom of religion protections to *for profit* corporate actors.[78] The practice is concerning – more so if it should be upheld by international human rights mechanisms[79] in as much as it may be indicative of the emergence of a special legal (sub-)regime for business entities that claim to also have religious goals. This jurisprudential trend has important socio-legal consequences: the increase and legitimizing of interferences by corporate actors with the rights of women and minorities, the muddling of the conceptual foundations of the right to freedom of religion[80] and the exacerbation of the existing power imbalance

[76] See European Commission of Human Rights, *Finska församlingen i Stockholm and Teuvo Hautaniemi v. Sweden*, Decision of 11 April 1996, 11 April 1996, Application No. 24019/94 (https://www.legal-tools.org/doc/t7r4dd/). See also Charlotte Smith, "A Very English Affair: Establishment and Human Rights in an Organic Constitution", in Peter Cane, Caroline Evans and Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context*, Cambridge University Press, 2008, p. 183.

[77] Cismas, 2014, p. 90, see *supra* note 31.

[78] See discussions in Sandra Fredman, "Tolerating the Intolerant: Religious Freedom, Complicity, and the Right to Equality", in *Oxford Journal of Law and Religion*, 2020, vol. 9, no. 2, pp. 305–328; Cismas and Cammarano, 2016, see *supra* note 60.

[79] Note that the ECtHR has dismissed the case *Gareth Lee v. the United Kingdom*, Application no. 18860/19 on grounds of non-exhaustion of domestic remedies and has not pronounced itself on the merits of the case.

[80] Specifically, collective forms of manifestation of religion, including of religious legal entities, are derivative from the individual's right to manifest religion. Case law, such as *Hobby Lobby* severs these ties with profound conceptual and empirical implications. See Cismas and Cammarano, 2016, pp. 22–26, *supra* note 60.

between individuals and corporations,[81] coupled with restricted avenues of accountability for the latter.[82]

Finally, let us turn to individual religious leaders. The International Criminal Tribunal for Rwanda ('ICTR') convicted a number of religious leaders for their involvement in the Rwandan genocide.[83] The judgments signal that no one is above the law, not even men of God – we could infer, therefore, that religious leaders whose actorhood takes the shape of individuals enjoy rights and obligations under international law in a similar fashion to other human beings.[84] We must, nonetheless, recognize that a special regime, albeit not a self-contained one,[85] exists for situations where individualized actorhood intersects with their professional function. The first instantiation refers to clerical privilege, which is recognized in the rules of procedures of various international criminal courts. It is noteworthy that the "confidentiality relationship" between a cleric and a penitent receives protection in the same manner as that between a doctor and a patient or legal counsel and their client.[86] This functional professional privilege

81 *Ibid*., pp. 34–42.

82 See Juan Calderon-Meza, "Seeking Accountability of Corporate Actors", in Nina Jørgensen (ed.), *The International Criminal Responsibility of War's Funders and Profiteers*, Cambridge University Press, 2020, pp. 362–395; Ioana Cismas and Sarah Macrory, "The Business and Human Rights Regime under International Law: Remedy without Law?", in James Summers and Alex Gough (eds.), *Non-State Actors and International Obligations*, Brill Nijhoff, Leiden, 2018, pp. 222–259.

83 ICTR, *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Trial Chamber I, Judgment and Sentence, 21 February 2003, ICTR-96-10 and ICTR-96-17-T (https://www.legal-tools.org/doc/30307b/); ICTR, *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Appeals Chamber, Judgment, 13 December 2004, ICTR-96-10-A and ICTR-96-17-A (https://www.legal-tools.org/doc/af07be/); ICTR, *Prosecutor v. Athanase Seromba*, Trial Chamber III, Judgment, 13 December 2006, ICTR-2001-66-I (https://www.legal-tools.org/doc/e0084d/); ICTR, *Prosecutor v. Athanase Seromba*, Appeals Chamber, Judgment, 12 March 2008, ICTR-2001-66-A (https://www.legal-tools.org/doc/b4df9d/).

84 See generally Andrew Clapham, "The Role of the Individual in International Law", in *European Journal of International Law*, 2010, vol. 21, no. 1, pp. 25–30; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge University Press, 2016, and for a critique of Peters' book, see, Tara J. Melish, "Beyond Human Rights: The Legal Status of the Individual in International Law. By Anne Peters. Cambridge, UK: Cambridge University Press, 2016. pp. xxxv, 602. Index", in *American Journal of International Law*, 2019, vol. 113, no. 3, pp. 654–664.

85 For the difference between the two concepts, see generally Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 216 (https://www.legal-tools.org/doc/dda184/).

86 International Criminal Court, Rules of Procedure and Evidence, 3–10 September 2002, ICC-ASP/1/3, Rule 73 (https://www.legal-tools.org/doc/8bcf6f/). See also Cismas, 2014, pp. 43–44, *supra* note 31.

may be limited when there is a reasonable expectation of disclosure.[87] The second case refers to religious personnel in armed conflict and requires a detailed examination.

13.4.2. Religious Personnel – A Test Case

Under treaty and customary IHL, applicable in both international and non-international armed conflict,[88] military and civilian religious personnel "exclusively assigned to religious duties must be respected and protected in all circumstances"; yet "[t]hey lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy".[89] To be considered religious personnel, an individual would have to cumulatively fulfil two conditions: they must be assigned to their religious duties by a party to a conflict under whose control they are placed (attachment), and the assignment must be exclusive, limited to them in fulfilling their ministry work or spiritual function (exclusivity).[90]

The dual obligation to respect and protect religious personnel requires that parties to an armed conflict refrain from attacking them and take positive measure to help them in fulfilling their duties.[91] The religious personnel status entitles such individuals to wear the distinctive emblems of the Geneva Conventions.[92]

---

87 See ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Minutes of Proceedings, 30 November 2001, ICTR-99-52. See also Robert John Araujo, "International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the Priest-Penitent Privilege under International Law", in *American University International Law Review*, 1999, vol. 15, no. 3, pp. 639–666.

88 In what concerns the applicability of the obligation to respect and protect religious personnel in non-international armed conflict, the ICRC Study on Customary IHL notes, as treaty sources, Article 9 of the Additional Protocol II and Article 8(2)(e)(ii) of the Statute of the International Criminal Court, as well as specific references in military manuals (Canada, the Netherlands and the United Kingdom) in national legislation, some other state practice, and the absence of contrary practice. Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, International Committee for the Red Cross, Cambridge University Press, 2005, Chapter 7, Rule 27 (Religious Personnel) and corresponding practice, and Rule 28 (Medical Units) and corresponding ('ICRC Study on Customary IHL').

89 *Ibid*., Rule 27 (Religious Personnel).

90 *Ibid*. In respect to medical personnel (the special protection regime which is applied by analogy to religious leaders), Kolb and Nakashima note: "This definition is considered applicable in both IAC and NIAC, subject to the differences resulting from the presence of non-State armed groups". Robert Kolb and Nakashima Fumiko, "The Notion of "acts harmful to the enemy" under International Humanitarian Law", in *International Review of the Red Cross*, 2019, vol. 101, no. 912, p. 1174.

91 See ICRC Study on Customary IHL, Rules 27 (Religious Personnel) and 30 (Persons and Objects Displaying the Distinctive Emblem), *supra* note 88.

92 *Ibid*.

Can this protective status conferred upon religious personnel be considered an example of special 'rights'[93] of religious leaders? It is worth recalling that religious personnel are not unique, in that medical personnel, for example, also enjoy a special protective status under IHL. Indeed, the rights regime of medical personnel, and the conditions in which they may lose special protection, are applied *mutatis mutandis* to religious personnel. As such, it would be incorrect to conclude that the special legitimacy which religious actors enjoy translates into a unique IHL legality regime. Instead, they enjoy a special protective status because of the professional function that they fulfil in times of war, comparative in nature and scope to other actors with similar functions.[94] Let us thus examine the requirement of 'exclusivity' and the consequences of loss of protection, followed by the requirement of 'attachment'.

13.4.2.1. (Non-)Exclusivity and Loss of Protection

Exclusivity in reference to religious personnel refers to these actors' spiritual function and the involvement in the work of their ministry on the battlefield. In addition to providing spiritual guidance to combatants or fighters, leading in prayer, administering funerals and organizing religious fasts and feasts, religious personnel may carry out medical tasks, provide social services for combatants or fighters and their families and organize recreation – these activities would not be considered to taint the exclusivity criterion, yet pursuing another occupation on a full-time basis may be.[95] In some armed forces and organized armed groups, religious personnel are tasked with instructing combatants and fighters on military ethics, IHL or the norms on conduct in war of a particular religion.[96] Due to their direct institutionalized channels of communication to the higher ranks and ordinary combatants, religious personnel hold a great potential to influence the behaviour of armed actors through instruction and advice.[97] Notably, in a 2019

93 Whether IHL gives rise to rights for individuals is a matter of doctrinal debate, see Lawrence Hill-Cawthorne, "Rights under International Humanitarian Law", in *European Journal of International* Law, 2017, vol. 28, no. 4, pp. 1187–1215; and Anne Peters, "Direct Rights of Individuals in the International Law of Armed Conflict", Max Planck Institute for Comparative Public Law and International Law Research Paper No. 23, 19 December 2019.

94 ICRC Study on Customary IHL, Rule 25 (Medical Personnel), see *supra* note 88.

95 Stefan Lunze, "Serving God and Caesar: Religious Personnel and Their Protection in Armed Conflict", in *International Review of the Red Cross*, 2004, vol. 86, no. 853, p. 75. See also, for activities performed by chaplains, Andrew Bartles-Smith, "Religion and International Humanitarian Law", in *International Review of the Red Cross*, 2022, nos. 920–921, p. 30; and Ron E. Hassner, *Religion on the Battlefield*, Cornell University Press, Ithaca, 2016.

96 See Bartles-Smith, 2022, p. 30, *supra* note 95.

97 Channels and means of communication have been identified by the Generating Respect Project as one of the relevant variables, based on which we can identify the influence of religious leaders on parties to armed conflict.

address, Pope Francis encouraged Catholic religious personnel to contribute to the socialization of combatants in the norms and spirit of IHL:

> Dear Ordinaries and military chaplains: as you carry out your mission to form the consciences of the members of the armed forces, I encourage you to spare no effort to enable the norms of international humanitarian law to be accepted in the hearts of those entrusted to your pastoral care.[98]

Whilst noting the important role that religious personnel could play in enhancing IHL compliance, Bartles-Smith observes that some have "accused military religious personnel of acting more like indoctrination agents than true clergy".[99] Which brings us to the question of the scope of non-exclusivity. Would indoctrination, religiously-grounded war propaganda or recruitment interfere with the exclusivity criterion, and if so, with what consequences?

In addressing this question, let us first establish the consequences of a loss of special protection for religious personnel – the IHL regime for medical personnel is applied *mutatis mutandis* to chaplains.[100] As such, religious personnel would lose their special protection if they commit "outside their humanitarian function, acts harmful to the enemy" ('AHTTE') or "hostile acts, outside their humanitarian function", terminology present in the First Geneva Convention, Additional Protocol I and respectively II, and taken to carry the same meaning.[101]

According to Kolb and Nakashima's analysis, *civilian* religious personnel involved in AHTTE would lose their special protection after they have been provided with a warning to cease the harmful conduct, a reasonable period to comply, and if the warning was not heeded.[102] As a consequence, they would fall back onto the general protection provided by their status as civilians. As such, the loss of special protection does not automatically make them subject to a direct attack – they would become targetable only if, and for such time, they are

98 Holy See Press Office, Summary of Bulleting, "Audience with the Participants in the Fifth International Course of Formation of Catholic Military Chaplains on International Humanitarian Law, 31 October 2019" (available on its web site). See also, Bartles-Smith, 2022, p. 30, *supra* note 95.

99 Bartles-Smith, 2022, p. 30, and the cited source, Hassner, 2016, see *supra* note 95.

100 See ICRC Study on Customary IHL, Rule 27 (Religious Personnel), see *supra* note 88. Note that the loss of protection of medical personnel draws on an analogy with the loss of protection of medical units and transports.

101 *Ibid*., Rule 25 (Medical Personnel).

102 It remains debatable whether the warning requirement applies also in non-international armed conflict as a matter of customary international law. Kolb and Nakashima, 2019, p. 1183, see *supra* note 90.

engaged in direct participation in hostilities ('DPH').[103] Sassòli notes that "the expression 'acts harmful to the enemy' was elaborated for medical units and establishments, while 'direct participation in hostilities' refers to persons".[104] Premised on this difference, he posits that loss of special protection should occur only if civilian religious personnel are involved in DPH. Whichever view one takes – that AHTTE must amount to DPH to result in loss of social protection or that AHTTE is a wider concept not requiring DPH – for the purposes of targeting *civilian* religious personnel, there is, ultimately, no difference, because the DPH test would have to be applied anyway to establish the lawfulness of a direct attack.

Sassòli's premise would make a significant difference for *military* religious personnel. Kolb and Nakashima contend that the loss of special protection for military medical personnel, and thus analogously for military religious chaplains, results from their involvement in AHTTE and, after the requirements for the warning-prong have been met, with the consequence being that they will become liable to direct attack.[105] In other words, according to these authors' analysis, the loss of special protection means that military religious personnel revert to the status of fighter (combatants) and can be targeted at all times.[106] On Sassòli's submission, however, loss of special protection for military religious personnel would "be limited to acts that amount to direct participation in hostilities, because this notion would be a more relevant criteria for persons than the notion of acts harmful to the enemy, which had been developed for objects".[107]

This view appears to be supported by the Commentary to the First Geneva Convention, which notes that "[t]he consequences of medical or religious personnel committing an 'act harmful to the enemy outside their humanitarian

[103] See *ibid*., p. 1195. The DPH test comprises three elements that must be cumulatively met: the threshold of harm, direct causation and belligerent nexus; see Niels Melzer, *ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 46–64.

[104] Marco Sassòli, "When do Medical and Religious Personnel Lose What Protection?", in *Vulnerabilities in Armed Conflicts: Selected Issues: Proceedings of the Bruges Colloquium*, 17–18 October 2013, p. 54.

[105] Kolb and Nakashima, 2019, p. 1195, see *supra* note 90.

[106] *Ibid*.

[107] The cited text is from Laurent Gisel, "The Protection of Medical Personnel under the Additional Protocols: The Notion of 'Acts Harmful to the Enemy' and Debates on Incidental Harm to Military Medical Personnel", in Fausto Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, 40th Round Table on Current Issues of International Humanitarian Law, San Remo, 7–9 September 2017, p. 167, who summarizes Sassòli, 2013, p. 54, see *supra* note 104.

duties' need to be measured in a nuanced way".[108] Because the bindingness of the warning requirement in non-state armed conflict is unclear[109] and, as we shall see below, the application of the attachment requirement in respect to non-state parties is often muddled – thus potentially increasing the number of individuals that could be classed as military religious personnel. It seems that the more cautious approach is that of applying the DPH test to military religious personnel for the purposes of lawful targeting. This would be in line with "humanitarian considerations".[110]

Whilst being involved in AHTTE, and certainly in DPH, would result in non-exclusivity of religious personnel, state practice would not seem to support a literal interpretation of the term 'exclusive'.[111] Benson surveyed the practice of the United States and Israel, finding that strategic advice to military commanders, a certain level of indoctrination and even human intelligence collection[112] are part of the activities undertaken by some military religious personnel.[113] Hassner makes similar observations relying on historic and more recent cases.[114] From a legal doctrinal point of view, one can either conclude that some of these instances represent departures from the treaty and customary law provision on the exclusivity of chaplains or that the term is interpreted more broadly in state practice. A social constructivist lens would point either to a lack of a shared understating of what exclusivity means or that an understanding exists, or is emerging, which has faded the exclusivity norm away from its literal meaning.

---

[108] Bruno Demeyere, "Article 24: Protection of Permanent Personnel", in *Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949*, ICRC, Geneva, 2016, para. 2008.

[109] See *supra* note 102 and reference therein.

[110] The 2016 ICRC Commentary to the First Geneva Convention, whilst differentiating between AHTTE and DPH, with the former being considered wider and the latter narrower, appears to allow for differing interpretations, "in view of the humanitarian values at stake, in case of doubt as to whether a particular type of behaviour qualifies as an act harmful to the enemy, it ought not to be considered as such". Demeyere, 2016, paras. 1998, 2002, see *supra* note 108.

[111] Contrast with Holterhus, who argues precisely for such a literal reading of exclusivity. Till Patrick Holterhus, "Targeting the Islamic State's Religious Personnel Under International Humanitarian Law", in *Yearbook of International Humanitarian Law*, T.M.C. Asser Press, The Hague, 2019, pp. 216–218.

[112] This would seem to amount to AHTTE and possibly DPH in respect to medical personnel, hence, by analogy also to religious personnel. See Kolb and Nakashima, 2019, p. 1195, *supra* note 90.

[113] K. Benson, "The Chaplaincy Exception in International Humanitarian Law: American-Born Cleric Anwar Awlaki and the Global War on Terror", in *Buffalo Human Rights Law Review*, 2014, vol. 1, no. 20, pp. 1–36.

[114] Hassner, 2016, see *supra* note 95.

How then can we answer the leading question of this section, whether indoctrination, religiously-grounded war propaganda or recruitment interfere with the exclusivity criterion, and if so, with what consequences? Whilst these activities may taint the exclusivity requirement (although state practice appears rather tolerant on this aspect), they would not amount to DPH,[115] and thus should not result in the lawfulness of targeting religious personnel, whether civilian or military.

13.4.2.2. Attachment

Attachment is the other condition that must be met by religious leaders to benefit from special protection under IHL.[116] Among this mixed category of 'attached' personnel, a crucial distinction to be made is that between military and civilian religious personnel because a loss of protection, as we have seen above, could result in different consequences for the purposes of targeting. Assignment to armed forces or wings of a party to a conflict will also often have clear implications for the ability of religious personnel to influence commanders, as well as rank and file members. This is so, because of the direct access and institutionalized channels of communications it provides. In the case of the Colombian Armed Forces, this observation has been confirmed by a former military chaplain.[117] Moreover, differentiating religious *personnel* and religious leaders *tout court*, is particularly pertinent when parties to an armed conflict have armed or military forces or wings, as well as humanitarian and political wings.

Let us engage critically with an example from literature to understand the various implications. Holterhus argues, in respect to the Islamic State ('IS'), that a loss of protection results in "IS-chaplains" – which he equates with military religious personnel due to their "membership in the IS organized armed group" – becoming lawful targets of direct military attacks.[118] In other words, due to

[115] See Melzer, 2009, p. 24, *supra* note 103. However, on propaganda, see Alexandre Balguy-Gallois, "The Protection of Journalists and News Media Personnel in Armed Conflict", in *International Review of the Red Cross*, 2004, vol. 86, no. 853, p. 12.

[116] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 8(d) ('Additional Protocol I') (https://www.legal-tools.org/doc/d9328a/). Article 15 of Additional Protocol I extends the scope of Article 24 of the First Geneva Convention and Article 36 of the Second Geneva Convention to provide protective status for civilian religious personnel, in addition to military religious personnel. The ICRC Study on Customary International Humanitarian Law notes that the "extension is widely supported in State practice […] [and also] […] by States not, or not at the time, party to Additional Protocol I". See ICRC Study on Customary IHL, Rule 27 (Religious Personnel), see *supra* note 88.

[117] Piergiuseppe Parisi and Yolvi Lena Padilla Sepulveda, "Interview with former military chaplain", Colombia, February 2022.

[118] Holterhus, 2019, pp. 213–216, 218, see *supra* note 111.

their non-exclusivity through involvement in war propaganda and recruitment (thus, arguably failing one criteria), but by continued attachment (meeting the other), they 'fall back' on the status of fighters.

> As members of the organized armed group IS, IS's religious personnel can, therefore, as every other ordinary member, legally be subjected to direct military attack at any time (within the limits of the IHL's principles of necessity, proportionality, humane treatment, etc.).[119]

As argued above, I consider the better approach, for the purposes of establishing loss of protection, to be engagement in DPH, for both civilian and military personnel. Be that as it may, Holterhus' analysis raises two other problematic aspects. First, the term "organized armed group" – the entity to which "IS-chaplains" are purportedly attached – appears to be understood by Holterhus as IS, the non-state party to a conflict, and not solely as IS' armed wing.[120] This is in stark contrast with interpretative practice. The International Committee of the Red Cross ('ICRC') Interpretative Guidance on the notion of DPH differentiates between military or armed wings, political wings and humanitarian bodies, and concludes that in respect to targeting, the term "organized armed group" needs to be understood as referring to the armed wing of a non-state party to a conflict.[121] Similarly, Article 8, paragraph (d) of Additional Protocol I stipulates that for a chaplain to be considered 'attached', they need to be attached to "the *armed forces* of a Party to the conflict"[122] – importantly, this provision is arguably also applicable in non-international armed conflict, thus in reference to armed wings of non-state parties as well.[123]

---

[119] *Ibid*., p. 218.

[120] For Holterhus' analysis on this aspect, see Holterhus, 2019, pp. 213–216, *supra* note 111.

[121] Melzer, 2009, p. 32, see *supra* note 103:

> it is crucial for the protection of the civilian population to distinguish a non-state party to a conflict (e.g., an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group). As with state parties to armed conflicts, non-state parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-state party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-state party to the conflict.

See also, for a supportive yet novel perspective that allows to address a potential accountability gap, Katharine Fortin, "Civilian Wings of Armed Groups: included within the concept of 'Non State Party' under IHL?", in *Armed Groups and International Law*, 13 October 2020 (available on its web site).

[122] See Additional Protocol I, Article 8(d), *supra* note 116 (emphasis added).

[123] See ICRC Study on Customary IHL, *supra* note 116.

The equivalency, operated by Holterhus, between the non-state armed group in its totality and its armed wing, potentially renders a very large number of religious leaders affiliated to IS' political wings and media apparatus or religious actors otherwise affiliated to one of IS' organizations – yet not attached, in the sense required by IHL, to their armed wing – classifiable as military religious personnel.[124] Concretely, let us look at members of the IS Research and *Fatwá* Department and staff of the *Dabiq* magazine. The first is IS' politico-religious department and the second is its English-language magazine – both are involved in religiously grounded war propaganda and likely in recruitment efforts.[125] They have published the most horrendous justifications of enslavement, sexual slavery and rape of girls and women, "as religiously meritorious: not just acceptable but a positive good. Rather than grudgingly grant its permissibility, or merely matter-of-factly assume its legality as most premodern texts do, IS proclaims enslavement a triumphalist reflection of its own legitimacy".[126]

Undoubtably, these are prosecutable international crimes.[127] Indeed, the Independent International Commission of Inquiry on the Syrian Arab Republic has used articles published in *Dabiq* among the evidence based on which it inferred 'intent to destroy', as an element of the crime of genocide.[128] Be that as it may, these remain actors that are part of IS' political wings and as such cannot be considered attached to its military wing.

---

[124] When a member of an "organized armed group" becomes targetable remains a contested matter. The ICRC Interpretative Guidance proposes a functional membership approach, that is, "membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group and lasts until he or she ceases to assume such function". Melzer, 2009, p. 71 and Section ii.3, see *supra* note 103; see also, Gloria Gaggioli, "Targeting Individuals Belonging to an Armed Group", in *Vanderbilt Journal of Transnational Law*, 2018, vol. 51, no. 901, pp. 901–917. Contrast with Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance", in *New York University Journal of International Law & Politics*, 2009, vol. 42, pp. 641–695.

[125] See, for example, Brendon Colas, "What Does Dabiq Do? ISIS Hermeneutics and Organizational Fractures Within Dabiq Magazine", in *Studies in Conflict and Terrorism*, 2017, vol. 40, no. 3, pp. 173–190; Emily Chertoff, "Prosecuting Gender-Based Persecution: The Islamic State at the ICC", in *Yale Law Journal*, 2017, vol. 26, no. 4, pp. 1050–1117.

[126] Kecia Ali, "Redeeming Slavery: The 'Islamic State' and the Quest for Islamic Morality", in *Mizan*, *Journal of Interdisciplinary Approaches to Muslim Societies and Civilizations*, 2016, vol. 1, no. 1, p. 6, pp. 1–22.

[127] See Chertoff, 2017, *supra* note 125.

[128] "ISIS explicitly holds its abuse of the Yazidis to be mandated by its religious interpretation and its public statements have provided an invaluable resource directly demonstrative of its intent". Independent International Commission of Inquiry on the Syrian Arab Republic, "'They came to destroy': ISIS Crimes Against the Yazidis", UN Doc. A/HRC/32/CRP.2, 15 June 2016, paras. 150–165 and citation at para. 151 (https://www.legal-tools.org/doc/24962f/).

A second problematic aspect ensuing from Holterhus' article is the presumption of attachment based on a religious leader's membership in IS. Doctrine presents attachment as an intentional act that must be undertaken by an authority, not the religious leader themselves. A person can be a member of the armed wing or forces whilst also (having qualifications as) a cleric; unless an authority assigns them to the armed entity or expressly accepts them as (military) religious personnel, the person will not enjoy special protective status, but be subject to the legal regime applicable to fighters.[129] Lunze notes that:

> The decision on the attachment of religious personnel rests with the competent military authorities and creates an official relationship between chaplain and armed forces. […] A unilateral declaration of the religious ministers themselves or their religious community is insufficient to constitute chaplain status. Instead, they must be received into the group they are attached to, designated for or at least accepted by.[130]

The Commentary of 1987 on the Additional Protocols explains why the intentionality of attachment is a key element in the architecture of the religious personnel institution:

> the competent authorities of the Parties to the conflict therefore retain responsibility for designating, or at least accepting, religious personnel who will enjoy protection. It should be reme mbered that this restriction is justified by the fact that the authorities of the Parties to the conflict are responsible for the application of the Protocol, and in particular for ensuring that no abuses will be committed by protected persons. To automatically and generally attribute the right to protection to all medical or religious personnel would make such a task extremely difficult, if not impossible.

Consequently, the better view must be that military religious personnel would need to be *intentionally* attached to a non-state party's *armed wing* or a state party's *armed forces* to be eligible for special protection, whereas the attachment of the civilian religious personnel would be to their humanitarian or medical agencies.[131] Other religious leaders that are not assigned specifically as military or civilian religious personnel cannot claim special protection, but would certainly enjoy general protection as civilians. This interpretation is supported by the Commentary of 1987, when it notes that:

---

[129] Lunze, 2004, p. 75, see *supra* note 95. See also, Demeyere, 2016, paras. 1972–1976, *supra* note 108.

[130] Lunze, 2004, p. 75, see *supra* note 95.

[131] Note also, the provisions of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Article 9(2) ('Additional Protocol II') (https://www.legal-tools.org/doc/fd14c4/).

> The majority of civilian religious personnel *in the usual meaning of the term*, i.e., those carrying out their function amongst the civilian population, are therefore not covered by this provision. However, special protection cannot be justified for such personnel, who, it should be remembered, remain covered by the general protection accorded the population and all civilian persons.[132]

The observation echoes empirical findings from the Generating Respect Project and other research. For example, in the Philippines, Bangsamoro Darul-Ifta', the Islámic council with authority over religious matters in the central Mindanao island group, was instrumental in facilitating the engagement between the UN and the Moro Islamic Liberation Front ('MILF') concerning the Action Plan on the Recruitment and Use of Children in Armed Conflict.[133] The plan led to the disengagement of almost 2,000 children from the ranks of the MILF's Bangsamoro Islamic Armed Forces ('BIAF').[134] A UNICEF report notes:

> To ensure the Action Plan received full acceptance by its forces from a religious point of view, the MILF first consulted its Darul Ifta (Religious Council), which deliberated and confirmed that the Action Plan did not contravene Islamic teachings and principles, and endorsed the agreement for signing by the MILF leadership. This mitigating step by the MILF leadership minimised possible resistance to the legitimacy of the Action Plan among the commanders and elements, greatly facilitating its implementation in later years.[135]

The actions of the Darul-Ifta' provide an extraordinary example of the influence of religious leaders on parties to armed conflict and their potential – or in this case, the actuality – to generate greater respect for IHL and IHRL. Be that as it may, unlike the BIAF's Department of Islamic Call and Guidance, "which oversees senior religious leaders from its rank who are given lead roles as *murshideen* and *murshidaat* to provide Islámic guidance to the BIAF and BIWAB [Bangsamoro Islamic Women Auxiliary Brigade] in all base

---

132 Claude Pilloud, Yves *Sandoz*, *Christophe Swinarski* and *Bruno Zimmermann*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, M. Nijhoff Publishers, Geneva, 1987, p. 195 (emphasis added).

133 See, generally, Jeyashree Nadarajah, "Children in Armed Conflict: Philippines", UN International Children's Emergency Fund ('UNICEF'), 2019.

134 *Ibid*., p. ii.

135 *Ibid*., p. 20. See also, for a discussion of the legal argumentation of the MILF, Heyran Jo, "Non-State Armed Actors and International Legal Argumentation: Patterns, Processes, and Putative Effects", in Ian Johnstone and Steven Ratner (eds.), *Talking International Law: Legal Argumentation Outside the Courtroom*, Oxford University Press, 2021.

commands",[136] the Darul-Ifta' cannot be classified as military (or civilian) religious personnel, either on ICRC's functional approach or by employing formal criteria of membership in the armed wing.[137] Whilst the difference may appear one of scholarly pedantry, it is not – it may have very real implications for the targeting regime that these leaders will be subjected to in case of loss of protection; in particular, if such loss is considered to occur for AHTTE that do not amount to DPH.[138] It may signify the difference between being prosecutable or being killable. With this reflection in mind, let us turn to avenues for ensuring accountability for abuse.

13.5. (Rethinking) Accountability

Having established that religious leadership spans the state–non-state spectrum and their obligations under international law largely map onto the obligations of their respective non-religious peers, what then can be said about avenues of accountability? International law is a notoriously weak system when it comes to accountability – unsurprisingly given its anarchic and consensualist nature. Accountability is the system's "Achilles' heel" as Krieger noted in relation to IHL,[139] an observation that equally applies to other branches of international law, despite the mushrooming of international courts and quasi-judicial mechanisms that can be observed in recent decades. Be that as it may, is accountability more difficult to achieve when one deals with religious states and religious non-states actors, including individuals?

Beyond the anecdotal evidence provided by the initial accommodating treatment which the Holy See had received during its periodic review by UN treaty bodies, it is difficult to assert that the international system has a reticence to specifically hold religious actors to account. Among the states that various judicial and quasi-judicial bodies have sought to hold accountable, we can find religious states; international criminal courts have convicted individual clerics,

[136] *Ibid*., p. 4. For a wider discussion of the role of these religious leaders in legitimizing processes of vernacularization of IHL, see Dominic Earnshaw and Datuan Magon, "Engaging *Ulama* in the Promotion of International Humanitarian Law: A Case Study from Mindanao", in *Journal of Human Rights Practice*, 2023 (forthcoming), and Chris Rush, Annyssa Bellal, Pascal Bongard and Ezequiel Heffes, "From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms", Moro Islamic Liberation Front/Bangsamoro Islamic Armed Forces, August 2022.

[137] See, for a discussion of the two approaches, Melzer, 2009, *supra* note 103, in contrast to Holterhus, 2019, see *supra* note 111.

[138] This chapter has emphatically argued against this interpretation.

[139] Heike Krieger, "Introduction", in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, 2015, p. 1.

and indeed even religious personnel.[140] When it comes to non-state legal entities, religious or otherwise, direct accountability under international law is largely absent, due to lack of personal jurisdiction. Against this background of generalized difficulty to ensure state and non-state actors' accountability, non-religious and religious, two interrelated trends are noticeable, in particular in the fields of IHRL and IHL. First, there is a turn towards soft law, arguably as a "complement" or "alternative" to hard law.[141] Second, we note a reconceptualization of accountability into a more holistic notion, which is achieved by widening its scope to include non-judicial and extra-legal mechanisms and processes.

Illustrative of both trends is the process which began with the adoption of the Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence ('Rabat Plan').[142] This instrument has succeeded in resetting the terms of discussion away from the 'defamation of religions' resolutions, championed by the OIC at the turn of the century, towards a much needed debate on hate speech that incites violence, "an area of human rights law which has long remained dormant and the implementation of which is lacking in many respects".[143] The Rabat Plan was followed by the Beirut Declaration on Faith for Rights, the 18 commitments on Faith for Rights and the subsequent operationalization through the #Faith4Rights toolkit, described as a "practical peer-to-peer learning and capacity-building programme".[144] Essentially, the Faith for Rights framework promotes the engagement between and among human rights scholars and practitioners and religious leaders. Its aim is to achieve a form of preventative accountability by creating shared understandings on human rights and religions.

---

[140] Emmanuel Rukundo, convicted by the ICTR was a chaplain in the Rwandan Armed Forces. See ICTR, *Prosecutor v. Emmanuel Rukundo*, Trial Judgment, 27 February 2009, ICTR-2001-70-T (https://www.legal-tools.org/doc/1c7819/).

[141] For a discussion of these terms, see the excellent article of Gregory C. Shaffer and Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance", in *Minnesota Law Review*, 2009, vol. 94, pp. 706–799.

[142] United Nations Human Rights Council, Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, Conclusions and Recommendations Emanating from the Four Regional Expert Workshops Organized by OHCHR in 2011, and Adopted by Experts at the Meeting in Rabat, Morocco, on 5 October 2012, Appendix to the Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, UN Doc. A/HRC/22/17/Add.4, 11 January 2013 (https://www.legal-tools.org/doc/oymwge/).

[143] Cismas, 2014, pp. 62–69 and in particular p. 68, see *supra* note 31.

[144] See "OHCHR and the 'Faith for Rights' Framework" (available on the OHCHR's web site); Ibrahim Salama and Michael Wiener, "Faith for Rights in Armed Conflict: Lessons from Practice", in *Journal of Human Rights Practice*, 2023 (forthcoming).

The approach is not dissimilar to that pioneered by An-Na'im, who encouraged already in the early 1990s, the exploration of "possibilities of cultural reinterpretation and reconstruction through *internal cultural discourse and cross-cultural dialogue*".[145]

In the past decades, humanitarian organizations have also increasingly sought to engage with religious leaders. This humanitarian engagement appears to represent an IHL compliance-generation strategy, complementary to direct engagement with the parties to an armed conflict.[146] Engagement as form of accountability, in this case, is understood less as an avenue to address the religious leaders' own liability for their actions and discourse in war, and more as a means to tap into their potential to influence state and non-state parties to conflicts towards greater humanitarian norms compliance. Let us look at some of the interactions that occur between religious leaders and IHL and IHRL, beyond use and abuse.

13.6. Interactions Between Religious Leaders and International Law – Beyond Respect and Abuse

In Section 13.4., this study has identified the rights and obligations of religious leaders under international law, in particular IHRL and IHL, and highlighted some instances of abuse. Beyond these instances, and with particular attention to the context of armed conflict, there is a multitude of activities and discourses put forward by religious leaders that have a bearing on humanitarian norms[147] and which have influenced the behaviour of parties to the conflict or the lived experiences of war-affected communities. In this sense, not only is international law relevant to religious actors, but the latter are relevant to international law. Drawing on literature and our own empirical research, the Generating Respect Project has identified the following typology of interaction of religious leaders with IHL and IHRL:

1. Direct implementation or facilitation;

[145] Abdullahi Ahmed An-Na'im, "Introduction", in Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1992, p. 3 (emphasis in the original).

[146] Such initiatives are documented in Cismas and Heffes, 2021, see *supra* note 33. For a guidance document on humanitarian engagement with religious leaders, see Cismas *et al*., 2023, pp. 22–30, see *supra* note 30. See also, the excellent blog of the ICRC, "Religion and Humanitarian Principles" (available on its web site).

[147] The Generating Respect Project has focused on three broad norms – the protection of civilians from attacks, the protection of detainees and the facilitation of humanitarian assistance – understood to be anchored in both IHL and IHRL. However, the fieldwork findings have relevance to other norms.

2. Processes of 'translation' of humanitarian norms, such as vernacularization;
3. Strategic avoidance;
4. Hybridization and selective application;
5. Rejection;
6. Silence.[148]

The first type of interaction may perhaps be surprising for some. Religious leaders are often direct implementers of IHL and IHRL in armed conflict, because of their strong links with local communities and their legitimacy among parties to conflict. In Myanmar, since the *coup d'état* of February 2021, religious leaders seemed to be the main, and at times the only, actors that manage, at great personal risk, to provide humanitarian assistance to internally displaced people, refugees and other civilians shielding from the violence unleashed by the military junta. One religious leader recounts:

> So people when they are fleeing, when they are running for their life they, they call us or they talk to their friends and their friends know us, and they got our numbers and they say please can you bring rice. So that's how we are working. We are working directly with the people who are really in the war zone […] we are not working with other organizations.[149]

Interestingly, in some instances, an element of inter-faith co-operation can be observed:

> So, we went to the temples to talk with the Buddhist monks because Buddhist temples are big, big enough to receive all these [displaced] people […] when we bring the rations, we give it to the monk because we trust them, they will not use it, you know, they will not do anything, so we, we give it to them to give out.[150]

In Colombia, Catholic religious leaders have often acted as mediators in hostage situations and their intervention often led to the release of both civilians and members of armed forces.[151] Similar interventions of Islámic religious leaders have been documented in Mali.[152]

A different context offers a most fascinating example of advocacy by religious leaders that contributed to greater gender equality within a non-state

148 See Cismas *et al*., 2023, pp. 30–38, *supra* note 30.

149 Rush and Cismas, 2022, see *supra* note 47.

150 *Ibid*.

151 See Piergiuseppe Parisi and Adelaida Ibarra, "The Catholic Church and Conflict Actors: In Search of Legitimacy to Build", in *Journal of Human Rights Practice*, 2023 (forthcoming).

152 See Piergiuseppe Parisi, "Confronting Rifles with Words: The High Islamic Council of Mali and Armed Actors", in *Journal of Human Rights Practice*, 2023 (forthcoming).

armed group. A member of the group approached influential religious leaders, explaining that women carry a significant burden in terms of domestic and auxiliary work, yet they "would like to contribute in the decision making room, not just supporting the men's wing".[153] The religious actors conveyed these views to the armed group's leadership, and subsequently the space was created for women to occupy decision-making positions in the group's political wing.[154]

The second type of interaction refers to translation processes of humanitarian norms by religious actors through vernacularization, localization or pluralization.[155] As stated above, religious leaders claim a special legitimacy drawing on tradition or charisma. Due to these sources of legitimization, a religious command that supports human rights and humanitarian norms may vernacularize or localize these norms in a manner, in which 'domestication' of international law through parliamentary acts on its own would not be able to achieve. This is much in keeping with the suggestions made in the seminal *The Roots of Restraint in War* study, that "humanitarian norms have received greater traction" by "linking the law to local norms and values", since this connection encourages individual members of the parties to a conflict to internalize the standards, which in turn promotes restraint in war in a more durable manner.[156] The role of the *'ulama'* in the development of rules of conduct in war for the MILF provides such an example of vernacularization.[157]

Strategic avoidance, a third type of interaction, is particularly motivating, because it demonstrates that religious actors are, at times, interested in promoting IHRL and IHL, and will find creative ways to do so in complex contexts where political and societal elites reject a rights-based discourse. Doffegnies and Wells identify religious leaders' initiatives in Myanmar who sought to address the violence against the Rohingya, yet consciously avoided using human rights language due to "popular rejection".[158] Similarly, for strategic reasons, some religious leaders with confirmed influence on non-state armed groups may prefer to address aspects of IHRL and IHL with these actors directly behind closed

[153] Chris Rush and Ioana Cismas, "Interview with member of armed group", 2022. Information about the location of the group is suppressed to ensure anonymity.

[154] *Ibid*.

[155] For vernacularization, see, generally, Sally Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice*, University of Chicago Press, 2006. Localization and pluralization are discussed and illustrated in Cismas *et al*., 2023, pp. 32–35, see *supra* note 30.

[156] Fiona Terry and Brian Quinn, *The Roots of Restraint in War*, 12 June 2020, p. 9.

[157] See Earnshaw and Magon, 2023, *supra* note 136; see also the discussion in the same footnote.

[158] See Amy Doffegnies and Tamas Wells, "The Vernacularisation of Human Rights Discourse in Myanmar: Rejection, Hybridisation and Strategic Avoidance", in *Journal of Contemporary Asia*, 2022, vol. 52, no. 2, p. 247.

doors. Thus, a lack of a public discourse of religious leaders on the topic should not necessarily be read as a complete absence of IHRL and IHL preoccupations. Interestingly, this type of framing which avoids mentioning human rights and resolves to pursue a quiet diplomacy around shared values is not unusual even outside conflict contexts.[159]

The fourth type of interaction, hybridization, describes a declarative adherence to IHRL or IHL by religious leaders, whilst imparting the norms with an own meaning, which, in turn, departs from the posited norm. Doffegnies and Wells refer to religious leaders in Myanmar who presented a vision of human rights that sometimes supported, rather than opposed, the exclusion of Muslim minorities.[160] An illustration of selective application of humanitarian norms comes from Mali, where some Christian religious leaders had been willing to engage with our researchers to discuss their discourse and activities with a bearing on IHL. Yet, they have refused to engage on human rights topics, perceiving the latter as a "problématique piège" as the discussion would, in their view, inevitably centre on the rights of sexual minorities.

During fieldwork conducted for the Generating Respect Project, we have encountered examples of Yemeni religious actors affiliated to the Houthis that have rejected humanitarian standards because of their perceived foreign origin. This firth type of interaction, rejection of IHL and IHRL, is a common theme for Islámist groups such as IS or Al-Qaeda and religious leaders affiliated with them.[161] A project of "critical comparativism", as is the one suggested by Badawi, that treats Islámic law on armed conflict and IHL "as alternative manifestations of power structures which, when contrasted against each other, help shed more light on the inherent bias in each legal system",[162] may provide useful insights into the rejection of humanitarian norms by some Islámist groups and the modalities that could be pursued to effectively engage with such actors.

Sixth, silence, a different concept to that of strategic avoidance, may hide religious leaders' lack of awareness of IHL and IHRL standards or an uneasiness

[159] See Paul Gready, "The Implications of and Responses to Covid-19 in the City of York (UK)", in *Journal of Human Rights Practice*, 2020, vol. 12, no. 2, pp. 250–259.

[160] See Doffegnies and Wells, 2022, p. 247, *supra* note 158.

[161] See "From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norm, The Islamic State Group" and "From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms Al-Qaeda", American University in Cairo, September 2022.

[162] Nesrine Badawi, "Regulation of Armed Conflict: Critical Comparativism", in *Third World Quarterly*, 2016, vol. 37, no. 11, pp. 1990–2009.

with their own conduct in war.[163] This observation, in and of itself, represents a call for humanitarians and human rights actors to engage with religious leaders. Finally, reflexive research practice requires that we ask whether what we perceive as silence may simply be the result of our own narrow conceptualization of religious leadership. In other words, discourses and activities with a bearing on international law standards may well be put forward by religious leaders; however, because we do not regard the emitters as religious leaders, we fail to *see* their actions and understand their implications.

13.7. Conclusion

We return, thus, to Madame Cissé's observation from the opening vignette – that women are often excluded from discussions about law and religion, and that their role in generating norm-compliance is invisibilized. The lesson, we argued, that (international) lawyers should learn from this is the necessity to centre reflexivity in our scholarship and practice, in general and specifically in encounters with religions. Embarking on a reflexive process, this chapter acknowledged its anchoring in social constructivist theory and the embrace of a socio-legal approach, which mixes empirical and doctrinal legal methods to provide a more holistic understanding of the relevance of international law to religious leaders and *vice-versa*. The concept of relevance then comprises the applicability of legal standards and accountability and interactions of religious leaders with international law beyond use and abuse.

Shaped by our theoretical and methodological choices, religious leadership was defined broadly to refer to those actors that claim a special legitimacy grounded in charisma or tradition, have a formal or informal affiliation to religion, express leadership individually or collectively, and span the non-state or state spectrum of actorhood, whilst being institutionally external or internal to armed actors. This understanding of religious leadership has promoted our inquiry into whether these actors enjoy special rights and lesser obligations when compared to their non-religious peers. The analysis concluded that whilst some religious leaders, such as religious personnel, enjoy special rights, this is so because of the function that they fulfil within the system of international (humanitarian) law. In this sense, their special status does not disrupt the system's legality by engendering exceptions from international obligations due to their special legitimacy. Because avenues for seeking redress for violations of international law, whether by non-religious or religious actors, remain imperfect, we observed a move towards a broader approach to accountability. This approach

[163] This silence could be paralleled with the absence of some influential religious actors from transitional justice mechanisms, the absence of which can be linked back to the actors' own complicity in past violations. See Cismas, 2017, pp. 302–343, *supra* note 51.

centres the development of soft law and the engagement between human rights and humanitarian scholars and practitioners, and religious leaders.

Meaningful engagement, we submit, requires that religious leaders are understood to be right-holders and duty-bearers, as well as influencers of IHRL and IHL norms-compliance by third parties. In the context of armed conflict, the Generating Respect Project has documented religious leaders that directly implemented or facilitated, vernacularized, strategically avoided, hybridized, received with silence or rejected humanitarian norms. With this variety of interactions in mind, engagement would have to be sought not only with those religious actors that share the same human rights and humanitarian values or principles as legal scholars and practitioners, but also (and from the point of view of humanitarian organizations, bound as they usually are to engage with all parties to a conflict) particularly with those who do not. On this account then, we may have to (uncomfortably) acknowledge that engagement may have to take the shape of "critical comparativism" and not be premised on the supremacy of international law over religious law. The hope expressed here, a social constructivist one, is that continued engagement will construct relevance, in a thick, socio-legal sense, for international legal standards – that is, both crafting ownership for the standards among religious leaders and addressing the power imbalances within international law and its system.

Publication Series No. 41 (2023):

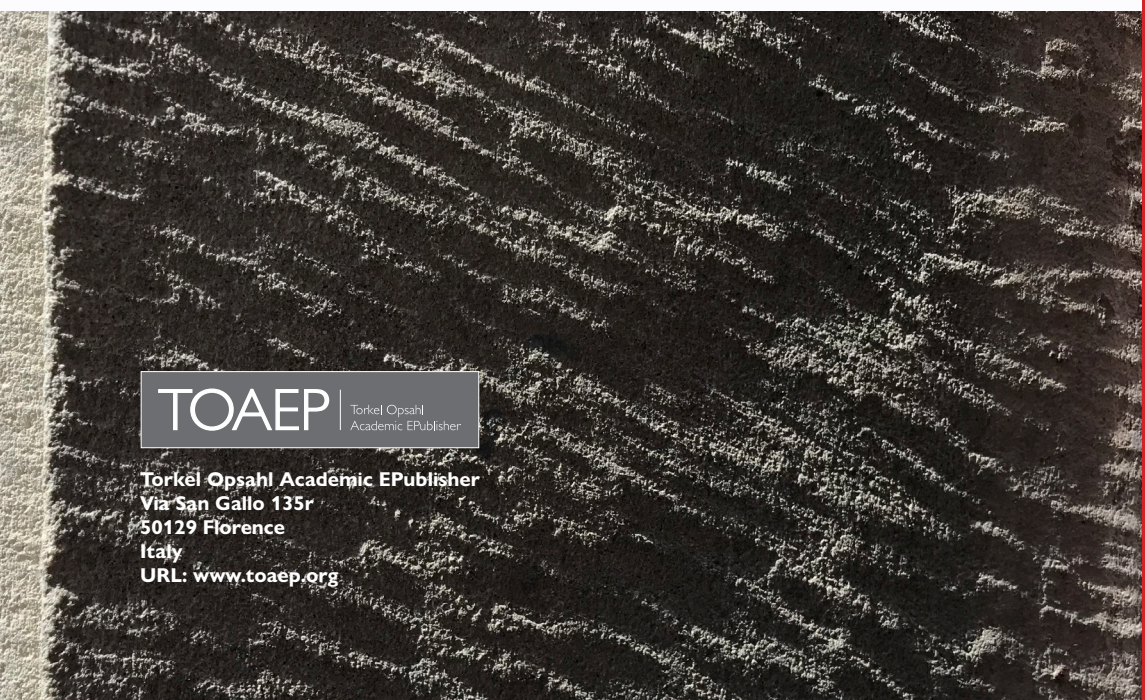
Religion, Hateful Expression and Violence

Morten Bergsmo and Kishan Manocha (editors)

The focus of this comprehensive anthology is hate speech by religious actors or in the name of religion. Such hate speech has grown in severity, leading to tragic occurrences of violence and acts of terrorism. This has become a challenge of concern to the international community as a whole. The anthology offers in-depth case studies of religion-based or -related hate speech (India, Myanmar and the former Yugoslavia); explanations and discussions of relevant international law, philosophical and religious normative frameworks; expert analyses of factors motivating hate speech in the name of religion (including personality and situational factors, colonial prejudice, abuse of religious themes and exploitation of social influence); and 250 pages of analysis of measures available to assist religious leaders to reduce or prevent hate speech by their members or in the name of their community. The book identifies a variety of formal and informal sanctions or means of disapproval that may be available to religious leaders who seek to reduce hate speech.

The anthology contains 31 chapters and several forewords, with contributions by 40 leading authors from diverse backgrounds, in alphabetical order: Fathi M.A. Ahmed, U Aye Lwin, Mohamed Elewa Badar, Dorit Beinisch, Morten Bergsmo, Charles M. Bo, Emiliano J. Buis, Vincenzo Buonomo, Ioana Cismas, Medha Damojipurapu, Laura Dellagiacoma, David Donat-Cattin, Bani Dugal, Gunnar M. Ekeløve-Slydal, Mona Elbahtimy, Rana Moustafa Essawy, Nazila Ghanea, Majda Halilović, Harleen Kaur, Claus Kreß, U Kyaw Tin, Jacques P. Leider, Madan B. Lokur, David J. Luban, Adel Maged, Kishan Manocha, Michael Marett-Crosby, Ariel Merari, Svein Mønnesland, Shruti Narayan, Matthias Neuner, Gilad Noam, Ochi Megumi, Fania Oz-Salzberger, Eli Salzberger, Song Tianying, Eliyahu Stern, Peter J. Stern, Usha Tandon and Johan Vibe.

ISBNs: 978-82-8348-141-9 (print) and 978-82-8348-142-6 (e-book).



Torkel Opsahl Academic EPublisher
Via San Gallo 135r
50129 Florence
Italy
URL: www.toaep.org