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From the Watch Tower to the Acropolis: The Search for a Consistent Religious Freedom Standard in an Inconsistent World

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FROM THE WATCH TOWER TO THE ACROPOLIS: THE SEARCH FOR A CONSISTENT RELIGIOUS FREEDOM STANDARD IN AN INCONSISTENT WORLD

INTRODUCTION

In late 2011, Greek authorities convicted a Pentecostal Christian for proselytizing to another man.[1] In Greece, proselytism is a crime punishable by hefty fines and imprisonment and is strictly prohibited by both the Constitution and statutes.[2] Emmanuel Damavolitis, a Pentecostal Christian, now faces four months in prison and a fine of €840 for proselytism.[3] His attorney, Vassilios Tsirbas, appealed his case to the European Court of Human Rights ("ECHR"), claiming the conviction violates Article 9 of the European Convention of

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[1] *See* Joel Thornton, *A "Sad Day" for Religious Freedom in Greece*, FINDING JUST. (Sept. 30, 2011), http://findingjustice.org/religious-freedom-in-greece. The Court of Appeals of Rethymno upheld the conviction of the event, which occurred in rural Crete in 2006. *Id.*

[2] 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 13:2 (Greece), *translated in* HOUSE OF PARLIAMENT, CONSTITUTION OF GREECE 13, 13–14 (1975); Nomos (1938:1363) Anagkastikoi Nomos [Imperative Law], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1938, A:305, art. 4 (Greece) (making proselytism a criminal offense), *amended by* Nomos (1939:1672) Anagkastikoi Nomoi [Imperative Laws], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1939, A:123 (Greece); *accord* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 13 (1993) ("'Article 1 of the Constitution, which establishes the freedom to practise any known religion . . . [and to] perform rites of worship[,] . . . and prohibits proselytism and all other activities directed against the dominant religion . . . means that purely spiritual teaching does not amount to proselytism, even if it demonstrates the errors of other religions and entices possible disciples away from them . . . of their own free will; this is because spiritual teaching is in the nature of a rite of worship performed freely and without hindrance. Outside such spiritual teaching, . . . any determined, importunate attempt to entice disciples away from the dominant religion by means that are unlawful or morally reprehensible constitutes proselytism as prohibited by the . . . Constitution.'") (quoting Symboulion Epikrateias [S.E.] [Supreme Administrative Court] 2276/1953 (Greece) (construing and defining proselytism under the 1952 SYNTAGMA [SYN.] [CONSTITUTION] and EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.], A:2, art. 1 (Greece))).

[3] Giorgou Oikonomíde [George Economides], *Threskeytikós Fanatismos kai Ellenikos Skotadismós!!!* [*Religious Fanaticism and Greek Obscurantism!!!*], SPOREAS THRESKEIA [SPOREAS RELIGION] (Oct. 9, 2011), http://www.sporeas.gr/thriskeytikos_fanatismos_ellinikos_skotadismos.html; *see also* BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2011: GREECE 5 (2011), http://www.state.gov/documents/organization/193027.pdf ("In October a Court of Appeals in Rethymno, Crete, convicted an individual to four months in prison and an 840 euro ($1,176) fine for violating the law against proselytism. He paid a fine in lieu of prison time."); *European Nation Rules Sharing Beliefs Criminal*, WORLDNETDAILY (Oct. 3, 2011, 8:37 PM), http://www.wnd.com/2011/10/351561/; *see also Greek Evangelist Faces Prison Time for Proselytizing*, FAITHANDTHELAW'S BLOG (Oct. 4, 2011), http://faithandthelaw.wordpress.com/2011/10/04/greek-evangelist-faces-prison-time-for-proselytizing.

Human Rights.[4] This case illustrates how creating a framework for securing religious freedom is a paradox amidst the democratic revolution of the modern world.

In our globalized and interconnected world, the tensions between liberal democratic societies and their religious citizens have not gone unnoticed. After the atrocities of the Second World War, the global community came together to draft human rights documents like the Universal Declaration on Human Rights (Universal Declaration),[5] the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention),[6] and the International Covenant on Civil and Political Rights (ICCPR).[7] Religious freedoms received special attention.[8] Article 9 of the Convention, which draws from Article 18 of the Universal Declaration,[9] provides freedom of thought, conscience, and religion, including a right to change one's religion or belief and freedom to manifest one's religious beliefs "either alone or in community with others and

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[4] *See European Nation Rules Sharing Beliefs Criminal*, *supra* note 3. The ECHR has not yet acknowledged the appeal. With the Court's caseload, it may take several years to do so. *See* EUR. COURT OF HUMAN RIGHTS, COUNCIL OF EUR., YOUR APPLICATION TO THE ECHR: HOW TO APPLY AND HOW YOUR APPLICATION IS PROCESSED 4–7, 12 (2014).

[5] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 18, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration] ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

[6] Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, E.T.S. No. 5 [hereinafter Convention].

[7] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

[8] *See* Eur. Consult. Ass., *First Meeting of the Comm. of Experts 2nd–8th February 1950*, 1st Sess., Doc. No. 796 (1950), *reprinted in* 3 COUNCIL OF EUR., COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 180–237 (1975) [hereinafter "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS]; *see generally* MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 201–07 (1997) (discussing unresolved controversies around Article 18 of the ICCPR on whether freedom of religion includes the freedom to change religion); Council of Eur., *European Comm'n of Human Rights Preparatory Work on Article 9 of the European Convention on Human Rights*, Doc. No. DH(56)14 (Aug. 16, 1956), *available at* http://www.echr.coe.int/Documents/Library_TP_Art_09_DH(56)14_ENG.PDF.

[9] The first paragraph is inspired by the text of the Universal Declaration, while the second paragraph largely replicates the formula used for balancing individual rights against relevant competing considerations found elsewhere in the European Convention on Human Rights, and most obviously in Articles 8, 10, and 11. *Compare* Convention, *supra* note 6, arts. 8–11, *with* Universal Declaration, *supra* note 5, art. 18. This formula is in turn also found in Article 18 of the ICCPR. ICCPR, *supra* note 7, art. 18.

in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[10]

However, the right to manifest one's religion or belief is not absolute. Article 9(2) maintains that this right is subject to certain restrictions that are "prescribed by law" and "necessary in a democratic society."[11] Additionally, Article 9(2) governs when, for what purpose, and to what extent states may reasonably restrict individuals' right to engage in conduct required or inspired by his or her religion while conforming to the Convention.[12] According to this provision, the state may restrict religious conduct so long as the state's interference is: (1) carried out pursuant to domestic law; (2) directed toward a legitimate aim; and (3) "necessary in a democratic society."[13] The ECHR's application of the above principles forms the three-prong analysis under Article 9(2).[14]

How does the state balance one person's right to manifest his faith against another person's right to liberty of conscience, another group's right to religious expression, and another group's right to religious self-determination? How can domestic authorities protect the various rights claims of majority and

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[10] Convention, *supra* note 6, art. 9.

[11] *Id.* art. 9(2).

[12] *Id.*

[13] These three requirements are what constitute the "three-prong" limitations analysis. *See id.* art. 9(2) (defining the limitations clause of Article 9). Similarly, Articles 9, 10, 11, and 12 all contain similar clauses "allowing states to interfere with [these] rights in pursuit of other legitimate purposes, primarily of a collective nature." *See* Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MOD. L. REV. 671, 671 (1999). *Compare* Convention, *supra* note 6, art. 9(2) ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."), *with id.* art. 10(2) ("[P]rescribed by law and . . . necessary in a democratic society, . . . national security, territorial integrity or public safety, for the prevention of disorder or crime, . . . protection of health or morals, . . . reputation or rights of others, . . . disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."), *and id.* art. 11(2) ("[P]rescribed by law and are necessary in a democratic society in the interests of national security or public safety, . . . prevention of disorder or crime, . . . protection of health or morals or . . . the rights and freedoms of others. This Article shall not prevent . . . restrictions on . . . members of the armed forces, . . . police or . . . administration of the State."), *and id.* art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.").

[14] *See* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 12–17 (1993) ("Application of the Principles. Such an interference is contrary to Article 9 unless it is 'prescribed by law,' directed at one or more of the legitimate aims in paragraph 2 and 'necessary in a democratic society' for achieving them."). For a discussion of "first order reasons, see discussion *infra* Part II.C.

minority religions, or of foreign and indigenous religions? How does the state balance its need to create national solidarity and peace with its duty to respect minority cultures and their right to dissent? And probably the most difficult question, how can international tribunals and domestic authorities craft a general rule to govern multiple theological understandings of conversion and proselytism? Although Mr. Emmanuel's case may look like something out of another time and world, the problem of proselytism and religious conflict is a modern problem that has always plagued the ECHR.[15]

In Europe, many of the Convention's High Contracting Parties[16] have experienced this tension—Greece, France, Turkey, and others—in struggling to find appropriate responses to the changing religious demographics and demands on their citizenry.[17] As states like Greece try to strike a balance between the competing needs of religious free exercise, cultural traditions, public order, and societal needs, they find themselves under increasing global scrutiny.[18] Ironically, some states must now face the possibility that the values

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[15] This problem also confronted the drafters of the U.N. Declaration and ICCPR. John Witte, Jr., *The Rights and Limits of Proselytism in the New Religious World Order*, *in* RELIGIOUS PLURALISM: GLOBALIZATION, AND WORLD POLITICS 105, 109 (Thomas Banchoff ed., 2008) [hereinafter *Rights and Limits of Proselytism in the New Religious World Order*].

[16] The government signatories, which are "members of the Council of Europe," have agreed to the Convention and are denoted as "High Contracting Parties." Convention, *supra* note 6, pmbl., art. 1. All forty-seven High Contracting Parties have ratified the Convention. See Council of Eur. Treaty Office, *Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL EUR., http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=07/01/2013&CL=ENG (last visited Feb. 2, 2013), for a list of all "High Contracting Parties."

[17] *See, e.g.*, Press Unit, Eur. Court of Human Rights, Factsheet–Freedom of Religion 1–8 (July 2013), http://www.echr.coe.int/Documents/FS_Freedom_religion_ENG.pdf (summarizing facts from landmark Article 9 cases). From the Court's creation in 1959 to 2012 Greece, France, and Turkey account for about forty percent of the cases where the Court found a violation of Article 9. *See* EUR. COURT OF HUMAN RIGHTS, STATISTICAL INFORMATION: VIOLATIONS BY ARTICLE AND BY RESPONDENT STATE (1959–2012), at 1–2 (2012), http://www.echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf [hereinafter VIOLATIONS BY ARTICLE AND BY RESPONDENT STATE].

[18] *See Human Rights in Greece: A Snapshot of the Cradle of Democracy, Hearing Before the Comm'n on Sec. & Cooperation in Eur.*, 107th Cong. 2–3, 24–28 (2002) (statement of Vassilios Tsirbas, Senior Counsel, European Centre for Law and Justice).

> Reports on the human rights climate in today's Greece paints [sic] a sobering picture, particularly with respect to the obstacles frequently faced by members of ethnic and religious minority communities.
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> . . . Greek officials in recent years have increasingly acknowledged and, most important, have taken actions to address persistent human rights problems. The participation of officials from Athens in today's proceedings underscores this refreshing new approach. Movement on long-

of pluralism and liberty enshrined in the Convention might severely limit the state's ability to respond to perceived threats to the liberal, democratic order.[19]

Although the Convention's human rights regime entered into force in 1953,[20] the ECHR did not actually decide a case under Article 9(2) until

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> standing concerns, including . . . the removal of religious affiliation from the national identity card . . . .
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> . . . [C]oncerns remain with respect to ethnic minority rights, religious liberty, freedom of the media and the very serious issue of human trafficking. Individuals who are members of minority communities in Greece frequently face severe restrictions on their right to freedom of cultural expression, violations of their freedom of association, and other forms of harassment and discrimination . . . .

Id. at 2 (statement of Hon. Christopher H. Smith, Co-Chairman, Comm'n on Sec. & Cooperation in Eur.). *See also Religious Freedom In and Around the World: Hearing Before the Subcomm. on Eur. Affairs of the S. Comm. on Foreign Relations*, 107th Cong. 17 & n.3 (2001) (statement of W. Cole Durham, Jr. & Elizabeth A. Clark) ("[T]he European Court of Human Rights in Strasbourg . . . has developed an extensive and growing body of case law that is committed to the highest standards of freedom of religion.") (footnote omitted).

[19] *See, e.g.*, Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 186 ("[A]mbivalence displayed by the leaders of the . . . Refah Partisi including the . . . Prime Minister, over their attachment to democratic values, and . . . advocacy of a plurality of legal systems functioning according to different religious rules for each religious community was perceived in Turkish society as a genuine threat to republican values and civil peace."); *id.* at 224–25 (Tulkens, J., dissenting) ("[I]t is the threat posed by 'extremist political movements' seeking to 'impose on society as a whole their religious symbols and conception of a society founded on religious precepts' which, in the Court's view, serves to justify the regulations in issue, which constitute 'a measure intended to . . . preserve pluralism in the university.'"); Refah Partisi v. Turkey, 2003-II Eur. Ct. H.R. 209, 303 ("In a country . . . where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students . . . may be justified under Article 9 §2 of the Convention."); *accord* IAN BURUMA, MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE 18–19, 33 (2006) (narrating the murder of the celebrated and controversial Dutch filmmaker, Theo van Gogh, for making a movie that "blasphemed" Islam by a young Muslim man, Mohammed Bouyeri, the son of Moroccan immigrants, which horrified the Netherlands, a country that prides itself as a "bastion of tolerance," and sent shockwaves across Europe and the world.); *cf.* Jilan Kamal, Note, *Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)*, 46 COLUM. J. TRANSNAT'L L. 667, 687 (2008).

[20] See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19, Nov. 4, 1950, 213 U.N.T.S. 221, for the original provision. When it was created in 1954, the European Commission of Human Rights was vested with the responsibility of ensuring compliance with the rights guaranteed by the Convention. *Id*. The European Commission of Human Rights was not elected until March 18, 1954, after Turkey's ratification of the Convention and Protocol 1. *See* İnsan Haklarını ve Ana Hürriyetleri Koruma Sözleşmesi ve buna Ek Protokolün Tasdiki Hakkında Kanun, Kanun No. 6366 [Convention for the Protection of Human Rights and Fundamental Freedoms and the Law on the Ratification of this Protocol, Law No. 6366], Mar. 10, 1954, T.C. RESMÎ GAZETE [R.G.] [OFFICIAL GAZETTE OF THE REPUBLIC OF TURKEY], March 19, 1954, No. 8662 (ratifying the Convention and its Protocol); Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, E.T.S. No. 9; Denys P. Myers, Comment, *The European Commission on Human Rights*, 50 AM. J. INT'L L. 949 (1956). "In accordance with article 6, the Protocol came into force on 18 May 1954, after the deposit of the tenth instrument of

1993.[21] Because of the early absence of cases decided under Article 9(2), critical analysis of the ECHR's limitations jurisprudence under Article 9 has had little to say about the three-prong analysis.[22] Further, the literature exploring the concepts of religious freedom under the ECHR regime tends to take one of two approaches: (1) It considers the recent Article 9(2) cases paralleled with cases that implicate religious freedom in general, without offering a separate assessment of limitation's jurisprudence under Article 9(2);[23] or (2) it argues that the absence of a "Mediating Doctrine" is the overarching problem.[24]

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ratification, in respect of the following States, on behalf of which the instruments of ratification were deposited with the Secretary-General of the Council of Europe on the dates indicated." Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms n.1, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262; *see also* EUR. COMM'N HUM. RTS. R.P. R. 1 (1954), *reprinted in* COUNCIL OF EUR., EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 303 (1977); PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2–3 (3rd ed. 1998).

[21] Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) (1993). Over the past two decades, the ECHR's jurisprudence in this area has grown tremendously, and Greece remains near the top spot of the docket. EUR. COURT OF HUMAN RIGHTS, OVERVIEW 1959–2012: ECHR 6–7 (2013). Greece has had thirteen complaints of a violation of Article 9(2) reach the ECHR (in ten, the Court found Greece in violation), Turkey is second at seven complaints (all of which the Court found Turkey in violation), and Russian is third with six complaints (five of which the Court found Russia in violation). See *HUDOC Search Page–Council of Europe*, HUDOC: EUR. CT. HUM. RTS., http://hudoc.echr.coe.int (filter search by "Article" by choosing "9–2"), for up-to-date statistics and numbers. *See also* VIOLATIONS BY ARTICLE AND BY RESPONDENT STATE, *supra* note 17, at 1–2.

[22] *See, e.g.*, STEVEN GREER, COUNCIL OF EUR., HUMAN RIGHTS FILES NO. 15, THE EXCEPTIONS TO ARTICLE 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14–17 (1997) [hereinafter EXCEPTIONS TO ARTICLE 8 TO 11].

[23] Others have surveyed the broader issue of religious freedom's scope secured by the Convention. *See, e.g.*, Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587 (2005) (surveying the Court's case law under Article 9 and addressing admissibility decisions and other cases implicating freedom of conscience); ROBIN C.A. WHITE & CLARE OVEY, JACOBS, WHITE, & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS *passim* (5th ed. 2010) (discussing the ECHR's application of the "democratic necessity test" under Articles 8, 10, and 11, without discussing it in the context of Article 9); Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 O.J.L.S. 405, 414, 426–28 (2003) (treating Articles 8 to 11 as their own class of rights that the ECHR, under its limitations analysis, illustrates diminished constitutional solicitude in contrast to other rights without citing a single decision under Article 9). Under the structure of the Convention, some aspects of religious freedom are protected not just under the formulation of Article 9 but also under the rights of free association and non-discrimination. See CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7–8 (2001), for a discussion of this overlap by noting that Articles 10, 11, and 14 of the Convention and Article 2 of the First Protocol are also used to protect different aspects of freedom of conscience, from freedom of association to discrimination on the basis of religion.

[24] *See* Kamal, *supra* note 19, at 692–704 (suggesting that the overarching problem with the ECHR's application of Article 9(2) is the absence of rules of decisions and a mediating doctrine). The two proposed rules of decision are two tools that are already part of Article 9(2) jurisprudence and only address the third prong of the limitations analysis. *Id.* at 705–06.

In light of cultural and historical factors, current conditions, and recently decided cases, this Comment contends that the ECHR has been inconsistent in its application of Article 9(2), particularly with respect to its interpretation and application of the "necessary in a democratic society" prong of the limitations clause and its illustration of what forms "legitimate aim." Further, more inconsistencies arise in the ECHR's: (1) conflicting interpretations of when a country is responding to a "pressing social need" to survive the "democratic necessity test"; (2) sporadic use of the "margin of appreciation" doctrine;[25] and (3) selective use of various levels of factual analysis for assessing what makes up "improper" proselytism.[26]

Using the example of Greece, this Comment undertakes a critical analysis of the vague opinions and inconsistent applications by the ECHR under the limitations clause of Article 9(2) and suggests that the Court use three[27] balancing tools to help decide whether to give deference to domestic authorities in religious freedom cases: (1) special historical circumstances; (2) religious restoration and preservation of culture; and (3) lack of autonomous meaning. Applying Article 9(2)'s three-prong analysis, when supplemented with these criteria, will balance the competing needs of religious free exercise, cultural traditions, public order, and societal needs of Europe's states.[28]

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[25] "Margin of appreciation" is the English equivalent of the French term "*marge d'appreciation*." STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (Council of Eur., Human Rights Files No. 17, 2000) [hereinafter INTERPRETATION AND DISCRETION UNDER THE ECHR]; *see also* DAHL'S LAW DICTIONARY/DICTIONNAIRE JURIDIQUE DAHL: FRANÇAIS–ANGLAIS/FRENCH–ENGLISH 214 (Henry S. Dahl & Tamera Boudreau eds., 3d ed., 2007). The term "margin of appreciation" refers to the space for manœuvre. The term "margin of appreciation" refers to the space for manœuver that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the Convention. INTERPRETATION AND DISCRETION UNDER THE ECHR, *supra*, at 5. The "margin of appreciation" gives deference to the decisions of domestic authorities. *See infra* Part II.B.

[26] In the case of proselytism, the Court has held that there could be "improper" proselytism, which the Greek government could properly ban when Greece argued that the ban was necessary for the "peaceful enjoyment" of the rights of others guaranteed by the Convention—including Article 9 itself. *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 8, 20 (noting that the applicant had the misfortune of trying to convert the wife of an Orthodox priest who reported him to the police). The Court has also stated that "improper" proselytism is not among the manifestations of religion protected by Article 9, but has not elaborated on what those "different factors [that] come into the balance" actually are. Larissis v. Greece, 1998-I Eur. Ct. H.R. 362, 379, 381.

[27] See *infra* Part II.C, for a discussion of what constitutes second-order reasons.

[28] I have derived this list from: (1) various opinions, concurrences, and dissents of the ECHR; (2) universal human rights concepts; and (3) the Vienna Convention on the Law of Treaties to which all forty-seven High Contracting Parties are also signatories. *See* discussion *infra* Part II.C.

Part I introduces the origin and development of the problem of proselytism, the judicial and legislative handling of proselytism in Greece, and modern societal concerns about proselytism. Part II analyzes: (1) the case-law applying and interpreting Article 9,[29] (2) the difficulties in applying the rule fairly and equitably across a diverse continent, and (3) relevant judicial arguments, treaties, and documents that could be used to create a more predictable formula for assessing Article 9(2) questions in an ever-changing world. Finally, Part III offers tools to redress the problems analyzed in Part II and applies the tools to timely examples.

I. BACKGROUND

The right to freely convert others to your faith[30] has been one of the most controversial and contested aspects of the right to freedom of thought, conscience, or religion.[31] Part of this modern problem is caused by competing theological and legal understandings of conversion[32]—how does one create a legal rule that simultaneously protects the sharply competing understandings of conversion among various religions? Most Western Christian denominations have easy conversion into and out of the faith.[33] Muslims generally accept easy conversion into the faith, but allow for no conversion out of it.[34] "Whose rites get rights?"[35] How does one craft a legal rule that respects religions of voluntary acceptance alongside Eastern Orthodox, Hindu, or Jewish traditions

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[29] Part II uses Article 9(2)'s three-prong analysis.

[30] For the purposes of this Comment, I am mainly discussing proselytism as a manifestation of religion.

[31] *See, e.g.*, Lovell v. Griffin, 303 U.S. 404, 449, 451–52 (1938) (holding that a Georgia city ordinance requiring a Jehovah's Witness to seek city permission before distributing religious material within the city limits was unconstitutional on its face).

[32] *See infra* Part I.B.

[33] *See* Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT'L L. REV. 563, 563–656 (1998).

[34] Richard C. Martin, *Conversion to Islam by Invitation: Proselytism and the Negotiation of Identity in Islam*, *in* SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM 95 *passim* (John Witte, Jr. & Richard C. Martin eds., 1999) [hereinafter SHARING THE BOOK]; Donna E. Artz, *Jihad for Hearts and Minds: Proselytizing in the Qur'an and First Three Centuries of Islam*, *in* SHARING THE BOOK 79 *passim*. It is a capital crime for members to convert out of Islam. *Cf.* Donna E. Artz, *The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law*, *in* 1 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 387–453 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

[35] *Rights and Limits of Proselytism in the New Religious World Order*, *supra* note 15, at 109.

where religious identity is not a voluntary choice, but tied to "birth, blood and soil, language and ethnicity, sites and sights of divinity?"[36]

The different formulations of this freedom found in major international human rights instruments and domestic laws reflect stark differences in emphasis and intention between various states.[37] On the one hand, some states seek unrestricted freedom for the individual to change religion,[38] without considering it necessary to seek a right to maintain a religion. In contrast, other states give priority to one's right to maintain a religion. For example, in the Universal Declaration debates, the delegate for Greece wondered, "whether the phrase 'freedom . . . to manifest his religion or belief' might not lead to unfair practices of proselytizing."[39] In connection with that thought, he mentioned that he had "occasion to observe real religious competition in a country where all religions were represented."[40] He explained, "free lodgings, material assistance and a number of other advantages were offered to persons who agreed to belong to one religion or another."[41] Further, the "danger of such unfair practices was a threat, not only to the minority groups of a given country . . . but also to the religious majority. While, admittedly, every person should be free to accept or reject the religious propaganda to which he was subjected," the delegate "felt that an end should be put to such unfair competition in the sphere of religion."[42] While Greece did not make a formal proposal on the matter, it did comment in its post-vote explanation on Article

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[36] *Id.*

[37] Soc., Humanitarian & Cultural Affairs Comm., U.N. GAOR, 3d Sess., 127th mtg., U.N. Doc. A/C.3/SR.127, at 391–404 (Nov. 9, 1948); Soc., Humanitarian & Cultural Affairs Comm., U.N. GAOR, 3d Sess., 89th mtg., U.N. Doc. A/C.3/SR.89, at 36 (Sept. 30, 1948); Draft International Covenant on Civil and Political Rights, *Saudi Arabia*: *Amendment to Article 16 of the Draft Declaration (E/800)*, U.N. GAOR, 3d Comm., 3d Sess., U.N. Doc. A/C.3/247 (Nov. 9, 1948); Draft International Covenant on Civil and Political Rights, *Saudi Arabia*: *Amendment to Article 16 of the Draft Declaration (E/800)*, U.N. GAOR, 3d Comm., 3d Sess., U.N. Doc. A/C.3/247/Rev.1 (Nov. 9, 1948); Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, *in* 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES 285 *passim* (Johan D. van der Vyver & John Witte, Jr., eds. 1996) (interpreting the meaning of religious rights in Russia).

[38] *See, e.g.*, International Religious Freedom Act of 1988, Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended at 22 U.S.C. § 6401); ARCOT KRISHNASWAMI, U.N. ECON. & SOC. COUNCIL, SUB. COMM'N ON PREVENTION OF DISCRIMINATION & PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60.XIV.2 (1960).

[39] U.N. GAOR, 3d Sess., 127th mtg., U.N. Doc. A/C.3/SR.127, at 393 (statement of Ambassador Alexander Contoumas, Representative of Greece).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 393–94.

18 of the Universal Declaration that it had voted for the Article "on the understanding that it did not authorize unfair practices of proselytism."[43]

A. Competing Modern Societal Concerns and Conflicts

There are many grounds for opposition to proselytism. States whose religious laws treat adherence to a particular religion as sacrosanct, and regard changing from that religion as apostasy, are understandably opposed to initiatives promoting alternative minority religions, particularly where state and religious law are inseparable.[44] In other countries that prohibit proselytism, the distaste roots itself in issues of culture and national identity (*ethnos*)[45] that

[43] Soc., Humanitarian & Cultural Affairs Comm., U.N. GAOR, 3d Sess., 128th mtg., U.N. Doc. A/C.3/SR.128, at 406 (Nov. 9, 1948). Similarly, the opposition to proselytism expressed by certain states in the International Covenant on Civil and Political Rights led to the proposal of an anti-coercion provision. Draft International Covenants on Human Rights, Rep. of the Third Comm., U.N. Doc. A/4625 (Dec. 8, 1962), GAOR, 15th Sess., Annex, para. 58 (1962). Although the resulting Article 18(2) of the ICCPR was not accepted as a full anti-proselytism measure, it was meant to prevent any coercion that would interfere with the individual's *forum internum*, or right to maintain their religion. *See* PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS AND PRACTICE 64 (2005).

[44] This occurs largely in Islamic countries. Abdullahi Ahmed An-Na'im, *Islamic Foundations of Religious Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE, *supra* note 34, at 337, 346, 352; *see e.g.*, Article 2, Section 1, Doustour Joumhouriatal-Iraq [The Constitution of the Republic of Iraq] of 2005; ALGERIAN CONST. art. 9; QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1979] arts. 12–13; BAHR. CONST. art. 2; PAKISTAN. CONST. art. 19; *see* Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT'L L. 947, 951–52 (2005).

[45] Adamantia Pollis, *The State, the Law, and Human Rights in Modern Greece*, 9 HUM. RTS. Q. 587, 594–95 (1987) (noting that the word *ethnos* (εθνος) (nation), used initially interchangeably with *laos* (λαος) (people), has become a distinct category). Ioannis Metaxas, in 1935, tried to legitimate his rule by arguing that his regime furthered the interests of the *ethnos*. *Id.*; MARINA PETRAKIS, THE METAXAS MYTH: DICTATORSHIP AND PROPAGANDA IN GREECE 32–63 (2006); *see also* THE CLASSIC GREEK DICTIONARY: GREEK-ENGLISH AND ENGLISH-GREEK 195, 406–07 (Follett Publishing Co. ed. 1951) (1896); Ioannis Metaxas, Speech to EON'S Parents and Teachers (Oct. 19, 1939), http://metaxas-project.com/metaxas-eon-youth/. EON Stands for "*Εθνικὴ Οργάνωσις Νεολαίας*" or "*Ethnikí Orgánosis Neoléas*," which translates to "National Youth Organization"—a fascist youth organization in the Kingdom of Greece during the Metaxas Regime. *See id.*; PETRAKIS, *supra*, at 18–25. This concept of an organic entity, whose wellbeing transcended those of the people, *laos*, was also central to the military junta and has been retained in the 1975 Constitution. Pollis, *supra*, at 594–95, 609 ("Eastern Orthodoxy is an essential element of Greek nationality and thus, a component of the integral Greek nation. Other historic communities, such as the Muslims and the Jews, have legal standing as communal minorities but are psychologically external to the Greek nation."); *cf.* Nicolas Svoronos, *Greek History, 1940–1950: The Main Problems*, *in* GREECE IN THE 1940S: A NATION IN CRISIS 7 (John O. Iatrides ed., Modern Greek Studies Assoc. Ser. No. 4, 1981).

are quite separate from matters of religious doctrine.[46] Examples include Armenia, Bulgaria, and Greece, where Orthodox Christianity is integral to the national identity.[47]

The late eighteenth and early nineteenth centuries saw the emergence and spread of nationalism in many European nations.[48] In its wake, the Austro-Hungarian and Ottoman empires gradually collapsed.[49] In Western Europe, the new states, reflecting their industrialization and developing capitalism,[50] simultaneously affirmed liberalism.[51] However, in Eastern Europe, where industrialization had not taken hold, nationalism and religion intertwined.[52] When reconstructing new empires after the collapse, Eastern Orthodox Christians focused mainly on incorporating religion into their new sense of identity.[53] Due to the stark cultural differences that have long existed between the original (Western) members and newer (Eastern) members of the Council of Europe,[54] there is no true consensus on the value of "religious pluralism" in

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[46] *See generally* Tamás Földesi, *The Main Problems of Religious Freedom in Eastern Europe*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES: LEGAL PERSPECTIVES 243, 243–62 (John Witte, Jr. & Johan van der Vyver eds., 1996).

[47] CIA, *Armenia*, *in* THE WORLD FACTBOOK 2012–13, at 38–39 (50th Anniversary ed. 2012) [hereinafter THE WORLD FACTBOOK] (Armenian Apostolic 94.7 percent of the population); CIA, *Bulgaria*, *in* THE WORLD FACTBOOK, *supra*, at 112 (Bulgarian Orthodox 82.6 percent of the population); CIA, *Greece*, *in* THE WORLD FACTBOOK, *supra*, at 288–89 (Greek Orthodox (official) ninety-eight percent of the population); Földesi, *supra* note 46, at 243–62.

[48] Adamantia Pollis, *Eastern Orthodoxy and Human Rights*, 15 ORTHODOXY HUM. RTS. Q. 339, 345 (1993) [hereinafter *Eastern Orthodoxy and Human Rights*].

[49] *Id.* at 348.

[50] *See id.*

[51] *Id.* (discussing more "Westernized" ideas of individual rights, or the "First Amendmentization" of rights).

[52] NATIONS AND NATIONALISM: A GLOBAL HISTORICAL OVERVIEW: A GLOBAL HISTORICAL OVERVIEW *passim* (Guntram H. Herb & David H. Kaplan eds., 2008).

[53] *Eastern Orthodoxy and Human Rights*, *supra* note 48, at 348. *See* 1 Pedro Ramet, *Autocephaly and National Identity in Church-State Relations in Eastern Christianity: An Introduction*, *in* EASTERN CHRISTIANITY AND POLITICS IN THE TWENTIETH CENTURY: CHRISTIANITY UNDER STRESS 7, 7–10 (Pedro Ramet ed., 1988), for a discussion of nationality and Orthodoxy.

[54] Founded in 1949 by eleven countries (the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland), the Council of Europe seeks to develop—throughout Europe—common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. *See* Statute of the Council of Europe, May 5, 1949, E.T.S. No. 1, 87 U.N.T.S. 103.

Europe.[55] Thus, Eastern European nations perceive their identity to be threatened by zealous proselytizers.

Accordingly, Greece has argued that its restrictions on proselytism are legitimate and aim to protect a cultural resource that helped save the country during foreign occupations and is now under attack from foreign religions.[56] During four centuries of foreign occupation, the Eastern Orthodox Church maintained Greek culture and language.[57] The Church took such an active part in the Greek people's struggle for emancipation that Hellenism is almost synonymous with the Eastern Orthodox faith.[58] King Otto I[59] implemented the first anti-proselytism measures under his reign.[60] The Orthodox Church, which had complained of publicity aimed at Orthodox school children by an

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[55] *Eastern Orthodoxy and Human Rights*, *supra* note 48, at 339–42; *cf.* CIA, *European Union*, *in* THE WORLD FACTBOOK, *supra* note 47, at 818–19. Unlike the Western states, many of the new Eastern states were under oppressive Ottoman rule. 2 Carlton J. H. Hayes, *The Dismemberment of the Ottoman Empire, 1683–1914*, *in* A POLITICAL AND SOCIAL HISTORY MODERN EUROPE 490–98 (rev. ed. 1931). Also, the religious experience of the two is very different. Western members share a variety of different religions, from Roman Catholic, to Lutheran, Anglican, etc., while Eastern members come from an Eastern Orthodox tradition whose idea of individual rights, mysticism, and *ethnos* is very different. *Eastern Orthodoxy and Human Rights*, *supra* note 47, at 341, 349. Thus, in states such as Greece, Russia, Romania, Serbia, and Ukraine (footnote listing all the Eastern states where Eastern Orthodoxy is majority religion and the percentages) where Eastern Orthodoxy is the dominant religion, minority religions often face the most discrimination. *Id.* at 338–42; *see, e.g.*, CIA, *Greece*, *in* THE WORLD FACTBOOK, *supra* note 47 (Greek Orthodox (official) ninety-eight percent of the population); CIA, *Russia*, *in* THE WORLD FACTBOOK, *supra* note 47, at 600–01; CIA, *Romania*, *in* THE WORLD FACTBOOK, *supra* note 47, at 596 (Eastern Orthodox 86.8 percent); CIA, *Serbia*, *in* THE WORLD FACTBOOK, *supra* note 47, at 639–40; CIA, *Ukraine*, *in* THE WORLD FACTBOOK, *supra* note 47, at 755 (83.7 percent Eastern Orthodox, including: Ukrainian Orthodox–Kyiv Patriarchate 50.4 percent; Ukrainian Orthodox–Moscow Patriarchate 26.1 percent; and Ukrainian Autocephalous Orthodox 7.2 percent).

[56] Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 11–12 (1993). Other countries where Eastern Orthodoxy is the primary religion argue this, too. *See* Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, 111–12.

[57] *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 6–7.

[58] *Id.* at 7.

[59] Otto (also spelled "Othon" and "Otho"), King of Greece, was the first modern Greek king after Greece was granted its independence from the Ottoman Empire (1832–62). Convention Relative to the Sovereignty of Greece art. 1, Gr. Brit.-Fr.-Russ.-Bavaria, May 7, 1832, 19 B.S.P. 33, 4 H.C.T. 313 [hereinafter Treaty of London] ("The Courts of Great Britain, France, and Russia, duly authorised for this purpose by the Greek nation, offer the hereditary Sovereignty of Greece to the Prince Frederick Otho of Bavaria, second Son of His Majesty the King of Bavaria. . . . The Prince Otho of Bavaria shall bear the Title of King of Greece."); Hayes, *supra* note 55, at 499, 515; *see also* 1 WILBUR WALLACE WHITE, *Greece and the Greek Islands*, *in* THE PROCESS OF CHANGE IN THE OTTOMAN EMPIRE 34 (1937).

[60] 1844 SYNTAGMA [SYN.] [CONSTITUTION] 1, EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.], A:5 (Greece).

Evangelical Bible group,[61] succeeded in getting a clause added to the first Greek Constitution (1844) forbidding "proselytism and any other action against the dominant religion."[62] Later, during the dictatorship of Metaxas,[63] proselytism was a criminal offence for the first time.[64] The following year, an amendment clarified the meaning of the term "proselytism."[65]

Modern law reflects the Greek national identity. Both the modern Constitution and various Greek statutes officially recognize the Greek Orthodox Church and prohibit proselytism,[66] while still reserving the freedom

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[61] *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 7. The Jehovah's Witness movement appeared in Greece at the beginning of the twentieth century. *Id.* at 10. The group's membership today is estimated to be between 25,000 and 70,000. *Id.* Jehovah's Witnesses have 338 Greek congregations; the first one was formed in 1922 in Athens. *Id.*

[62] 1844 SYNTAGMA [SYN.] [CONSTITUTION] 1, EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.], A:5 (Greece). The Constitutions of 1864, 1911, and 1952 reproduced the same clause. *See* 1864 SYNTAGMA [SYN.] [CONSTITUTION] 1, EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.], A:48 (Greece); 1911 SYNTAGMA [SYN.] [CONSTITUTION] 1, EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.], A:127 (Greece); 1952 SYNTAGMA [SYN.] [CONSTITUTION] 1, EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.], A:2 (Greece). The 1975 Constitution prohibits proselytism in general. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 13:2.

[63] Metaxas was the second Greek ruler (post-independence) to issue anti-proselytism laws. *See* Charalambos Papastathis, *Tolerance and Law in Countries with an Established Church*, 10 RATIO JURIS 108, 111 (1997).

[64] Nomos (1938:1363) Anagkastikoi Nomoi [Imperative Laws], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1938, A:305, art. 4 (Greece) (making proselytism a criminal offense), *amended by* Nomos (1939:1672) Anagkastikoi Nomoi [Imperative Laws], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1939, A:123, art. 2 (Greece).

[65] Nomos (1939:1672) Anagkastikoi Nomoi [Imperative Laws], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1939, A:123 (Greece). The term "proselytism" was clarified by § 2:

> 1. Anyone engaging in proselytism shall be liable to imprisonment and a fine of between 1,000 and 50,000 drachmas; he shall, moreover, be subject to police supervision for a period of between six months and one year to be fixed by the court when convicting the offender. The term of imprisonment may not be commuted to a fine.
> 2. By proselytism is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.
> 3. The commission of such an offence in a school or other educational establishment or a philanthropic institution shall constitute a particularly aggravating circumstance.

Id.

[66] 1975 SYNTAGMA [SYN.] [CONSTITUTION] 3, 13 (Greece); Nomos (1938:1363) Anagkastikoi Nomoi [Imperative Laws], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1938, A:305, art. 4 (Greece) (making proselytism a criminal offense), *amended by* Nomos (1939:1672) Anagkastikoi Nomoi [Imperative Laws], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.E.B.] 1939, A:123, art.

of religion. Article 3 of the 1975 Greek Constitution states that "[t]he prevailing religion in Greece is that of the Eastern Orthodox Church of Christ."[67] Yet, Article 13 of the Greek Constitution states: "[f]reedom of religious conscience is inviolable. Enjoyment of individual and civil rights does not depend on the individual's religious beliefs,"[68] and although "[a]ll known religions shall be free and their rites of worship shall be performed unhindered and under the protection of law," manifestation of these rights is "*not allowed to offend public order* or moral principles. *Proselytism is prohibited*."[69] The Constitution also states that "[n]o person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions."[70] Further, because the Greek government maintains its own definitions of words,[71] the definitions of certain concepts and acts, such as "proselytism," do not always match the definition provided by international tribunals, the United Nations, the Council of Europe, or the European Union.[72]

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2 (Greece). According to 1993 statistics provided to the ECHR by Minos Kokkinakis and his counsel, 4,400 Jehovah's Witnesses were arrested between 1975 and 1992, while 1,233 of them were committed for trial and 208 convicted. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 10 (1993). Earlier, several Jehovah's Witnesses had been convicted under anti-communist and social order laws. *Id*. Nomos (1936:117) Perí Metron pros Katapolemhsin tou Kommoynismou kai ton ek Toutoy Synepeion [Protective Measures for Combating Communism and its Effects], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1936, A:402 (Greece); Nomos (1075:1938) Perí Metron Asfaleias tou Koinwnikoú Kathestotos kai Prostasías ton Politon [On Security Measures Preserving the Social Order], EPHEMERIS TES KYVERNESEOS TOU VASILEIOU TES HELLADOS [E.K.B.E.] 1938, A:45 (Greece).

67 1975 SYNTAGMA [SYN.] [CONSTITUTION] 3: 1 (Greece).

68 *Id.* 13:1.

69 *Id.* 13:2 (alteration in original) (emphasis added).

70 *Id.* 13:4.

71 *Id.*; Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 31 (1993) (Valticos, J., dissenting) ("The Law deals with, as an offence, 'proselytism,' which is of course a Greek word and, like so many others, has passed into English and also into French, and which the *Petit Robert* dictionary defines as 'zeal in spreading the faith, and *by extension* in making converts, winning adherents.'" (quoting *Prosélytisme*, 1 LE PETIT ROBERT: DICTIONNAIRE ALPHABÉTIQUE ET ANALOGIQUE DE LA LANGUE FRANÇAISE 1552 (Paul Robert ed., 1991) (emphasis added))). Judge Valticos noted that this is a divergence "from merely manifesting one's belief" under Article 9. *Id.* Someone who proselytizes seeks to convert others; he does not confine himself to affirming his faith but seeks to change that of others to his own. *Le Petit Robert* clarifies its explanation by giving the following quotation from Paul Valéry: "I consider it unworthy to want others to be of one's own opinion. Proselytism astonishes me." *Id*. (quoting LE PETIT ROBERT, *supra*). In essence, they are using the definition of words that were defined and given to them by the Greek Orthodox Church.

72 The Greeks consider their definition to be legitimate for many reasons when it comes to religious and/or biblical issues/use: that definition does not include conversion from one Christian denomination to another. *See Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 31 ("'[P]roselytism,' which is of course a Greek word . . . ."). The English noun "proselyte," is more of a calque than a translation of the Greek προσήλυτος, which derives from the verb "to come" with a prefix meaning "over" or "toward." Paul J. Griffiths,

B. The War for Souls and Theological Differences in Proselytism

Christians do not have harmonious understandings of how to fulfill and carry out Jesus' command to "make disciples of all nations."[73] Eastern Orthodox Christians are careful to differentiate evangelistic witness from the church's mission.[74] While the church's mission has many facets, evangelistic witness expresses the "communication of Christ to those who do not consider themselves Christian."[75]

The Gospel requires evangelical witness because it considers everyone to be worthy of "the good news of God," and the essential goal of witness is to convert and baptize.[76] This means conversion, baptism, and dialogue about and between Christians and non-Christians. Most Christian denominations denounce proselytism "as outside the bounds of true [Christian] witness" and "a corruption of Christian witness."[77] An important distinction between

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Proselytizing for Tolerance, FIRST THINGS, Nov. 2002, at 30; LEO WALSH, U.S. CONFERENCE OF BISHOPS, PROSELYTISM AND EVANGELIZATION: IMPORTANT DISTINCTIONS FOR CATHOLIC CATECHISTS (2012), *available at* http://www.usccb.org/beliefs-and-teachings/how-we-teach/catechesis/catechetical-sunday/new-evangelization/upload/Proselytism-and-Evang-Walsh-2.pdf. Thus, a literal etymological analysis of the word "proselyte," historically in the Greek Septuagint, denotes a gentile who has converted to Judaism. *Id.* "The proselyte leaves an old community, whether of belief or practice, and enters a new one . . . in becoming one of Christ's proselytes you leave the pagan community and enter that of the baptized . . ." Griffiths, *supra*, at 30. And the argument is further legitimized when you take into account that the New Testament was written in Koine Greek, translated into Latin, and then translated and transliterated into hundreds of other modern languages. The Greek definition and words have gone through far fewer degrees of separation. *See* Albert C. Sundberg, Jr., *The Septuagint: The Bible of Hellenistic Judaism*, *reprinted in* THE CANON DEBATE 72 (Lee Martin McDonald & James A. Sanders eds. 2002); Press Release, Wycliffe Bible Translators, Wycliffe Bible Translators Climb a Mountain, Sept. 16, 2013, http://wycliffe.org.uk/wycliffe/news/documents/130910-pr-kilimanjaro.pdf (stating that the "full" Bible has been translated into 518 languages); *see also* Exodos [Exodus] 12:48–50 (Septuagint Bible).

[73] *Matthew* 28:16–19.

[74] Meaning the "entire" mission as a whole, not limiting it to one small part. WORLD COUNCIL OF CHURCHES, MISSION SER., NO. 7, GO FORTH IN PEACE: ORTHODOX PERSPECTIVES ON MISSION 30 (Ion Bria, comp. & ed., rev. ed. 1986) [hereinafter GO FORTH IN PEACE]; *see also* Nichols, *supra* note 33, at 626.

[75] GO FORTH IN PEACE, *supra* note 74, at 30.

[76] *Matthew* 28:19; Nichols, *supra* note 33, at 626–27 (looking at the four major segments of Christianity: Roman Catholicism, Evangelical Protestantism, Conciliar Ecumenical Christianity, and Eastern Orthodoxy for their different emphases and understandings of mission or evangelism, which leads to differing activities or methods of evangelism). *See, e.g.*, ORTHODOX CHURCH IN AMERICA, MISSION PLANTER'S RESOURCE KIT 7–28 (2005) [hereinafter OCA MISSION HANDBOOK], *available at* http://www.faith2share.net/DesktopModules/Bring2mind/DMX/Download.aspx?language=en-GB&Command=Core_Download&EntryId=1159&PortalId=0&TabId=79 ("This resource kit is being offered as an instrument to assist both clergy and laity in fulfilling the Lord's mandate to 'make disciples of all the nations'" (quoting *Matthew* 28:19)).

[77] Nichols, *supra* note 33, at 628.

evangelical witness and proselytism is the target of the Christian witness. For Eastern Orthodox Christians, "evangelistic witness is for the Christian who is not a Christian."[78]

On March 15, 1992, the Patriarchs and Archbishops of the fourteen regional Orthodox Churches convened at the Ecumenical Patriarchate headquarters in Istanbul, Turkey.[79] The church leaders issued a joint message about various topics, including mission, evangelism, and proselytism.[80] The *Message* carries substantial weight because all fourteen church leaders signed.[81] In this Pan-Orthodox Statement ("*Message of the Primates*"), Orthodox leaders vigorously denounced all forms of proselytism, distinguishing it from evangelization and mission.[82] For the Eastern Orthodox Church, true mission can occur only in non-Christian countries among non-Christians. The Orthodox definition of proselytism includes any "mission" effort to persons who are either already Christians or non-Christians who are living in Christian countries.[83]

After *Message of the Primates*, an ongoing series of discussions on mission and witness began under the auspices of the World Council of Churches ("WCC"). The first gathering was held at Chembésy, Switzerland in February 1993 and consisted of fifteen members from Eastern Orthodox, Roman Catholic, and Protestants churches who met to discuss the problems of

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[78] GO FORTH IN PEACE, *supra* note 74, at 34.

[79] BARTHOLOMEW I, *Message of the Primates of the Most Holy Orthodox Churches*, *reprinted in* SPEAKING THE TRUTH IN LOVE: THEOLOGICAL AND SPIRITUAL EXHORTATIONS OF ECUMENICAL PATRIARCH BARTHOLOMEW 382 (John Chryssavgis, ed. 2011) [hereinafter *Message of the Primates*]; Nichols, *supra* note 32, at 633.

[80] *Message of the Primates*, *supra* note 79, at 384–85.

[81] The following is a list of the fourteen Church Leaders: (1) Bartholomaios, Archbishop of Constantinople, New Rome and Ecumenical Patriarch; (2) Parthenios, Pope and Patriarch of Alexandria and all Africa; (3) Ignatius, Patriarch of Antioch and all the East; (4) Diodoros, Patriarch of the Holy City of Jerusalem and all Palestine; (5) Alexiy, Patriarch of Moscow and all Russia; (6) Pavle, Patriarch of Belgrade and all Serbia; (7) Teoctist, Patriarch of Bucharest and all Romania; (8) Maxime, Patriarch of Sofia and all Bulgaria; (9) Elias, Archbishop of Metschetis and Tiflis and Catholicos-Patriarch of all Georgia (Represented by the Ecumenical Patriarch); (10) Chrysostomos, Archbishop of Neas Justinianis and all Cyprus (Represented by the Patriarch of Alexandria); (11) Seraphim, Archbishop of Athens and all Greece; (12) Wasily, Metropolitan of Warsaw and all Poland; (13) Dorothej, Metropolitan of Prague and all Czechoslovakia; and (14) John, Archbishop of Karelia and all Finland. *Message of the Primates*, *supra* note 79, at 57.

[82] *Message of the Primates*, *supra* note 79, at 385.

[83] *Id.*; *see also* Nichols, *supra* note 33, at 628–29.

proselytism.[84] A paper drafted by the attendees confirmed that Christian traditions universally recognize that "the commitment to evangelism is inseparable from the commitment to the unity of the Body of Christ."[85] While there remain different perspectives and divergent views on "proper" evangelism, the gathering affirmed some of the Eastern Orthodox Church's concerns as legitimate.[86] For instance, the participants acknowledged that "[m]ission activity from outside has 'invaded' certain countries," particularly after the fall of communism.[87] While they affirmed that mission activity in itself is generally good, this particular "invasion" is wrong and harmful because the activity is occurring in places where the local church has existed (but under suppression) for many centuries.[88]

Consequently, in countries where the dominant religion and the national identity are intrinsically linked,[89] groups like the Jehovah's Witnesses[90]—whose doctrine advocates conscientious objection, a belief that God's Kingdom is the only true government,[91] denounce IGOs as the "Scarlet Beast"

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[84] *Towards Responsible Relations in Mission: Some Reflections on Common Witness, Proselytism, and New Forms of Sharing*, 82 INT'L REV. MISSION 235, 235 (1993) [hereinafter *Towards Responsible Relations in Mission*].

[85] *Id.*

[86] *Id.* at 235–36.

[87] *See id.* at 236.

[88] *Id.* "The newcomer is often unaware of the history of local churches, their spiritual life, their courageous witness, their suffering, sacrifice and martyrdom. Pain is often inflicted on the local believers because of the insensitivity of fellow Christians." *Id.*

[89] The Watchtower Bible and Tract Society originated in the late 1800's in Pennsylvania. This religion is not only new but originated in the United States, is a tradition that affords the highest degree of protections to religious freedom, regardless of how offensive various individuals, groups, and countries may find their conduct at various times.

[90] Françoise Rigaux, *L'Incrimination du Prosélytisme Face à la Liberté d'Expression*, 17 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME [REV. TRIM. DR. H.] 144, 149–50 (1994) (calling attention to the "hostility" shown by governments and courts toward Jehovah's Witnesses, primarily because they present a more radical version of the Christian faith); *see, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 301–09 (1940). The Court found that conviction of Jehovah's Witnesses for playing a phonograph in a predominantly Roman Catholic neighborhood that condemned the Catholic Church and labeled the Catholic Church as enemies, as a breach of the peace an unconstitutional violation of the defendant's freedom of religion. *Id.* at 311.

[91] WATCHTOWER BIBLE & TRACT SOC'Y, "LET GOD BE TRUE" 153–54 (2d rev. ed. 1952) [hereinafter "LET GOD BE TRUE"] ("Finding its beginning in 1919 in the League of Nations, that political image has been revived now in a new form, an international organization for peace and security. This stands as a great image, a substitute for God's established kingdom. Flying in the face of the Kingdom's announcement, Christendom rebelliously rejects God's kingdom and lauds man's feeble efforts for earth's domination."); J.F. RUTHERFORD, PROHIBITION AND THE LEAGUE OF NATIONS–BORN OF GOD OR THE DEVIL, WHICH?: THE BIBLE PROOF 58 ("By advocating the League of Nations, the World Court, the international peace pacts, and by participating in the politics of the world, the clergy have brought great reproach upon the name of Jehovah

from the Book of Revelations,[92] and proselytism strategies that have become so zealous that they are often militant[93]—are at the center of most religious rights disputes.[94] Less than three months after the WCC gathering in

God. The have *prostituted true Christianity* in order that they might gain popularity. They have sold themselves to the Devil that they may win the praise of men."); "LET GOD BE TRUE," *supra* note 91, at 258 ("In man's history till A.D. 1914 there had been seven great world powers, the seventh being the Anglo-American empire system. 'And the wild beast that was but is not, it is also itself an eighth king [now known as the United Nations], but owes its existence to the seven, and it goes off into destruction.' Note that the prophecy says there was to be an eighth, which owes its existence to the seven previous ones. The conceiving of the former League of Nations was due to the seventh world power, and now the United Nations gets its chief support and backing from the same world power." (quoting *Revelation* 17:3, 8, 11) (citations omitted)).

[92] *See, e.g.*, WATCHTOWER BIBLE & TRACT SOC'Y OF PENN., PAY ATTENTION TO DANIEL'S PROPHECY! 269 (1999) ("What 'disgusting thing' has been 'put in place' in modern times? Apparently, it is a 'disgusting' counterfeit of God's Kingdom. This was the League of Nations, the scarlet-colored wild beast that went into the abyss, or ceased to exist as a world-peace organization, when World War II erupted. (Revelation 17:8) 'The wild beast,' however, was 'to ascend out of the abyss.' This it did when the United Nations, with 50 member nations including the former Soviet Union, was established on October 24, 1945. Thus 'the disgusting thing' foretold by the angel—the United Nations—was put in place.").

[93] Doctrinally, Jehovah's Witnesses neither participate in national holidays nor salute the flag of their country, both of which have been heavily adjudicated in domestic and international courts. *See, e.g.*, N. v. Sweden, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 206–07 (1984); Raninen v. Finland, 1997-VIII Eur. Ct. 2804, 2822; X v. Germany, App. No. 7705/76, 9 Eur. Comm'n H.R. Dec. & Rep. 201 (1977); Comm. of Ministers, *Recommendation to Member States Regarding Conscientious Objection to Compulsory Military Service*, 406th mtg., No. R (87) 8 (Apr. 9, 1987), *reprinted in* COUNCIL OF EUR., COLLECTION OF RECOMMENDATIONS, RESOLUTIONS AND DECLARATIONS OF THE COMMITTEE OF MINISTERS CONCERNING HUMAN RIGHTS: 1949–87, at 184 n.1 (1989); Comm. of Ministers, *Recommendation on the Human Rights of Members of Armed Force*, 1077th mtg., Doc. No. CM/Rec (2010) 4 (Feb. 24, 2010)). Paturel v. France, App. No. 54968/00, paras. 31–51 (Eur. Ct. H.R. 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71837 (finding that conviction by French domestic authorities of a number of Jehovah's Witnesses for defamation violated Article 10 because the passages considered offensive were value judgments based upon a sufficient factual basis rather than being merely factual assertions).

[94] These characteristics damage Jehovah's Witnesses' reputation and presence on the world stage. For instance, in February 1992 the Watchtower Society took a huge step in the direction of global cooperation when it became an Associate Member to the United Nations Department of Public Information. *See About Us*, U.N. DEP'T PUB. INFO., http://outreach.un.org/ngorelations/about-us/ (last visited Feb. 10, 2014). However, in 2002 (or 2001) at the request of Giro Audicino, main representative of the Watchtower Bible Tract and Society of New York to the United Nations, the Watchtower Society terminated its membership. A large part of this decision was due to its refusal to abide by various NGO codes of ethics and conduct. This issue surfaced when the *Guardian* exposed them in 2001. Disaffected members of the group were angered by the choice of their elders to work with, and accept linkages with, an organization that they denounce in apocalyptic terms. Circular Letter from Chairman's Comm., World Headquarters of Jehovah's Witnesses, to Jehovah's Witness Brothers (Nov. 1, 2001), *reprinted in* THE WATCHTOWER SOCIETY AS A UNITED NATIONS NGO: A CRITICAL LOOK AT THE CONSPIRACY THEORY *available at* http://www.jehovahsjudgment.co.uk/watchtower-un-ngo/pdf/Watchtower%20NGO%20-%20A4%20-%20November%202007.pdf. The Watch Tower Society has been denouncing the United Nations and its predecessor, the League of Nations, for over eighty years, believing them to be a world empire of false religion predicted in the Book of Revelation. Stephen Bates, *Jehovah's Witnesses Link to UN Queried: Sect Accused of Hypocrisy Over Association It has Demonised*, GUARDIAN,

Switzerland, the ECHR found that Greece's application of its anti-proselytism laws against a Jehovah's Witness violated Article 9(2) of the Convention.[95] However, the Court did not find that a law banning proselytism on its face violates the Convention.[96] Despite this ruling, complaints of discrimination against Jehovah's Witnesses in Greece have continued to make their way up to the ECHR.[97]

Undeterred by their continued conflicts with Greek authorities, the Jehovah's Witnesses have not toned down their zealous proselytism techniques as their mission has expanded into the once closed societies that have become open to increased religious freedom.[98] As recently as 2005, the U.N.'s Special Rapporteur for Freedom of Religion or Belief stated there are "numerous reports of cases where missionaries, religious groups and humanitarian NGOs have allegedly behaved in a very disrespectful manner vis-à-vis the

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Oct. 8, 2001, at 13; *see also* RUTHERFORD, *supra* note 92, at 52 ("Here is the positive and unqualified statement from Jehovah God that neither the League of Nations nor any other combination of men and governments shall have anything to do with the setting up of his kingdom and establishing peace and righteousness. It is God's kingdom, and not man's; and for men to assume to do what God has declared he will do is a gross, presumptuous sin. The nation organization that attempts to run ahead of God and presumptuously attempts to set up a rule or organization and call it God's kingdom will suffer severe punishment.").

95 *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21–22 (1993); .

96 *See id.*

97 *See, e.g.*, Thlimmenos v. Greece, 2000-IV Eur. Ct. H.R 263, 271; Tsirlis v. Greece, 1997-III Eur. Ct. H.R. ; Pentidis v. Greece, 1997-III Eur. Ct. H.R.; Georgiadis v. Greece, 1997-III Eur. Ct. H.R.; Efstratiou v. Greece, 1996-VI Eur. Ct. H.R.; Valsamis v. Greece, 1996_VI Eur. Ct. H.R.; Manoussakis v. Greece, 1996-IV Eur. Ct. H.R. 1346. Since the revision of the Constitution in 1975, the Supreme Administrative Court has held on several occasions that the Jehovah's Witnesses come within the definition of a "known religion." Tsirlis v. Greece, 1997-III Eur. Ct. H.R. at 8–9. In 1986, the Supreme Administrative Court held that a ministerial decision refusing the appointment of a Jehovah's Witness as a literature teacher was contrary to freedom of conscience in religious matters and hence to the Greek Constitution. Tsirlis v. Greece, 1997-III Eur. Ct. H.R. (citing Symboulion Epikrateias (S.E.) [Supreme Administrative Court] 3533/1986 (Greece)).

98 The Greek Orthodox Church does not consider Jehovah's Witnesses to be a religion, but a sect, "which contests the divinity of Jesus Christ and the status of the Virgin and the Saints." Special Rapporteur for Freedom of Religion or Belief, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Addendum*, para. 127, U.N. Doc. A/51/542/Add.1 (Nov. 7, 1996) (by Abdelfattah Amor) [hereinafter *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*]. "The Orthodox Church says it is opposed, not to the religious conscience of the Jehovah's Witnesses, but to the propaganda methods they use vis-à-vis members of the Orthodox Church." *Id.* The Greek Orthodox Church's counter-reaction is "said to be based on the right to react morally against those who are hostile to the moral integrity of the members of the Orthodox Church and take advantage of the poverty and low cultural level of some of those members." *Id.*

populations of the places where they were operating."[99] The Special Rapporteur stated that she "deplores such behaviour and is of the opinion that it constitutes religious intolerance, and may even provoke further religious intolerance."[100]

Article 19 of the ICCPR indicates that the right of expression, including religious expression, "carries with it special duties and responsibilities."[101] "One such duty, it would seem, is to respect the religious dignity and autonomy of the other and to expect the same respect for one's own dignity and autonomy."[102] The ICCPR encourages all parties, especially foreign proselytizing groups, to negotiate and adopt voluntary codes of conduct that espouse restraint and respect of others; in this sense, it resembles the Golden Rule.

II. INTERFERENCES WITH RELIGIOUS MANIFESTATION UNDER THE ECHR FRAMEWORK

This Part explores the ECHR's interpretation of the freedom to "proselytize" as expressed in Article 9 of the Convention. Subpart A provides an overview of the three-prong limitations analysis (an interference does not violate the Convention if it is: (1) directed toward a legitimate aim; (2) carried out according to domestic law; and (3) "necessary in a democratic society"),,[103]

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[99] Special Rapporteur for Freedom of Religion or Belief, *Rep. on Elimination of All Forms of Religious Intolerance*, para. 66, U.N. Doc. A/60/399 (Sept. 30, 2005) (by Asma Jahangir) [hereinafter *Rep. on Elimination of All Forms of Religious Intolerance*]; *see also Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *supra* note 98, para 88 (discussing Jehovah's Witnesses in Greece).

[100] *Rep. on Elimination of All Forms of Religious Intolerance*, *supra* note 99, para. 66; Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) at 7–14 (1995). *Das Liebeskonzil* is a 1982 film by Werner Schroeter, based on a play by Oskar Panizza. *See* B. Swart, *The Case-Law of the European Court of Human Rights in 1994*, 3 EUR. J. CRIME CRIM. L. & CRIM. JUST. 281, 292; Martinez-Torrón, *supra* note 23, at 626; *Liebeskonzil* (Saskia Film 1982). The film was banned by the Austrian government in 1985 on the grounds that it insulted the Christian religion. *See Otto-Preminger-Institut*, 295 Eur. Ct. H.R. (ser. A) at 33. In 1994, in the case of *Otto-Preminger-Institut*, the ECHR held, by a six-to-three vote that the banning of the film was a justifiable limitation on the freedom of expression because the film would offend Austrian Roman Catholics. *Id.* at 34.

[101] ICCPR, *supra* note 7, art. 19(3).

[102] John Witte, Jr., *Primer on the Rights and Wrongs of Proselytism*, 31 CUMBERLAND L. REV. 619, 628 (2001).

[103] *See* Convention, *supra* note 6, art. 9(2). An interference does not violate the Convention if it is: (1) directed toward a legitimate aim; (2) carried out according to domestic law; and (3) "necessary in a democratic society." Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) 18–21 (1993).

as well as the case-law applying and interpreting it. Subpart B analyzes the difficulties of determining whether ECHR should afford deference to the state and the effects of the margin of appreciation doctrine. Subpart C suggests the balancing tools the ECHR should adopt: ((1) Special Historical Circumstances, (2) Religious Restoration and Preservation of Culture, and (3) Lack of Autonomous Meaning), and discusses relevant judicial opinions, treaties, and documents that could be used to create a more predictable formula for assessing the limitations clause.

A. The Three Prongs

The language of the Convention under Article 9(1) grants the individual an absolute right to freedom of belief, but the limitations clause of Article 9(2) curtails the individual's right to *manifest* that belief.[104] Thus, there are two alternative tracks for a claim under Article 9. The first consists of alleging that the interference violates their passive right to hold individual beliefs, an individual's *forum internum*.[105] The second part of Article 9, and the key issue for purposes of this Comment, delineates the situations where a state party may legitimately interfere with the individual's right to "manifest" their religion or belief, an individual's *forum externum*.[106]

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[107]

The textual requirements of Article 9's limitations clause creates the three-prong analysis the ECHR uses to analyze whether the state interference

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[104] *See* Convention, *supra* note 6, art. 9(1)–(2).

[105] "The *forum internum* is taken to denote the internal and private realm against which no State interference is justified in any circumstances, while the *forum externum*, or right of manifestation, may be restricted by the State on specific grounds." TAYLOR, *supra* note 43, at 19.

[106] The *forum externum* is the external and public right of manifestation of those internal beliefs. *Cf. id.*

[107] Convention, *supra* note 6, art. 9(2). The textual formulation expresses the necessity to consider the threshold question of whether Article 9 is applicable, and if so, whether the interference constitutes an actual violation of Article 9. Thus, "the *applicability* of Article 9 is distinct from consideration of the justification for the interference." *Id.*; *see also* Jim Murdoch, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights* 10 (Council of Eur., Human Rights Handbook No. 9, 2007) [hereinafter *Guide to the Implementation of Article 9*].

violates Article 9: (1) prescribed by law; (2) legitimate aim; and (3) necessary in a democratic society.

1. Prescribed by Law

A state violates the Convention if it does not show that its interference with manifestation of religion or belief was "prescribed by law,"[108] thus satisfying this prong requires the challenged measure to have a domestic legal basis, be adequately accessible and foreseeable, and contain sufficient protection against arbitrary application of the law.[109] In any event, the ECHR may avoid having to decide whether interference is "prescribed by law" if it finds that the interference was not "necessary in a democratic society,"[110] however, this part of the three-prong analysis is almost never the deciding factor in Article 9(2) jurisprudence and is the easiest prong for a state to answer.[111]

In *Kokkinakis*, the applicant argued that the Greek government's definition of "proselytism" was insufficiently defined in domestic law, could easily censure any kind of religious conversation or communication, and "[c]onsequently, no citizen could regulate his conduct" under the law.[112] Nonetheless, the ECHR noted that it is inevitable that the wording of statutes will not reach precision and agreed with the Greek government that the

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[108] Convention, *supra* note 6, art. 9(2). "This concept expresses the value of legal certainty, which might be defined broadly as the ability to act within a settled framework without fear of arbitrary or unforeseeable state interference." *See Guide to the Implementation of Article* 9, *supra* note 106, at 27.

[109] Jim Murdoch, *Protecting the Right to Freedom of Thought, Religion, Conscience and Religion Under the European Convention on Human Rights* 37 (Council of Eur., Human Rights Handbooks, 2012).

[110] *See, e.g.*, Supreme Holy Council of the Muslim Cmty. v. Bulgaria, App. No. 39023/97, at 17 (Eur. Ct. H.R. 2004), *reprinted in* 41 EUR. HUM. RTS. REP. [EHRR] 3 (2005). This illustrates the importance of the "necessity in a democratic society" prong. Here, the Court noted that in an earlier case, dealing with the same legal provisions, the Court found that the interference was not prescribed by law because it was arbitrary, based on legal provisions that gave unfettered discretion to the executive, and "did not meet the required standards of clarity and foreseeability of the law." *Id.* at 17 (citing Hasan v. Bulgaria, 2000-XI Eur. Ct. H.R. 117). However, due to the specific circumstances of the case, the ECHR considered that it was "not necessary to rule on the lawfulness of that interference." *Id.*

[111] *See Guide to the Implementation of Article 9*, *supra* note 107, at 27–29. Where the interference with Article 9 involves criminal sanctions, "an applicant may well additionally allege a violation of Article 7 of the Convention, which enshrines the principle of *nullum crimen, nulla poena sine lege*." *Id.* at 28–29; *see also* Convention, *supra* note 6, art. 7. In such instances, the Strasbourg Court is likely to address the issues raised under Articles 7 and 9 by using a similar approach. *See id.*; Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 22 (1993); Larissis v. Greece, 1998-I Eur. Ct. H.R. 362, 378–79. There is only one time where this prong has not been satisfied in an Article 9(2) case. *Hasan*, 2000-XI Eur. Ct. H.R. 117 at 143–45.

[112] Kokkinakis, 260-A Eur. Ct. H.R. (ser. A) at 19.

existence of a body of settled and published domestic case law supplementing the statutory provision was enough to meet the "prescribed by law" requirement.[113]

2. Legitimate Aim

Next, if the interference is "prescribed by law," the state must prove the interference by one of the legitimate aims listed in Article 9(2). Article 9's recognized legitimate interests—"the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others"[114]—are very similar in textual formation to other interests recognized under the Convention.[115] The ECHR has yet to thoroughly illustrate the breadth of the "legitimate aims" prong. In principle, the burden lies with the State to assert the particular aim it wishes to advance; in practice, the Court will deem an interference purporting to have a legitimate aim as within the scope of one of the listed aims of the particular guarantee.[116] For cases involving prohibitions on proselytism, the ECHR recognizes both protection of public order and protection of the rights and freedom of others as legitimate aims.[117] While the process of establishing an aim or purpose of interference may be easy, the state still must justify it.[118] Thus, it is important

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[113] *Id*. at 19–20 ("The Court has already noted that the wording of man statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. Criminal-law provisions on proselytism fall within this category. The interpretation and application of such enactments depend on practice." (citation omitted) (citing Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) at 20 (1988))).

[114] Convention, *supra* note 6, art. 9(2).

[115] However, they are slightly narrower in their textual formation than Articles 8, 10 and 11; for example, national security is not recognized under Article 9. *Compare* Convention, *supra* note 6, art. 9(2) ("[I]n the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."), *with id.* art. 8(2) ("[I]n the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."), *and id.* art. 10(2) ("[I]n the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, . . . protection of health or morals, . . . reputation or rights of others,. . . disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."), *and id.* art. 11(2) ("[I]n the interests of national security or public safety, . . . prevention of disorder or crime, . . . protection of health or morals or . . . the rights and freedoms of others. This Article shall not prevent . . . restrictions on . . . members of the armed forces, . . . police or . . . administration of the State.").

[116] *See Guide to the Implementation of Article 9*, *supra* note 107, at 26. See Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, 111–12, for a discussion of the ease by which a states can establish a legitimate aim for interference with an individual's right to manifest their religious beliefs.

[117] *See* Serif v. Greece, 1999-IX Eur. Ct. H.R. 73, 87–89; *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20.

[118] *See Metro. Church of Bessarabia*, 2001-XII Eur. Ct. H.R. at 113–14.

to distinguish the purpose of the "legitimate aim" prong from the "social need" of the democratic necessity prong.[119]

3. Necessary in a Democratic Society

The freedom to manifest religion must, on occasion, "be subject to restraint in the interests of public safety, for the protection of public order, health and morals, or the rights and freedoms of others."[120] However, determining whether a government's interference was actually "necessary in a democratic society" is the most problematic and inconsistent part of the ECHR's inquiry. To meet this standard, the interference complained of must: (1) correspond to a pressing social need; (2) be proportionate to the legitimate aim; and (3) be justified by relevant and sufficient reasons.[121]

The burden is on the respondent state to illustrate how its interference was "necessary in a democratic society."[122] In turn, the ECHR must decide whether the measures interfering with individuals' Article 9 rights, are both justified in principle and proportionate. Often, the ECHR considers various international and European standards and practices to interpret whether a state's interference with a Convention right was necessary.[123] So, for cases on proselytism, the ECHR has made reference to reports by various NGOs,[124] such as the World Council of Churches.[125] In practice, the standard of justification depends on the particular context of the interference.[126] Generally, the greater the "pressing social need," the easier it is for the State to prove the interference. Public safety and public order are a compelling social need, as justified in past Article 9(2) decisions upholding state restrictions on religious garb.[127]

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[119] *See Guide to the Implementation of Article 9*, *supra* note 107, at 30. While the former prong poses little difficulty for a state seeking to justify interference, the situation is very different in respect of the latter prong. *Id.*

[120] *See id.*

[121] *Id.*

[122] The state party has a first bite at the "apple" and the ECHR will only interfere if the party exceeded its "margin of appreciation." *See infra* Part II.B and accompanying text.

[123] *See* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 40–41 (1993); *see also* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

[124] Another NGO the ECHR has referenced is the Committee for the Salvation of Youth from Totalitarian Cults. Jehovah's Witness' of Moscow v. Russia, App. No. 302/02 (Eur. Ct. H.R. 2010).

[125] *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 21, 28.

[126] *Guide to the Implementation of Article 9*, *supra* note 94, at 31.

[127] *See, e.g.*, Motor-Cycle Crash Helmets (Religious Exemption) Act, 1976, c. 62 (U.K.). It is noteworthy that in the case *X. v. United Kingdom*, the European Commission for Human Rights decided that a requirement

In *Kokkinakis*, the first case decided under Article 9(2), Greece sentenced a Jehovah's Witness to imprisonment for proselytism.[128] The Greek government argued that the ban on proselytism was necessary for the "peaceful enjoyment" of the other rights guaranteed by the Convention, including Article 9.[129] The ECHR noted that the ban was "prescribed by law" and had the "legitimate aim" to protect the rights of others.[130] However, the Greek government did not show, how in the particular circumstances of the case, the interference was "necessary in a democratic society."[131] The ECHR explained the need to draw a distinction between "bearing Christian witness" and "improper proselytism."[132] Christian witness "corresponds to true evangelism."[133] The ECHR cited a World Council of Churches report from 1956 that described evangelical witness as "an essential mission and a responsibility of every Christian and every Church."[134] The *World Council of Churches' Report* noted that proselytism represented corruption and deformation of true evangelism and sometimes takes the form of "offering material or social advantages" to gain new members for a church, exerting pressure on people in distress or in

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to wear motorcycle crash helmets for Sikhs did not violate Article 9 of the European Human Rights Convention because it was reasonably and objectively justified, and a pressing social need. X v. United Kingdom, App. No. 7992/77, 14 Eur. Comm'n H.R. Dec. & Rep. 234–35 (1978); *cf.* Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. (holding that prohibiting wearing a cross violates Article 9 when the work place is an airplane but not when the workplace is a hospital).

> The Court considers that, as in Ms. Eweida's case, the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance. However, the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms. Eweida. Moreover, this is a field where the domestic authorities must be allowed a wide *margin of appreciation*. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.

Id. at 36. (emphasis added); *see infra* Part II.B and accompanying text.

128 *Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 9.

129 *Id.* at 20.

130 *Id.*

131 *Id.* at 21.

132 *Id.*

133 *Id.*

134 *Id.*; WORLD COUNCIL OF CHURCHES CENT. COMM., CHRISTIAN WITNESS, PROSELYTISM AND RELIGIOUS LIBERTY IN THE SETTING OF THE WORLD COUNCIL OF CHURCHES: A PROVISIONAL REPORT, *reprinted in* 9 Ecumenical Rev. 48, 55–56 (1956) [hereinafter CHRISTIAN WITNESS, PROSELYTISM AND RELIGIOUS LIBERTY: A PROVISIONAL REPORT].

need, and "entail[ing] the use of violence or brainwashing."[135] The report concludes by stating that proselytism "is not compatible with respect for the freedom of thought, conscience and religion of others."[136]

The Court explained that instead of justifying the applicant's conviction in the circumstances of the case, "Greek courts established the applicant's liability by merely reproducing the wording of [the legislation] and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means."[137]

Similarly, three years later, in *Manoussakis v. Greece*, the Court held that the law's application violated Article 9.[138] As in *Kokkinakis*, the ECHR did not elaborate its findings on the prohibition's legitimate aim in protecting public order; it seemed to accept the government's assertion that the prohibition supporting public order, rested on historical grounds.[139] Greece maintained that, "although the notion of public order had features that were common to the democratic societies in Europe, its substance varied on account of national characteristics."[140] In Greece, most of the population was of the Christian Orthodox faith, which was associated with significant moments in Greek history.[141] "The Orthodox Church had kept alive the national conscience and Greek patriotism during the periods of foreign occupation."[142] Additionally, "various sects sought to manifest their ideas and doctrines using all sorts of 'unlawful and dishonest' means" and "[t]he intervention of the State to regulate this area with a view to protecting those whose rights and freedoms were affected by the activities of socially dangerous sects was indispensable to maintain public order on Greek territory."[143] In short, the Greek government's rationale for restricting religious freedom is that such freedom threatens its Greco-Christian foundations.[144]

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135 *See* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 21 (1993) (citing CHRISTIAN WITNESS, PROSELYTISM AND RELIGIOUS LIBERTY: A PROVISIONAL REPORT, *supra* note 134).

136 *Id.*

137 *Id.*

138 Manoussakis v. Greece, 1996-IV Eur. Ct. H.R. 1346, 1362–66.

139 *See id.* at 1362; *see also Kokkinakis*, 260 Eur. Ct. H.R. (ser. A) at 20.

140 *Manoussakis*, 1996-IV Eur. Ct. H.R. at 1362.

141 *Id.*

142 *Id.*

143 *Id.*

144 *See* N. Korfiatis, *Proselytization as a Punishable Act in Greece*, 6 ARCHEION NOMOLOGIAS 329 (1955) (Greece). These restrictions on religious rights "stem from this organic ontology when threats are perceived to national integrity or cohesion." *Eastern Orthodoxy and Human Rights*, *supra* note 48, at 349.

In *Larissis v. Greece*, the ECHR upheld convictions of three pilots in the Greek air force for proselytizing their fellow officers: finding a justified interference under Article 9(2),[145] without making reference, to the "margin of appreciation" doctrine.[146] The Court's limitations analysis stated that "improper proselytism" was not among the manifestations of religion protected under the Convention .[147] Additionally, the ECHR noted that in the particular circumstances of the case, "different factors [will] come into the balance," presumably about whether the proselytism was "proper" or "improper."[148] The ECHR found that the Greek authorities were in principle justified, since in a military context there was arguably a need to protect the rights of others.[149]

In any event, application of the necessity prong—and thus, consideration of whether to recognize a "margin of appreciation"—must take into account the proportionality of the interference to its "pursued aim" and whether the reasons the respondent State provides are *relevant* and *adequate* to justify it as "necessary in a democratic society"[150]—a term whose interpretation manifests

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145 Larissis v. Greece, 1998-I Eur. Ct. H.R. 362, 381.

146 *See id*. at *passim*.

147 *Id*. at 379.

148 *Id.*

149 *Id.* at 380–81.

150 *See generally* INTERPRETATION AND DISCRETION UNDER THE ECHR, *supra* note 25, at 24–25.

> Various phrases have been used by the Court and Commission from time to time to express the idea that the rights in the Convention should take priority with the state carrying the burden of justifying the interference. For example, the grounds must be "relevant and sufficient," the necessity for a restriction must be "convincingly established," the exceptions should be narrowly construed, and the interference must be justified by a "pressing social need." While this, in principle, limits the scope for national discretion, the particular facts of any given case, and the circumstances prevailing in the given country at the time, may broaden it in practice. On the other hand, other decisions refer to the need for a 'balance' between rights and exceptions.

Id. at 20 (alteration in original) (footnotes omitted) (quoting Observer v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 30 (1991) (Martens, J., dissenting), *and* Autronic AG v. Switzerland, 178 Eur. Ct. H.R. (ser. A) at 27 (1990) (citing Barthold v. Germany, 90 Eur. Ct. H.R. at 26 (1985)), *and* Weber v. Switzerland, 177 Eur. Ct. H.R. (ser. A) at 22 (1990) (citing *Barthold*, 90 Eur. Ct. H.R. (Ser. A) at 26 (1985))), (citing *Observer*, 216 Eur. Ct. H.R. (ser. A) at 53 (1991) (Martens, J., dissenting), *and* Klass v. Germany 28 Eur. Ct. H.R. (ser. A) at 21 (1979), *and* Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 40 (1979) (citing Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976)), *and* Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) 11, at 26–27 (1986), *and* Ezelin v. France, 202 Eur. Ct. H.R. (ser. A) at 37 (1991), *and* Sunday Times, 30 Eur. Ct. H.R. (ser. A) at 50 (1979), *and Klass*, 28 Eur. Ct. H.R. (ser. A) at 27–28 (1979), *and* Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A) at 16 (1989), *and* Barfod v. Denmark, 149 Eur. Ct. H.R. (ser. A) at 12 (1989)).

inconsistency and disagreement. In consequence, the ECHR may recognize a certain "margin of appreciation" by domestic decision-makers."[151]

B. Connection Between the Margin of Appreciation and the Three Prongs

Applying a rule fairly and equitably across a diverse continent is not an easy task. Determining whether a measure is necessary and proportionate can never be merely a mechanical exercise of bright-line rules. Once all the facts are known, there remains an irreducible value judgment, made by asking whether "the interference in question was necessary in a democratic society."[152] The responsibility for ensuring that Convention rights are practical and effective belongs to national authorities.[153] Any given domestic situation is likely to show historical, cultural, and political sensitivities, and an international forum is not well situated to resolve such disputes.[154] To this end,

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[151] *See* Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* June 24, 2013, C.E.T.S. No. 213 (amending Convention, *supra* note 6, pmbl.). The purpose and meaning of the amendment to the Convention's Preamble is solely to make a reference to the doctrine of the margin of appreciation as developed by the Court in its case law and *not* to alter this judicial tool of interpretation in any way. *See* Comm. of Ministers., *Protocol No.15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms–Explanatory Report*, 123d Sess., para. 7, Doc. No. CM(2012)166 add (2012). Once Protocol No. 15 enters into force, the Convention's preamble will read:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

Protocol No. 15 art. 1, *supra* note (adding the principles of subsidiarity and the "margin of appreciation" to the Convention's preamble).

[152] INTERPRETATION AND DISCRETION UNDER THE ECHR, *supra* note 25, at 9.

[153] Murdoch, *supra* note 109, at 28. The Convention's guarantees have to be practical and effective rights. *Id.* Hence, ECHR jurisprudence includes the idea of "positive obligations," meaning responsibilities on the states to act in a manner that protects the rights of individuals. *Id.*

[154] *See* Murphy v. Ireland, 2003-IX Eur. Ct. H.R. 1, 19–20, 24. The ECHR found no violation of Article 9 or Article 10 where a "religiously homogeneous [state] being over 95% Roman Catholic" denied the application of "religious advertising coming from a different church [that could] be offensive to many people and might be open to the interpretation of proselytizing." *Id.* (citations omitted). With regard to the State's reasons justifying the interference, the ECHR found persuasive the government's argument underlining:

> [T]he particularly country-specific religious sensitivities in Ireland, noting the description of such concerns by the domestic courts in the present case. It might have been that there was no contemporary religious disharmony in Ireland. However, religious division had characterised Irish history, a history which included proselytizing and the creation of legal and social systems to undermine one religion. That historical context, the current manifestation of religious division in Northern Ireland together with the fact that the vast majority of the Irish population adhered to a religion (indeed, to one dominant religion) entitled the State in 1960 and again in 1988 to

the ECHR may accord domestic decision-makers a certain "margin of appreciation."[155]

The meaning of margin of appreciation is not immediately clear. It is helpful to broadly translate the original French term, *marge d'appréciation*, as "margin of assessment/appraisal/estimation."[156] Before Protocol No. 15—clarifying that the Court alone defines whether and to what extent states are granted a margin of appreciation[157]—the term was not found in the text of the Convention itself, or in the *travaux préparatoires*.[158] The term appeared for the first time in a 1958 report by European Commission on Human Rights (the Court's predecessor) in a case brought by Greece against the United Kingdom over alleged human rights violations during counter-insurgency operations in Cyprus.[159] The ECHR developed the "margin of appreciation" to take into account the Convention's broadly drawn principles and variations in the interpretation across different societies.[160] This "margin" may allow states a degree of deference, which obliges ECHR judges to take into account the cultural, historic, and philosophical differences between the ECHR in Strasbourg and the State in question: What is right for the United Kingdom may not be right for Greece. Since its introduction in 1958, the "margin of

> apprehend unusual sensitivity to religious issues in contemporary Irish society on the part of adherents of both dominant and minority religions. Given this potentially incendiary situation, the State was entitled to act with caution in conditioning the circumstances in which religious material, and in particular religious advertising, would be made available in the broadcast media.

Id. at 19–20.

155 Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22–23 (1976).

156 INTERPRETATION AND DISCRETION UNDER THE ECHR, *supra* note 25, at 5.

157 Protocol No. 15, *supra* note 151, art. 1. Protocol 15 adds the "margin of appreciation" to the preamble of the Convention; however, no clarification is provided, further intensifying the need for balancing tools. See id. The protocol was opened for signature on June 24, 2013 and will enter into force "on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 6." *Id.* art. 7.

158 H.C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 14 (1996); *see also* "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 8.

159 Greece v. United Kingdom II, App. No. 176/56, 1958–1959 Y.B. Eur. Conv. on H.R 174, 176 (Eur. Comm'n on H.R.) ("In general, the Commission takes the same view as it did with regard to the question of a 'public emergency threatening the life of the nation,' namely that the Government of Cyprus should be able to exercise a certain measure of discretion in assessing the 'extent strictly required by the exigencies of the situation.' The question whether that discretion has or has not been.").

160 INTERPRETATION AND DISCRETION UNDER THE ECHR, *supra* note 25, at 10.

appreciation" has appeared in over 700 judgments before the ECHR.[161] Even so, this doctrine has been difficult to apply in practice, inviting controversy.[162]

The first use of the doctrine by the ECHR was in *Handyside v. United Kingdom*.[163] In *Handyside*, the United Kingdom prosecuted and convicted an English publisher under the Obscene Publications Act of 1959 and 1964 for "having in his possession 1,069 obscene books entitled '*The Little Red Schoolbook*' for publication for gain."[164] The book contained passages that advised children to freely indulge in their sexual curiosity and suggested particular activities that the British courts held would result in illegal sexual acts in England.[165] The publisher applied to the ECHR claiming breaches of numerous Convention rights. The ECHR noted that the expression prohibited in this case was the type the Convention envisions to protect, creating little room for restrictions.[166] However, in the end, the ECHR explained that a wider "margin of appreciation" is given when a state is regulating expression about matters likely to offend personal convictions, within the sphere of morals or, especially, religion.[167] In affording the United Kingdom a "margin of appreciation," the ECHR reasoned that expression likely to cause substantial offence to people of particular religious persuasions will vary significantly from time to time and from place to place, especially in an era characterized by

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[161] Editors' Note, *The Doctrine of the Margin of Appreciation Under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice*, 19 HUM. RTS. L.J. 1, 1 (1998).

[162] INTERPRETATION AND DISCRETION UNDER THE ECHR, *supra* note 25, at 5 ("[W]hile some have argued for the elimination of the doctrine altogether, most maintain that greater clarity, coherence and consistency in its application are required. But few have ventured to suggest how this might be achieved." (citations omitted)).

[163] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

[164] *Id.* at 9; *see also* Obscene Publications Act, 1964, c. 74 (U.K.); Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66 (U.K.).

[165] *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 24.

> Basically the book contained purely factual information that was generally correct and often useful, as the Quarter Sessions recognised. However, it also included, above all in the section on sex and in the passage headed "Be yourself" in the chapter on pupils . . . that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences.

Id.

[166] *Id.* at 26–28.

[167] *Id.*; *see also* Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937, 1958.

an ever-growing array of faiths and denominations,[168] ultimately holding that the United Kingdom's restriction did not violate the Convention.[169]

The ECHR continues this line of reasoning for freedom of expression about attacks on religious belief—recent cases continue to illustrate this. In *Wingrove v. United Kingdom*,[170] for example, the ECHR reiterated that a wider "margin of appreciation" is given to a state when it's interference with free expression relates "to matters liable to offend intimate personal convictions within the sphere of . . . religion."[171] Further, the "margin of appreciation" widens "to an even greater degree, [when] there is no *uniform* European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions."[172] The ECHR also explained that because of states' "direct and continuous contact with the vital forces of their countries," domestic authorities are in a better place than the ECHR to give opinions on the exact content of the requirements regarding "the rights of others as well as on the 'necessity' of a 'restriction.'"[173] The domestic situation is likely to show historical, political, and cultural sensitivities, and an international forum is not always well placed to resolve such disputes.[174]

The situation in Greece[175] reflects the country's historical, political, and cultural sensitivities.[176] Although the ECHR has addressed certain external

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168 *Id.* at 22.

169 *Id.* at 28.

170 Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937, 1950–54 (referring to the "right of citizens not to be insulted in their religious feelings").

171 *Id.* at 1958; *accord Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23.

172 *Wingrove*, 1996-V Eur. Ct. H.R. at 1958 (emphasis added).

173 *Id.*

174 *See, e.g.*, Murphy v. Ireland, 2003-IX Eur. Ct. H.R 1, at 28–29.

175 The prohibition against proselytism, and Damavolitis Emmanuel's conviction. *See supra* notes 1–3 and accompanying text.

176 *See generally* Leonid Kishkovsky, *Orthodoxy at a Crossroads*, CATHOLIC WORLD, Jan. 1994, at 11–15. See Cecil M. Robeck, Jr., *Mission and the Issue of Proselytism*, INT'L BULL. MISSIONARY RES., Jan. 1996, at 2, for a discussion on the Eastern Orthodox and the issue of proselytism in post-Soviet Eastern Europe.

> It is equally clear that the Orthodox Church, dominant in this region for a millennium, counts on its cultural link with the past to move ahead after the era of Soviet suppression. Yet the seventy-year presence of Communism, with its intense persecution of the churches, has produced an enormous spiritual vacuum. The national churches, Orthodox and otherwise, find themselves with inadequate resources to fill this vacuum. Protestant and other groups from the West are entering the region with a distinct advantage. They are often able to afford to do things that the Orthodox churches can still only dream of."

Id.

factors (like the lack of uniformity in terms, concepts of rights, and morality in Europe), and has accepted special historical circumstances as a legitimate aim in past cases, the ECHR has yet to directly address the respective weights of the factors where a "margin of appreciation" was given. The ECHR alludes to similar external factors,[177] such as religious restoration and preservation of culture, but has not yet considered them.

C. Adding Structure to the Margin of Appreciation Analysis

From evaluating relevant judicial opinions, treaties, and documents, this Comment suggests that the ECHR use certain factors as balancing tools to determine whether to afford a "margin of appreciation" to the state. By employing these factors, also known as second-order reasons, the ECHR could create a more predictable formula for assessing Article 9(2) questions in an ever-changing world.

To begin, it is necessary to explain first- and second-order reasons. First-order reasons are essentially principles (e.g., the importance of protecting freedom of religion), and, like principles, generate *prima facie* reasons for judicial decisions.[178] Alone, a first-order reason cannot definitively call for what a concrete case requires; courts must weigh it against other reasons to find a particular decision.[179] Further, each first-order reason has a degree of weight[180]: it is the weighing that resolves the conflicts between first-order reasons.[181]

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[177] *E.g.*, Second-order reasons. *See infra* Part. II.C.1–2 and notes 190–91 and accompanying text.

[178] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 59 (2002).

[179] ANDREW LEGG, MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 28 (2012) [hereinafter THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW].

[180] See Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) (1979), for an illustration how the ECHR assesses each first-order reason's degree of weight. The United Kingdom's *sub judice* rule restricts the publication of reports and comments relating to cases that are *sub judice* to prevent prejudice on the parts of judges and jurors. James Young, *The Contempt of Court Act 1981*, 8 BRIT. J. L. & SOC'Y 243, 245–46 (1981). In *Sunday Times*, the ECHR held that the *sub judice* rule was broader than was necessary to fulfill its purpose, and failed to adequately take into account the importance of freedom of expression:

> [E]mphasising that it is not its function to pronounce itself on an interpretation of English law adopted in the House of Lords, the Court points out that it has to take a different approach. The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted. In the second place, the Court's supervision under Article 10 covers not only the basic legislation but also the decision applying it. It is not sufficient that the interference involved

Second-order reasoning draws from the philosophy of practical reasoning.[182] Second-order reasons are those to act or to refrain from acting on one's own assessment of the first-order balance of reasons, or balancing the reasons in issue.[183] Tribunals consider "non-exclusionary second-order reasons to uphold the states' interpretation of their international human rights obligations."[184] Some well-known second-order reasons would include the presumption of innocence in criminal law[185] and the doctrines of precedent and *stare decisis*.[186]

For example, precedent works like a second-order reason. Precedent cautions against a "*de novo* assessment of the case according to the balance of first-order reasoning, leaning instead towards consistency with previous decisions."[187] The weight given to previous decisions varies by case and by the level of the court within the legal system's hierarchy.[188] The weight of this second-order reason affects the extent to which a court can extend the law to new situations, distinguish precedent, or overrule earlier cases.[189] A court should not exclude any reasons when it considers whether to apply an existing precedent, assessing all the reasons for and against the outcome required by precedent.[190] After this first assessment, a court might apply the second-order

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> belongs to that class of the exceptions listed in Article 10 § 2 which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.

Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 41 (1979) (citations omitted) (citing Ringeisen v. Austria, 1 Eur. Ct. H.R. (ser. A) at 40 (1971), *and* Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) at 21 (1978), *and* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976)).

[181] THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 179, at 18–21. This is done by weighing the relative strength of conflicting reasons. *See also Sunday Times*, 30 Eur. Ct. H.R. at 33–42.

[182] THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 179, at 18–20.

[183] *Id.* at 18 (citing Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 O.J.L.S. 215, 223 (1987)).

[184] *Id.*

[185] *Id.* at 20. This presumption "requires stronger ground for guilt than the mere balance of first-order reasons when convicting. . . ." Whereas "[i]n a civil suit, if the same set of facts were to require determination, this second-order reason would not apply and the balance of first-order reasons would normally suffice." *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* "Often, precedent will determine how a case before the court ought to be decided." *Id.*

[190] *Id.* at 20. For simplicity, we will call the options *A* and *B*, respectively. *Id.*

reasons to follow precedent or other factors might override the need for consistency, which could inspire the court to extend the law.[191] Alternatively, there may be strong grounds for overruling precedent and establishing a new rule.[192]

The concept of deference intrinsically involves second-order reasoning. Thus, a "margin of appreciation,"[193] in the context of international human rights law, is best understood as involving allocation of weight to second-order reasons to follow the respondent state's approach to the interpretation and application of international human rights standards.[194]

International tribunals recognize a menu of second-order reasons, including: democratic legitimacy, the common practice of states, and the expertise of states.[195] In evaluating interferences under Article 9(2), what types of second-order reasons and external factors should the ECHR use to balance the first-order reasons in determining whether to give deference to decisions of domestic authorities? This Comment suggests the following: (1) special historical circumstance; (2) religious restoration and preservation of culture; and (3) lack of autonomous meaning.

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191 *Id.*

192 *Id.* Other common situations that involve second-order reasoning include deference to the fact finding of lower courts, deference in judicial review to political branches of government, or deference to technical agencies in domestic public law. *Id.*

193 In internationals courts without this exact expression, it is known as judicial deference.

194 *Id.* at 20–21.

195 *Id.* at 37. The various reasons can be categorized into reasons based on: (1) the "nature of the relationship and the role of the actor," and (2) "the expertise of the actor and the epistemic limitations of the decision-maker." *Id.* at 24. *Compare* Hertzberg et al. v. Finland, Comm. No. 61/1979, H.R. Comm., 10.3, U.N. GAOR, 37th Sess., Supp. No. 40, at 161, U.N. Doc. A/37/40 (Apr. 2, 1982) ("There is no universally applicable common standard. Consequently, in this respect, a certain *margin of discretion* must be accorded to the responsible national authorities." (emphasis added)), *and* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶¶ 58–62 (Jan. 19, 1984) ("[T]he Court is fully mindful of the *margin of appreciation* which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with. But the Court's conclusion should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and unjustified degree the political rights of naturalized individuals.") (emphasis added)), *with* Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 36 (1979) ("[T]he initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States. Accordingly, 'Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator . . . and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force.'" (quoting Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (alteration in original)).

1. Special Historical Circumstances and Religious Restoration and Preservation of Culture

Although the ECHR has accepted special historical circumstances as a legitimate aim in past cases,[196] it has yet to directly address its weight where a "margin of appreciation" was given. The ECHR alludes to similar second-order reasons,[197] such as religious restoration and preservation of culture,[198] but has not yet considered them.

In 1947, the American Anthropological Association's comment on the draft U.N. *Declaration on the Rights of Man* stated: "The Individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural rights."[199] The American Anthropological Association further maintained that one of the principles that should underpin any human rights agenda was that "standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of beliefs or moral codes of one culture must to an extent detract from the applicability of any Declaration of Human Rights to mankind as a whole."[200] This is not to say that states may invoke cultural diversity to infringe upon human rights. Rather, these second-order reasons, like respect for particular cultural and historical circumstances, should have proper weight so that "human rights [are] guarantees of cultural diversity."[201] The Council of Europe,[202] and many of its treaties[203] embodies these ideas.

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196 *See, e.g.*, Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) at 18–20 (1993); Manoussakis v. Greece, 1996-IV Eur. Ct. H.R. 1346, 1362–66 (holding that the Greek law has a legitimate aim but was not necessary in the particular circumstances).

197 In other words, the ECHR alludes to other external factors.

198 *See infra* notes 197–225 and accompanying text.

199 Exec. Bd., Am. Anthropological Assoc., *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 541 (1947).

200 *Id.* at 542. Recognizing the problem that confronted the newly independent countries of the 1960's, the association noted that on first contact with European and American power, many nations were awed and partially convinced of the superior ways of the Europeans and Americans. *Id.* at 541. By the time these peoples were freed from oppressive regimes they saw the limitations of the American and European systems of rights, and discovered new values in old beliefs they had been led to question. *Id.*

201 UNESCO, Paris, Fr., Oct. 15–Nov. 3, 2001, 31 C/Res 25, Universal Declaration on Cultural Diversity, art. 4, 31st Sess., Nov. 2, 2001, 1 Recs. of the Gen. Conf. 31st Sess. (2002) ("The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.").

202 Statute of the Council of Europe, May 5, 1949, E.T.S. No. 1, 87 U.N.T.S. 103 [hereinafter COE Statute].

The European Cultural Convention ("ECC"), founded on a common history and heritage, actuates the concept of cultural cooperation.[204] The ECC's mission is to help preserve the cultural identities of its signatory states.[205] This instrument encourages state parties to "promote the study of its language or languages, history and civilisation,"[206] and states that each state party "shall regard the objects of European Cultural value placed under its control as integral parts of the common cultural heritage of Europe, [and] shall take appropriate measures to safeguard them."[207] Additionally, the ECHR has noted the ECC's relevance for cases on interferences with Article 9.[208]

Although Article 9(2) jurisprudence is still relatively thin, examples of the weightiness of second-order reasons, such as the lack of a "uniform conception of morals," exist in Article 10 (freedom of expression) jurisprudence.[209] This recognition of a lack of "uniform European concepts of morals" serves as a great illustration because it is very similar to the particular cultural and special historical circumstances, of various European states, that drive a great deal of religious conflict.[210]

In *Handyside*, the ECHR held that there was no violation of Article 10 given that the interference was "prescribed by law" and "necessary in a democratic society . . . for the protection of morals" under Article 10(2).[211] The ECHR considered a number of relevant factors that in the end led to the state

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203 *See, e.g.*, Council of Europe Framework Convention on the Value of Cultural Heritage for Society, *opened for signature* Oct. 27, 2005, C.E.T.S. No. 199 [hereinafter Convention on the Value of Cultural Heritage]; European Charter for Regional or Minority Languages, *opened for signature* Nov. 5, 1992, E.T.S. No. 148, 2044 U.N.T.S. 575; European Cultural Convention, Dec. 19, 1954, E.T.S. No. 18, 218 U.N.T.S. 139 [hereinafter ECC]; Convention, *supra* note 6.

204 ECC, *supra* note 203; *Id.* The ECC was designed to safeguard and encourage the region's collective cultural development, recognizing each party's "national contribution to the common cultural heritage of Europe." *Id.* art. 1; *accord* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention]. Both the ECC and the Hague Convention recognize that losing cultural heritage damages the collective culture of the world. *Compare* Hague Convention, *supra*, pmbl., *with* ECC, *supra* note 203, art. 5.

205 ECC, *supra* note 203, art. 1.

206 *Id.* art. 2

207 *Id.* art. 5.

208 Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 194–95.

209 *See supra* note 180 and accompanying text.

210 *See* discussion *supra* Parts I.A–B.

211 Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 21 (1976).

having a "margin of appreciation"[212]—the factors that determined the case were second-order reasons.[213] The ECHR pointed out that "the machinery of protection established that the Convention is subsidiary to the national systems safeguarding human rights . . . leav[ing] to each Contracting State . . . the task of securing the rights and freedom it enshrines."[214] The ECHR additionally noted that it is "not possible to find in the [various] domestic law[s] . . . a uniform European conception of morals," but that the domestic law "of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far reaching evolution of opinions on the subject."[215] Lastly, by reason of the domestic authority's "direct and continuous contact with the vital forces of their countries," state authorities are in a better place "than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."[216]

There are a number of determinative factors in this opinion that cannot be classified as first-order reasons, for example: (1) the lack of a uniform concept of morality between European states; and (2) the view that because of their proximity on the ground, domestic authorities are in a better place to decide how to carry out the Convention's guarantees. The ECHR in this case decided that there was no breach of Article 10 largely because it deferred to the domestic authorities' view of the effect on morals within their locality.[217]

Another case that shows how second-order reasons affect balancing of first-order reasons is *Stoll v. Switzerland*.[218] In this case, domestic authorities fined Swiss journalists for publishing confidential state information that had been leaked to them.[219] The information contained snippets of sensitive correspondence between the U.S. Ambassador to Switzerland and Swiss government officials about claims by Jewish Holocaust survivors for

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212 THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 178, at 28 (alteration in original). "These factors were not part of the first-order reasons for determining whether there had been a violation of Article 10, such as how objectionable the content was or what the nature of the [United Kingdoms]'s restrictions were." *Id.*

213 *Id.*

214 *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 22.

215 *Id.*

216 *Id.*

217 *Id.*

218 Stoll v. Switzerland, 2007-V Eur. Ct. H.R. 267.

219 *See generally id.*

compensation from Swiss banks that profited from deposits made by victims of the Holocaust.[220] In its decision, the ECHR acknowledged freedom of the press and protection of political comment,[221] alongside the diverse approaches European states take in response to a leak of confidential information.[222] Ultimately, in "weighing the interests at stake in the present case against each other in the light of all the relevant evidence," the ECHR found that "the domestic authorities did not overstep their 'margin of appreciation.'"[223]

The ECHR has noted the Eastern Orthodox Church's importance, "which during nearly four centuries of foreign occupation symbolized the maintenance of Greek culture and the Greek language, took an active part in the Greek people's struggle for emancipation, to such an extent that Hellenism is to some extent identified with the Orthodox faith."[224] When the ECHR is deciding whether to give the domestic authority a "margin of appreciation" it should give proper weight to the Greek attempt to preserve their culture, and to the Special Historical Circumstances of Greece.

2. Lack of Autonomous Meaning

A recurring issue in Article 9(2) jurisprudence is the interpretation of what constitutes "improper proselytism." One reason for the inconsistency is that this term lacks "Autonomous Meaning,"[225] which Judge Pettiti's concurring opinion in *Kokkinakis* articulates this problem. Judge Pettiti criticized the majority opinion because it did not even attempt to clarify the meaning of

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220 *Id.* at 275–77.

221 Both freedom of the press and protection of political comment are first-order reasons. *Id.* at 299.

222 The diverse approaches of European States use second-order reasons in response to a leak of confidential information. *Id.* at 299–305.

223 *Id.* at 319.

> When it came to assessing the extent of the authorities' margin of appreciation, the fact that the matter had been examined in depth at the domestic level should also be taken into account. Such examination was vital to the operation of the principle of subsidiarity, a fact which should prompt the Court to show restraint. The Government argued that the crucial factor determining the margin of appreciation of the domestic authorities was not the nature and importance of the position held by the author of the document containing confidential information, but whether the person concerned had knowingly laid himself open to close scrutiny of his every word and deed, as was the case with politicians. In the instant case it was clear that Ambassador Jagmetti had quite reasonably assumed that his report would remain confidential.

Id. at 302.

224 Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) at 11–12 (1993).

225 *Id.* at 28 (Pettiti, J., partly concurring).

"improper proselytism."[226] He explained that it was possible to "define impropriety, coercion and duress more clearly and to describe more satisfactorily, in the abstract, the full scope of religious freedom and bearing witness."[227] Unfortunately, the textual formation of the Convention has given little insight into the precise meaning of its terms. Even so, if this issue continues, the ECHR's hesitancy to reconcile the term's lack of an autonomous meaning could generate doubt in its ability to handle more difficult cases in the future.[228] To alleviate inconsistency and restore confidence, the ECHR should address the "lack of autonomous meaning" of a term (or norm), and use this factor as a balancing tool to help decide whether to give the domestic authority a "margin of appreciation." This includes issues that arise in interpreting treaties and discrepancies in language.

The Vienna Convention on the Law of Treaties ("VCLT") addresses issues that arise in interpreting treaties and differences in languages.[229] The ECHR accepts that it must interpret the Convention according to Article 31 of the VCLT.[230] Article 5 of the VCLT positively compels autonomous interpretation of treaties,[231] which are already in force within the framework of an international organization—"an autonomous interpretation may diverge from the 'ordinary meaning to be given to the terms of the treaty.'"[232] In particular, the VCLT rules of interpretation provided in Articles 31 through 33 are the most pertinent for the purposes of this Comment.

Enforcement of human rights treaties against individual state parties derives legitimacy from consent of each state, and from the joint consent of all parties.[233] These sources of consent also offer guidance on interpreting human

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226 *Id.*

227 *Id.*

228 *Id.* Judge Pettiti, who partly concurred, and Judge Martens, who partly dissented, would have found the proselytism statute facially incompatible with the Convention. In a concurring opinion, Judge De Meyer appears to be taking the same view. *Id.* at 29 ("Proselytism, defined as zeal in spreading the faith, cannot be punishable as such." (citations omitted)).

229 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

230 MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 262 (1997) (citations omitted).

231 VCLT, *supra* note 229, art. 5.

232 *Id.*

233 Under appropriate circumstances, regional human rights treaties like the European Convention on Human Rights may be viewed as expressing the consent of a cohesive regional sub-community.

rights norms.[234] Textual or "ordinary meaning" interpretation relies on the phrasing of the treaty provision, as the object to which consent was given by all parties.[235] Reliance on the *travaux préparatoires*[236] uses documentary evidence from the past to reconstruct the common understanding of the parties at the time when initial consent was given.[237]

The VCLT also authorizes reference to later agreements among the parties and practices by them that show their common interpretation of the treaty, as well as other rules of international law applicable between them.[238] This allows for the ongoing consent of the relevant member states to legitimize and guide enforcement of more specific interpretations of terms than expected at the onset.[239] Human rights tribunals have found other, more detailed, human rights treaties and international soft-law instruments useful in elaborating the meaning of broadly phrased treaty norms.[240] Additionally, *jus cogens*[241] oblige the ECHR to interpret the Convention according to the VCLT.[242] Although the Convention does not have retrospective effect,[243] the ECHR has taken a view

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234 "Recourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable." Saadi v. United Kingdom, 2008-I Eur. Ct. H.R. 31, 59 (citations omitted) (citing VCLT, *supra* note 229, art. 32); *see also* Demir v. Turkey, 2008-V Eur. Ct. H.R. 333, 421 ("In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention." (citations omitted) (citing Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 14 (1975); Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) at 25 (1986); Lithgow v. United Kingdom, 102 Eur. Ct. H.R. (ser. A) at 49 (1986); Witold Litwa v. Poland, 2000-III Eur. Ct. H.R. 289, 306–07)).

235 VCLT, *supra* note 229, art. 31.

236 This phrase is French for "preparatory work."

237 VCLT, *supra* note 229, art. 31.The VCLT designates the use of *travaux* as a "supplementary" means of interpretation, subordinate to those in Article 31. *Id.* art. 32.

238 *Id.* art. 31(3).

239 One example is proselytism.

240 *See* J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 218, 218–26 (2d ed. 1993); *see also* F. MATSCHER, METHODS OF INTERPRETATION OF THE CONVENTION, IN THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 63, 74–75 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993) [hereinafter EUROPEAN SYSTEM]. The term "soft law" refers to a variety of nonbinding international instruments, ranging from treaties with content too vague or weak to bind the parties to voluntary resolutions and codes of conduct to which states have not agreed to be bound. *See, e.g.*, C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850, 851 (1989).

241 *Jus cogens*, such as interpreting the Convention according to the VCLT, are customary international laws.

242 *See* Andrea Bianchi, *Human Rights and the Magic of* Jus Cogens, 19 EUR. J. INT'L L. 491 (2008).

243 The VCLT was signed and ratified after the Convention. *See* Convention, *supra* note 6; VCLT, *supra* note 229.

that Articles 31–33 of the VCLT are reflective of customary international law.[244] There are many examples where the ECHR has referenced other international agreements in interpreting various other Convention rights.[245]

In *Gussenbauer v. Austria*,[246] for instance, an attorney claimed that he was "obliged to do compulsory labour contrary to Article 4 of the Convention."[247] In interpreting the concept of "forced or compulsory labor" within the meaning of Article 4(2)–(3) of the Convention, the Court made many references to the International Labour Organisation's Fourced Labour Convention No. 29,[248] which was much more detailed. A substantial amount of case law had already developed on the ILO, and Article 4 of the Convention drew from it.[249]

Another reference to other international agreements is found in *X v. United Kingdom*.[250] In this case, the point in issue was interpreting Article 2(1)'s extent and breadth: "[e]veryone's right to life."[251] In interpreting "everyone" and "life," the ECHR pointed out more recent international instruments for protecting human rights.[252] Article 4 of the American Convention on Human Rights "expressly extend[s] the right to life to the unborn: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.'"[253]

Although the ECHR has referenced documents from the World Council of Churches and other international human rights instruments in its past Article 9(2) cases, it has yet to directly offer analysis of their weightiness or balance against first-order reasons in a case where domestic authorities received a "margin of appreciation".[254] If it were to apply this approach to proselytism,

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244 Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 14 (1975).

245 *See, e.g.*, Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. at 257, 267–69 (designating an entire section to the analysis of "relevant international instruments").

246 Gussenbauer v. Austria, App. No 4897/71, 28 Eur. Comm'n H.R. Dec. & Rep (1972).

247 LAURIDS MIKAELSEN, EUROPEAN PROTECTION OF HUMAN RIGHTS: THE PRACTICE AND PROCEDURE OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS ON THE ADMISSIBILITY OF APPLICATIONS FROM INDIVIDUALS AND STATES 113 (1980).

248 Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55.

249 EUROPEAN SYSTEM, *supra* note 240, at 74.

250 X v. United Kingdom, App No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 250 (1981).

251 *Id.*

252 *Id.*

253 *Id.* (quoting American Convention on Human Rights art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123).

254 Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 21 (1993) (referencing the WCC).

general sources might be consulted. For example, recently, the World Council of Churches added additional characteristics of improper proselytism, such as "making unjust or uncharitable references to other churches' beliefs and practices and even ridiculing them . . . [and] comparing two Christian communities by emphasizing the achievements and ideals of one, and the weaknesses and practical problems of the other."[255]

Reports like this from the WCC and other international human rights instruments encourages those who want to express their religion to respect the religious dignity and autonomy of others if they are to expect the same respect for their own dignity and autonomy.[256] This would require guidelines of prudence and restraint by foreign missions.[257] Recent Council guidelines include knowing and appreciating the history, culture, and language of the person proselytism intends to reach, avoiding "Westernization of the Gospel and First Amendmentization" of politics,[258] dealing honestly and respectfully with theological and liturgical differences, respecting and advocating the religious rights of all peoples, being Good Samaritans as much as good preachers, and proclaiming their Gospel both in word and in deed.[259]

Kokkinakis is an example of recourse to supplementary means of interpretation. In this case, the ECHR referenced words used by the World Council of Churches, the Second Vatican Council, philosophers and sociologists on proselytism as a supplementary source for defining "improper proselytism." It described proselytism as the "abuse of one's own rights" that infringe the rights of others and manipulate people by methods that violate the conscience. Additionally, the dissent in *Kokkinakis* made particular note to the difficulty that results from interpreting a term or treaty when it has passed through multiple translations and exists in multiple languages: "The Law deals with, as an offence, 'proselytism', which is of course a Greek word and, like so

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255 *The Challenge of Proselytism and the Calling to Common Witness*, 48 ECUMENICAL REV. 212 (2010).

256 *See supra* notes 5–15 and accompanying text.

257 John Witte, Jr., *A Primer on the Rights and Wrongs of Proselytism*, 31 CUMB. L. REV. 619, 628–29 (2001).

258 John Witte, Jr., *Introduction* to PROSELYTISM AND ORTHODOXY IN RUSSIA: THE NEW WAR FOR SOULS 23 (John Witte, Jr. & Michael Bourdeaux eds., 1999).

259 *See* Anita Deyneka, *Guidelines for Foreign Missionaries in the Former Soviet Union*, *in* PROSELYTISM AND ORTHODOXY: THE NEW WAR FOR SOULS 340 (John Witte, Jr. & Michael Bourdeaux eds., 1999); Lawrence A. Uzzell, *Guidelines for American Missionaries in Russia*, *in* PROSELYTISM AND ORTHODOXY: THE NEW WAR FOR SOULS, *supra*, at 323–30; *see also* Witte, *supra* note 257, at 629 (arguing that encouraging moderation by proselytizers and people proselytism intends to reach could be an efficacious course).

many others, has passed into English and also into French. . . ."[260] The dissent also points out disagreement over the term "teaching" in Article 9, stating that it "undoubtedly refers to religious teaching in school curricula or in religious institutions, and not to personal door-to-door-canvassing as in the present case."[261] Still, the majority opinion did not speak directly to, or apply, an autonomous meaning to "improper proselytism."[262] To alleviate its vague opinions and inconsistent applications under the limitations clause of Article 9(2), the ECHR should use three criteria: (1) Special Historical Circumstances; (2) Religious Restoration and Preservation of Culture; and (3) Lack of Autonomous Meaning, to supplement its application of the three-prong test.

III. APPLYING THE SUGGESTED CRITERIA

Because the ECHR's current application of Article 9(2) manifests inconsistency, cases challenging the Greek prohibitions on proselytism are bound to continue. This Comment suggests the ECHR use the following second-order reasons as balancing tools for determining whether to give deference to domestic authorities: (1) Special Historical Circumstances; (2) Religious Restoration and Preservation of Culture; and (3) Lack of Autonomous Meaning. Applying the standard three-prong test in light of these criteria will balance the competing needs of religious free exercise, cultural traditions, public order, and societal needs of Europe and its member states.

This will need more stringent fact-finding on the part of the domestic authorities, which is a good thing. A state that provides a thorough analysis of facts under these criteria will help the ECHR to separate true proselytism from "improper" proselytism, giving legitimacy to those laws that survive the analysis and ridding states of those laws that do not. What would be the outcome for Mr. Emmanuel under an analysis employing these criteria?

A. Illustrating the Impact of the Suggested Criteria for the Case of Damavolitis Emmanuel

Certain aspects of this case would need an extensive factual record to properly decide. For instance, the Greek authorities would need to give

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260 Kokkinakis v. Greece, 260-A Eur. Ct. H.R. at 31 (1993) (J. Valticos, dissenting).
261 *Id.* at 30.
262 *See generally id.*

information about: (1) the education level of both Mr. Emmanuel and the young man that he proselytized; (2) the age and level of impressibility and vulnerability of the young man; (3) evidence of the type of relationship the two had; (4) whether his parents had intervened; (5) whether Mr. Emmanuel offered any material incentive to the young man; (6) history and practices of Mr. Emmanuel's local church; and (7) the nature of this proselytism. Although we do not have these facts before us, for the purposes of this Comment I will take the case through the analysis that the ECHR would use to decide this case under the new second-order reasons.

In this case, it is clear from earlier Article 9(2) case law that the Greek laws would easily survive the first prong of the analysis, "prescribed by law."[263] The second question that the ECHR would ask is whether Greek interference is justifiable under one of the "legitimate aims" listed in Article 9(2). The Greek government would likely argue that the interference was meant to protect public order and the rights and freedom of others.[264] Lastly, the ECHR must decide in this particular circumstance, whether the government's restriction is "necessary in a democratic society." To meet this last standard, this particular interference with Mr. Emmanuel's manifestation of religion must: (1) correspond to a pressing social need; (2) be proportionate to the legitimate aim;[265] and (3) be justified by relevant and sufficient reasons.[266]

Here, both Special Historical Circumstances, and Religious Restoration and Preservation of Culture, would likely strengthen the weight of the state's Legitimate Aim.[267] In *Manauossakis* and *Kokkinakis*, while the ECHR did not elaborate its findings on the prohibition's "legitimate aim" to protect public order; it seemed to accept the government's assertion that the prohibition

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[263] *See supra* notes 13–14 and accompanying text.

[264] *See* Serif v. Greece, 1999-IX Eur. Ct. H.R. 73, 86–89; Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 20 (1993).

[265] The legitimate aim here is "the pursuit of protecting public order and the protection of the rights and freedom of others." *Serif*, 1999-IX Eur. Ct. H.R. at 86.

[266] The following quasi-mathematical formula helps explain how the proposed second-order reasons would impact the first-order reasons in this case. For the sake of simplicity, the three prongs will be (*a*, *b*, and *c*) respectively: *a* and *b* are in favor of one outcome, *x* (*no violation*, margin of appreciation given), and *c* is in favor of a different outcome, *y* (*violation*, no margin of appreciation), the external or second-order reasons (*s1*, *s2*, and *s3*) respectively, operating as follows: x(a + b(s1)(s2)) considered along with *y*(c - (s1)(s2)(s3)). An important point to note here is that the effect of the external factors can only be determined once all of the reasons have been considered.

[267] *See supra* Part.II.C.1.

supporting public order, rested on historical grounds.[268] Thus, where the Court considers the "legitimate aim" prong, along an extensive evaluation of "special historical circumstances" and "religious restoration and preservation of culture," the legitimate aim could be strengthened to tilt the decision in favor of a finding of no violation.[269]

Without considering the Necessary in a Democratic Society prong, along with Special Historical Circumstances, Religious Restoration and Preservation of Culture, and Lack of Autonomous Meaning, this prong supports a finding that the interference violates Article 9(2). Similar to their effect on the legitimate aim prong, both special historical circumstances, and religious restoration and preservation of culture, would likely support a finding of no violation.[270] Both factors strengthen the argument that the Greek laws (1) correspond to a pressing social need, and are (2) justified by relevant and sufficient reasons, however, the third factor, lack of an Autonomous Meaning, addresses when the law is proportionate to the legitimate aim, in addition to the above two concerns (of the necessary in a democratic society prong).

In Article 9(2), there is no Autonomous Meaning of what makes up "improper proselytism." By using supplementary means of interpretation, the ECHR could better define what this concept entails. Or alternatively, it could find that because of Greece's "direct and continuous contact with the vital forces of [its] countr[y]," the Greek domestic authorities "are in principle in better place than the international judge to give opinions on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."[271] The latter would ultimately tilt the decisions in favor of a finding of no violation.

However, if the ECHR were able to define "improper" proselytism using supplementary means, an extensive factual record of Mr. Emmanuel's acts would be necessary to test whether his manifestation was true evangelism, or "improper" proselytism.[272] But, if no extensive factual record exists, or if

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[268] *See supra* Parts II.A.2–3.

[269] I.e., Greece is given a margin of appreciation.

[270] I.e., adding weight to the decision toward no violation.

[271] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

[272] Such evidentiary factors would include: (1) the education level of both Mr. Emmanuel and the young man he proselytized; (2) the age and level of impressionability and vulnerability of the young man; (3) evidence of the type of relationship the two had; (4) whether or not his parents had intervened; (5) whether or

Greece is not able to offer one that is satisfactory,[273] the terms' "Lack of Autonomous Meaning" would tilt the entire decision in favor of a violation of Article 9(2). The failure of domestic courts to specify the reasons and specific circumstances for the conviction make it impossible to show that there was a pressing social need. The Court in *Kokkinakis*[274] noted that "in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of [the legislation] and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding." The decision in Mr. Emmanuel's case would likely rest on the nature and extent of the factual record.

CONCLUSION

The ECHR's application of Article 9(2) limitations clause naturally manifests inconsistency. This Comment suggests the ECHR use three second-order reasons as balancing tools for determining whether to give deference to domestic authorities: (1) Special Historical Circumstances; (2) Religious Restoration and Preservation of Culture; and (3) Lack of Autonomous Meaning. Applying the three-prong limitations analysis in light of these criteria will balance the competing needs of religious free exercise, cultural traditions, public order, and societal needs of Europe and its member states.[275]

Although Article 9(2) jurisprudence is still developing, the problems that arise from manifestation of religion will not disappear anytime soon. The modern right to manifest one's religion is a coin with two sides. On one side, the modern human rights revolution catalyzed a great awakening of religion around the world.[276] In areas of the world where commitment to human rights and democracy is new, ancient religions once driven underground by oppressive, autocratic regimes have been reborn with vigor.[277] On the other

not any material incentive was offered to the young man; (6) history and practices of Mr. Emmanuel's local church; and (7) the nature of this proselytism. *See supra* Part III.A.

273 *See supra* Part. II.B.

274 Kokkinakis v. Greece, 260 Eur. Ct. H.R. at 21 (1993).

275 This list has been derived from: (1) various opinions, concurrences, and dissents of the ECHR; (2) Universal Human Rights Concepts; and (3) the VCLT's Article 31 for treaty interpretation, to which all forty-seven states are also signatories.

276 *Rights and Limits of Proselytism in the New Religious World Order*, *supra* note 15, at 105–06.

277 *Id.* at 106–07 (noting the former Soviet bloc, post-colonial Africa, and Latin America); *see also* ZOE KATRINA KNOX, RUSSIAN SOCIETY AND THE ORTHODOX CHURCH: RELIGION IN RUSSIA AFTER COMMUNISM 84–85, 173–74 (2004) (discussing Orthodoxy and religion Post-Soviet Russia); HUMAN RIGHTS IN AFRICA:

side of the spectrum, this very same democratic human rights revolution has inspired new forms of religious and ethnic conflict, oppression, and belligerence that have at times reached tragic proportions.[278]

As closed societies open up to the outside world with increasing religious freedom, liberal democracies acknowledging the freedom of persons to choose or change their religion must also acknowledge increasing competition in religious mission. Religious freedom must not become a license to disregard and marginalize local churches, traditions and cultures, but should rather be used to promote common witness so that human rights are guarantees of cultural diversity.[279]

Embodied in the Convention, as well as in the Universal Declaration and the ICCPR, is the idea that freedom of expression carries with it "special duties and responsibilities,"[280] such as the duty to respect the religious dignity and autonomy of others. This idea encourages all parties, especially foreign proselytizing groups, to work together and adopt voluntary codes of conduct, restraint, and respect of others. This requires not only continued nurture of interfaith dialogue and cooperation, but also guidance of restraint and prudence that every foreign mission group would do well to adopt and enforce.[281] These include: (1) proselytizers knowing and appreciating the history, culture, and language of the person proselytism intends to reach; (2) avoiding "Westernization" of the Gospel and "First Amendmentization"[282] of politics; (3) dealing both respectfully and honestly about differences in theological and

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CROSS-CULTURAL PERSPECTIVES *passim* (Abdullahi Ahmed An-Na'im & Frances Deng eds., 1990) (discussing religious human rights in post-colonial and post-revolutionary Africa); Symposium, *The Problem of Proselytism in South Africa*, 14 EMORY INT'L L. REV. (2000) (discussing religious human rights in post-Apartheid South Africa); RELIGIOUS FREEDOM AND EVANGELIZATION IN LATIN AMERICA: THE CHALLENGE OF PLURALISM (Paul E. Sigmund ed., 1999) (discussing religious freedom in Latin America); NEW RELIGIOUS MOVEMENTS IN EUROPE (Helle Meldgaard & Johannes Aagaard eds., 1997); NEW RELIGIONS AND NEW RELIGIOSITY (Eileen Braker & Margit Warburg eds., 1998); Jonathan Luxmoore & Jolanta Babiuch-Luxmoore, *New Myths for Old: Proselytism and Transition in Post-Communist Europe*, 36 J. ECUMENICAL STUD. 43 (1999); Susanne Hoeber Rudolph, *Introduction: Religion, States, and Transational Civil Society*, *in* TRANSNATIONAL RELIGION AND FADING STATES 1, 1–19 (Susanne Hoeber Rudolph & James Piscatori eds., 1997).

278 For example, in former Yugoslavia and Chechnya, local religious and ethnic rivals, previously kept at bay by a common oppressor, have converted their new liberties into new licenses to renew their ancient hostilities. *Rights and Limits of Proselytism in the New Religious World Order*, *supra* note 15, at 105.

279 *Towards Responsible Relations in Mission*, *supra* note 74.

280 ICCPR, *supra* note 7, art. 19(3).

281 *Rights and Limits of Proselytism in the New Religious World Order*, *supra* note 15, at 115.

282 *See supra* note 45 and accompanying text.

liturgical understandings; (4) proclaiming the gospel in both *word and deed* by refraining from improper proselytism; and (5) respecting and advocating human rights and dignity of all peoples.[283] However, until our world is free from conflict and can strike such a peaceful accord, international tribunals are necessary. For the Council of Europe, it is the job of ECHR to make sure the human rights enshrined in the Convention and its protocols are not violated.

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[283] *Id.* at 115.

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