

Religious Actors and International Law

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Introduction

The Shift in Focus

'Action without a name, a "who" attached to it, is meaningless...'

—Hannah Arendt¹

I. From Religion to Religious Actors

In 2009, Ms Lubna Hussein, a Sudanese journalist and employee of the United Nations (UN) in Khartoum, was charged alongside 12 other women for committing an indecent act: wearing trousers in public.² The charges were brought under article 152 of the Sudanese criminal code, which provides that indecent acts and obscene outfits 'shall be punished with flogging which may not exceed forty lashes or with fine or with both', whereby 'the standard of the person's religion' is taken to indicate whether an act is indecent or an outfit obscene.³ Law enforcement officers and Sudanese courts presume to decide which acts and what clothing deviate from religious standards.⁴ Ms Hussein asserted that, as an employee of the UN she enjoyed immunity from prosecution, but she chose to resign 'so that I could face the Sudanese authorities and make them show to the world what they consider justice to be'.⁵ Many lessons can be drawn from this

¹ H. Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), at 180–181.

² J. Copnall, 'Lubna Hussein: "I'm not afraid of being flogged. It doesn't hurt. But it is insulting"', *The Guardian*, 2 August 2009, accessed January 2012, <http://www.guardian.co.uk/world/2009/aug/02/sudan-women-dress-code>; L. Hussein, 'When I think of my trial, I pray my fight won't be in vain', *The Guardian*, 4 September 2009, accessed January 2012, <http://www.guardian.co.uk/commentisfree/2009/sep/04/sudan-woman-trousers-trial>; 'Sudan releases woman convicted of wearing tight pants', *CNN*, accessed January 2012, <http://www.cnn.com/2009/WORLD/africa/09/08/sudan.journalist.tight.pants/index.html#cnnSTCText>. For the position taken by the embassy of Sudan in London, see K. al-Mubarak, 'Lubna Hussein's trial had nothing to do with trousers', *The Guardian*, accessed January 2012, <http://www.guardian.co.uk/commentisfree/2009/sep/11/lubna-hussein-sudan-embassy-response>.

³ The full text of article 152 of the Memorandum to the Sudanese Penal Code 1991 can be found in Amnesty International, *Sudan: Amnesty International calls on government to repeal law penalizing women for wearing trousers*, Press Release, 4 September 2009, accessed January 2012, <http://www.amnesty.org/en/for-media/press-releases/sudan-amnesty-international-calls-government-repeal-law-penalizing-women>.

⁴ See note 3.

⁵ L. Hussein, 'When I think of my trial, I pray my fight won't be in vain', *The Guardian*, 4 September 2009.

case, but what should be emphasized in this introductory note is the way Ms Hussein framed the situation:

Islam does not say whether a woman can wear trousers or not. The clothes I was wearing when the police caught me—I pray in them. I pray to my God in them. And neither does Islam flog women because of what they wear. If any Muslim in the world says Islamic law or sharia law flogs women for their clothes, let them show me what the Qur'an or Prophet Muhammad said on that issue. There is nothing. It is not about religion, it is about men treating women badly.⁶

She asserts that the Sudanese authorities, not Islam, are responsible for *interpreting* Islam to require the flogging of individuals as a penalty for what *they consider* to be 'indecent acts' and 'obscene outfits'.

This study takes an approach that mirrors the way Ms Hussein framed the situation. It shifts the focus of legal analysis—concentrating on religious actors rather than their religion, and on the rights and obligations of religious actors under international law rather than the compatibility or incompatibility of religion with international law. It is an endeavour that underscores the agency of religious actors in interpreting religion(s) and seeks to establish their legal accountability for these interpretations.

The decision to concentrate on the actions of religious actors was prompted by a certain sense of hopelessness which emerges from studies and articles that portray conflicts between religion(s) and human rights. Religions, and religion in general terms even less, cannot be treated as static, unitary blocs. While religious texts may remain unaltered over centuries, the practice of any religion is dynamic over time and diverse across space. For instance, Exodus 21:12 reads '[h]e that smiteth a man, so that he die, shall be surely put to death'⁷ and Leviticus 24:17 confirms that '[h]e that killeth any man shall surely be put to death'.⁸ A literal reading of these passages from the Old Testament would imply that, among other religions, Catholicism should support the death penalty. The Catechism of the Catholic Church promulgated by Pope John Paul II admits that 'the traditional teaching of the Church does not exclude recourse to the death penalty . . .';⁹ nonetheless, it goes on to reach the *interpretation* that, because the modern state no longer needs to employ lethal means to protect society, non-lethal means of punishment are 'more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person'.¹⁰ Consequently, the US Catholic Bishops' Conference puts itself at the forefront of the campaign to abolish

⁶ J. Copnall, 'Lubna Hussein: "I'm not afraid of being flogged. It doesn't hurt. But it is insulting"', *The Guardian*, 2 August 2009.

⁷ *The Holy Bible. King James Version*, 7th ed., (Peabody, MA: Hendrickson Publishers, 2008), 21:12.

⁸ See note 7, 24:17.

⁹ *Catechism of the Catholic Church*, 2nd edition, revised in accordance with the official Latin text promulgated by Pope John Paul II, (Libreria Editrice Vaticana, United States Catholic Conference, 2000), para. 2267.

¹⁰ See note 9. See also T. Bjarnason and M. R. Welch, 'Father Knows Best: Parishes, Priests, and American Catholic Parishioners' Attitudes Toward Capital Punishment', 43 *Journal for the Scientific Study of Religion* 1 (2004) 103–118, at 104–105.

the death penalty in the United States.¹¹ The current interpretation of these biblical texts is not self-evident, nor have Catholic authorities adopted this reading consistently. In the past, the same text was used to justify the Crusades and Inquisition.¹²

With these examples in mind, we understand that religions are constructs that often integrate a range of reflections on a single issue, which contradict and complement one another, and evolve variously over time and across space. It is here where the role of religious actors as interpreters of religion(s) becomes central, because through interpretation they generate the dynamism and diversity of religions. Given these premises, and when the goal is to ensure human rights protection, reiterating that certain aspects of religion(s) are incompatible with legal norms cannot be sufficient or satisfactory. It is therefore necessary to escape the discourse of inevitable conflict between religion and law and replace it with a search for means of securing legal accountability in this area. This is why the present study addresses religious actors. It consciously chooses not to concentrate on religion as a category within which oppressive structures or patterns may exist, but to focus on religious actors who, by their interpretations of religion, uphold and promote or, on the contrary, transform those structures and patterns.

II. Societal Pertinence and Legal Relevance

The relevance of this book's approach and analysis can be affirmed by placing the study in its societal context and reflecting upon existing legal literature.

Evidence from several quarters suggests a renewed prominent role for religion in many areas of contemporary society. Many authors invoke the emergence of religion in public debate following the terrorist attacks of September 2001;¹³ however, the resurgence of religion had been heralded before then.¹⁴ In his introduction to a multidisciplinary volume on the *Desecularization of the World* (1999), Peter L. Berger observes: '[T]he assumption that we live in a secularized world is false. The world

¹¹ See Holy Week Campaign to End Death Penalty, accessed March 2011, <http://www.americancatholic.org/News/DeathPenalty/BishopsDeath.asp>; United States Conference of Catholic Bishops—Catholic Campaign to End the Use of Death Penalty, accessed March 2011, <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/upload/5-723DEATHBI.pdf>.

¹² See Apostolic Letter *Tertio Millennio Adveniente* of His Holiness Pope John Paul II to the Bishops, Clergy and Lay Faithful on Preparation for the Jubilee of the Year 2000, 10 November 1994; 'Pope apologises for church sins', *BBC News*, 12 March 2000, accessed March 2014, <http://news.bbc.co.uk/1/hi/world/europe/674246.stm>.

¹³ Carolyn Evans, for example, argues that the 9/11 attacks have been 'a powerful motivating factor' behind the reconsideration of religion as a public issue. C. Evans, 'Introduction', in P. Cane, C. Evans and Z. Robinson (eds.), *Law and Religion in Theoretical and Historical Context*, (Cambridge: Cambridge University Press, 2008), 1–15, at 1.

¹⁴ R. T. Antoun and M. E. Hegland (eds.), *Religious Resurgence: Contemporary Cases in Islam, Christianity, and Judaism*, (New York: Syracuse University Press, 1987); S. Thomas, 'The Global Resurgence of Religion, International Law and International Society', in M. W. Janis and C. Evans (eds.), *Religion and International Law*, (The Hague: Martinus Nijhoff Publishers, 1999), 321–338; D. Westerlund (ed.), *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics*, (London: Hurst, 1996).

today, with some exceptions... , is as furiously religious as ever, and in some places more so than ever.¹⁵ Berger ends his remarks with a warning: 'Those who neglect religion in their analyses of contemporary affairs do so at great peril'.¹⁶

Samuel P. Huntington was also preoccupied by religion when, after the end of the Cold War, he drafted his (in)famous theory on the 'clash of civilizations' to explain the 'remaking of world order'.¹⁷ The late social scientist contended that: '[T]he fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural'.¹⁸ It was Huntington's understanding that religion is a defining element of culture and therefore plays an important role in the conflict between civilizations. It is not necessary to report here the methodological, historical, and sociological criticisms of this theory.¹⁹ It may however be useful to illustrate with appeal to the 'Arab Spring' that a complex reality tends to refute any monolithic conception of, in this case, (political) Islam. These recent events have shown that the influence of economic concerns is at least as important as religious allegiance throughout the countries of North Africa.²⁰ Huntington assumed that cultures (including religious aspects) had fixed identities, rather than being in constant interaction with each other and with economic, social, political, and legal factors. This means that cultures constantly shape and are being shaped by the actions of various actors. The approach taken in this study is partly prompted by academic frustration with the fatalism that simple assumptions and simple categories can generate.

A different argument in support of the claim that religion—or rather its actors—exert social influence in modern societies refers to the many links between church and state in Western Europe,²¹ a region otherwise portrayed as an exemplar of

¹⁵ Berger reports that Western Europe and a 'globalized elite' are exceptions to the process of desecularization he describes. However, he is careful to point out that secularization may not describe accurately the reality in France, the United Kingdom, and Scandinavian countries. It would be more precise to speak of 'a shift in the institutional location of religion'. While support for organized religion has fallen away, 'strong survivals of religion' remain. P. L. Berger, 'Introduction', in P. L. Berger (ed.), *The Desecularization of the World: Resurgent Religion and World Politics*, (Washington D.C.: Wm. B. Eerdmans Publishing Co., 1999), 1–18, at 2 and 9–10.

¹⁶ See note 15, at 19.

¹⁷ S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, (New York: Simon & Schuster, 2003); S. P. Huntington, 'The Clash of Civilizations?', *Foreign Affairs*, Summer 1993 22–49.

¹⁸ S. P. Huntington, 'The Clash of Civilizations?', at 22.

¹⁹ See for example A. Mungiu-Pippidi and D. Mindruta, 'Was Huntington Right? Testing Cultural Legacies and the Civilization Border', 39 *International Politics* 2 (2002), 193–213; A. Sen, 'Violence, Identity and Poverty', 45 *Journal of Peace Research* 1 (2008), 5–15.

²⁰ Considering Egypt, commentators noted the electoral gains of political Islam. However, they also pointed out the divisions between Islamic parties, the absence of a united secular alternative, and the incentive for electors to support the Muslim Brotherhood's political arm because this organization was the only one that offered social and economic support nets during the Mubarak regime. L. Anderson, 'Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya', 90 *Foreign Affairs* 3, May/June 2011, 2–7; J. Voll, et al., 'Political Islam in the Arab Awakening: Who Are the Major Players?', 19 *Middle East Policy* 2 (2012), 10–35.

²¹ For example, John Madeley shows that European states are committed either *de jure* or *de facto* to support religious organizations or their aims. J. Madeley, 'European Liberal Democracy and the Principle of State Religious Neutrality', 26 *West European Politics* 1 (2003), 1–22. See generally J. Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance*, (Leiden: Martinus Nijhoff Publishers, 2010).

secularism. As Chapter 3 will show, the relationships between church and state account for many of the cases related to religion which are brought before the European Court of Human Rights (ECtHR). Perhaps the most interesting aspect is that secularism itself, while challenging the presence and role of religion and its symbols in public life, may become akin to a religion. In Joseph Weiler's view, for instance, secularism cannot be equated with neutrality, because 'Laïcité is not an empty category which signifies absence of faith. It is often... a rich world view, a position of conscience. It is not an indifference to religion... [B]ut a "faith" in its own right.'²² So, while religion is less present in what we regard as secularized societies, it becomes, paradoxically, more visible. The *Lautsi* case illustrates the paradox.²³ Ms Lautsi challenged the display of crucifixes in classrooms of an Italian public school on the grounds that it was 'contrary to the principle of secularism' according to which she wished to raise her children.²⁴ Even if nothing else is retained in relation to this case at this stage, the flurry of attention which the presence of the crucifix received—from various sectors of society across Europe and beyond, including from politicians, religious figures of various creeds, and indeed legal scholars—should be noted.

The purpose of this book is not to evaluate whether we find ourselves in a post-secular society²⁵ and measure how prominent religion is in such society; whether resurgence or continuation can be witnessed, or whether the renaissance of religion is merely a perception that may or may not be confirmed by statistical data. Instead the author ventures to suggest that a heightened *perception* of the prominence of religion is sufficient to support this book's focus on religious actors. This is so because when religion is perceived as important, religious actors that interpret it—through constructing meaning and attributing significance to religious texts and practices—are equally significant, or more so. In this sense then, it is in the interest of both the legal scholar and society at large to understand not (only) whether 'God believes in human rights',²⁶ but whether religious actors do.

This brings us to the second field to which the topic and the book's approach are relevant: legal scholarship. Responding to (perceived) developments in society

²² J. H. H. Weiler, 'Lautsi: Crucifix in the Classroom Redux', 21 *EJIL* 1 (2010), 1–6, at 4.

²³ A recent book carries the name of this case, which may, as well, be taken as an indication of its notoriety. See J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012).

²⁴ *Lautsi and Others v. Italy*, Application no. 30814/06, Grand Chamber, Judgment of 18 March 2011; *Lautsi v. Italy*, Application no. 30814/06, Judgment of 3 November 2009, para. 7. For a discussion of the case see Chapter 1, III.2, in this volume.

²⁵ See for instance J. Habermas, 'Secularism's Crisis of Faith: Notes on Post-Secular Society', 25 *New Perspectives Quarterly* (2008), 17–29.

²⁶ This inspired phrase is taken from N. Ghanaea, A. Stephens and R. Walden (eds.), *Does God Believe in Human Rights? Essays on Religion and Human Rights*, (Leiden: Martinus Nijhoff Publishers, 2007). Dennis de Jong also identifies *not* God as the one that should believe in human rights, but 'the adherents of religions and beliefs' who 'are bound to human rights law, whether they "believe" in them or not'. It should be noted that the terms 'adherents' and 'religious actors' employed in this study do not necessarily coincide. D. de Jong, 'Freedom of Religion and Belief in the Light of Recent Challenges: Needs, Clashes and Solutions', in N. Ghanaea, A. Stephens and R. Walden (eds.), *Does God Believe in Human Rights? Essays on Religion and Human Rights*, (Leiden: Martinus Nijhoff Publishers, 2007) 181–206, at 181.

legal authors have displayed a growing interest in religion and a rather rich literature has recently emerged. A survey of the literature shows that three clusters of topics have attracted the attention of legal scholars.²⁷

First, some scholars have studied church-state relations, the principle of state neutrality and secularism, including in relation to the display of religious symbols and the wearing of religious dress in public.²⁸ A recent volume by Jeroen Temperman makes an important contribution in this area. The author undertook a comprehensive legal analysis of church-state relationships in their different forms, and state practices with regard to them, with the aim of understanding their impact on the implementation of international human rights norms.²⁹ While recognizing that international legal instruments do not endorse a specific position on established religions, Temperman concludes that some forms of establishment of religion and state atheism 'amount to *ipso facto* violations of international human rights law'.³⁰ He argues that the 'ramifications' of the obligations of states under human rights law may give rise to a system of state neutrality understood as the 'self-imposed prohibition of direct discrimination on grounds of religion or belief, supplemented with a lasting commitment to prevent indirect discrimination as well as a durable commitment to redress any instances of inadvertent indirect discrimination'.³¹

²⁷ It is important to note that, although the cluster classification proposed here is useful for analytical purposes, these grand topics which appear in literature should not be perceived as clearly delimited one from the other. On the contrary, they are interrelated. Often an edited book covers in its different parts all three clusters: see for example J. Witte, J. and J. D. Van der Vyver (eds.), *Religious Human Rights in Global Perspective: Legal Perspectives*, (The Hague: Martinus Nijhoff Publishers, 1996) or the remarkable oeuvre N. Ghanae (ed.), *Religion and Human Rights*, vol. I, vol. II, vol. III, vol. IV (New York: Routledge, 2010).

²⁸ As indicative scholarship, the following can be listed: A. A. An-Na'im, 'The Synergy and Interdependence of Human Rights, Religion and Secularism', in J. Runzo, M. N. Martin and A. Sharma (eds.), *Human Rights and Responsibilities in the World Religions*, (Oxford: Oneworld Publications, 2003), 27–50; W. Brugger and M. Karayanni (eds.), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law*, (Berlin: Springer Verlag, 2007); M. Davies, 'Pluralism in Law and Religion', in P. Cane, C. Evans and Z. Robinson (eds.), *Law and Religion in Theoretical and Historical Context*, (Cambridge: Cambridge University Press, 2008), 72–99; D. L. Dreisbach, 'A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context', 35 *The American Journal of Legal History* 2 (1991), 172–204; C. Evans and C. Thomas, 'Church-State Relations in the European Court of Human Rights', *BYU L. Rev.* (2006), 699–725; M. Fadel, 'Islamic Politics and Secular Politics: Can They Co-Exist?', 25 *Journal of Law and Religion* 1 (2009), 101–118; D. McGoldrick, *Human Rights and Religion: the Islamic Headscarf Debate in Europe*, (Portland, OR: Hart, 2006); D. Meyerson, 'Why Religion Belongs in the Private Sphere, not the Public Square', in P. Cane, C. Evans and Z. Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008), 44–71; A. Nieuwenhuis, 'European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98', 1 *European Constitutional Law Review* 3 (2005), 495–510; A. Reuter, 'Säkularität und Religionsfreiheit: ein doppeltes Dilemma', 35 *Leviathan* 2 (2007), 178–192; T. Stahnke and R. 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 *Georgetown Journal of International Law* (2005), 947–1078.

²⁹ J. Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance*, at 4.

³⁰ See note 29, at 340.

³¹ See note 29, at 348–349.

A second group of literature examines the relationship between law and religion(s) through a historical, theoretical, doctrinal, or empirical lens. Important work in this category evaluates the contribution of religion to the development of international law, including that on human rights and humanitarian norms in particular,³² and the compatibility of religion(s) and religious norms with human rights law, as well as the influence of law on religion.³³ Scholars have paid particular attention in recent years to Islam and to gender issues in the context of Islam.³⁴ Nisrine Abiad's comparative analysis of the role sharia plays in the process of ratification of international human rights treaties is grounded in a thorough understanding of context and manages to capture the complex interactions of human rights and sharia law.³⁵ The author shows that sharia is sometimes used as an 'excuse' to limit the implementation of human rights law at domestic level; however in other cases legislative amendments have given effect to human rights law within the framework of sharia law, refuting the assumption that the two are necessarily incompatible.³⁶

Third, numerous publications analyse the protection that international instruments and national legislation provide to freedom of religion, the prohibition of religious discrimination, and parental rights concerning the religious education of their children. Many scholars examine the jurisprudence of international courts in

³² See for instance chapters 1–8 in M. W. Janis and C. Evans (eds.), *Religion and International Law*, (The Hague: Martinus Nijhoff Publishers, 1999).

³³ Among the works in this field are: P. W. Edge, *Religion and Law: An Introduction*, (Aldershot: Ashgate Publishing, 2006); C. Evans, 'The Double-Edged Sword: Religious Influences on International Humanitarian Law', 6 *Melbourne Journal of International Law* 1 (2005), 1–31; N. Ghanea, A. Stephens and R. Walden (eds.), *Does God Believe in Human Rights? Essays on Religion and Human Rights*, at 19–146; C. W. Ho, and (ed.), *Religious Fundamentalisms and the Human Rights of Women*, (New York: Palgrave Macmillan, 2001); M. W. Janis and C. Evans (eds.), *Religion and International Law*, (The Hague: Martinus Nijhoff Publishers, 1999); V. Popovski, G. M. Reichberg and N. Turner (eds.), *World Religions and Norms of War*, (New York: United Nations University Press, 2009); J. Runzo, M. A. Martin and A. Sharma (eds.), *Human Rights and Responsibilities in the World Religions*, (Oxford: Oneworld Publications, 2003), at 209–301; A. Whiting and C. Evans (eds.), *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region*, (Leiden: Martinus Nijhoff Publishers, 2005); J. Witte Jr, 'A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective', 42 *William & Mary Law Review* (2000), 707–770; J. Witte Jr and J. D. Van der Vyver (eds.), *Religious Human Rights in Global Perspective: Religious Perspectives*, (The Hague: Martinus Nijhoff Publishers, 1996).

³⁴ See for instance N. Abiad and F. Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective*, (London: British Institute of International and Comparative Law, 2010); R. Ahdar and N. Aroney (eds.), *Shari'a in the West*, (Oxford: Oxford University Press, 2010); S. A. Aldeeb Abu-Sahlieh, 'Conflits entre droit religieux et droit étatique chez les musulmans dans les pays musulmans et en Europe', 49 *Revue internationale de droit comparé* 4 (1997), 813–834; S. S. Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?*, (The Hague: Kluwer Law International, 2000); E. Krivenko Yahyaoui, *Women, Islam and International Law: within the context of the Convention on the Elimination of All Forms of Discrimination against Women*, (Leiden: Martinus Nijhoff Publishers, 2009); F. Raday, 'Culture, Religion, and Gender', 1 *International Journal of Constitutional Law* 4 (2003), 663–715; J. Rehman and S. Breau (eds.), *Religion, Human Rights and International Law*, Martinus Nijhoff Publishers, 2007.

³⁵ N. Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study*, (London: British Institute of International and Comparative Law, 2008).

³⁶ See note 35, at xv.

these areas. Topics that have received particular attention are conscientious objection, proselytism, and blasphemy.³⁷

In addition to academic publications, UN treaty bodies have produced relevant documents, including the Human Rights Committee's General Comment 22 on the right to freedom of religion enshrined in the International Covenant on Civil and Political Rights (ICCPR), supplemented by the work of Special Procedures and other studies by UN bodies.³⁸

This book regards the three clusters of legal literature as its point of departure and draws on many of these studies. At the same time, it takes the analysis in a new direction, through the focus on the agency of religious actors in interpreting religion. It reaches beyond freedom of religion to address a wider array of

³⁷ See S. Angeletti, *Libertà religiosa e patto internazionale sui diritti civili e politici. La prassi del comitato per i diritti umani delle Nazioni Unite*, (Torino: G. Giappichelli Editore, 2008); B. Dickson, 'The United Nations and Freedom of Religion', 44 *ICLQ* 2 (1995), 327–35; M. D. Evans, 'The United Nations and Freedom of Religion: The Work of the Human Rights Committee', in R. J. Ahdar (ed.), *Law and Religion*, (Aldershot: Ashgate, 2000), 35–62; N. L. Lerner, 'Proselytism, Change of Religion, and International Human Rights', 12 *Emory Intl L. Rev.* (1998), 477–561; N. Lerner, *Religion, Beliefs, and International Human Rights*, (Maryknoll, New York: Orbis Books, 2000); T. Massis and C. Pettiti (eds.), *La Liberté Religieuse et la Convention Européenne des Droits de l'Homme*, (Bruxelles: Bruylant, 2004); D. J. Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', 82 *AJIL* 3 (1988), 487–520; B. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, (Dordrecht: Martinus Nijhoff Publishers, 1996); P. M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2005); J. Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law', 26 *Netherlands Quarterly of Human Rights* 4 (2008), 517–545; R. Uitz, *Freedom of Religion in European Constitutional and International Case Law*, (Strasbourg: Council of Europe Publishing, 2007).

³⁸ Among the general comments of the treaty bodies addressing aspects related to religion, see: CEDAW Committee, *General Recommendation No. 21: equality in marriage and family relations*, 13th session, 1994; CEDAW Committee, *General Recommendation No. 23: women in political and public life*, 16th session, 1997; CESCR, *General Comment No. 13: The right to education (Art. 13)*, UN Doc. E/C.12/1999/10, 8 December 1999; CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, UN Doc. E/C.12/GC/20, 10 June 2009; CESCR, *General Comment No. 21: Right of everyone to take part in cultural life (art 15, para. 1(a))*, 20 November 2009, UN Doc. E/C.12/GC/21; HRC, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, 29 July 1983; HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989; HRC, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993; HRC, *General Comment No. 23: The rights of minorities (Art. 27)*, 8 April 1994; HRC, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6; HRC, *General Comment No. 28: Equality of rights between men and women (article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2008. For reports of Special Rapporteurs on the right to freedom of religion or belief, see <http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>, and in particular on gender aspects the Rapport soumis par M. Abdelfattah Amor, Rapporteur spécial, conformément à la résolution 2001/42 de la Commission des droits de l'homme, Additif: *Etude sur la liberté de religion ou de conviction et la condition de la femme au regard de la religion et des traditions*, 5 April 2002, UN Doc. E/CN.4/2002/73/Add.2. See also: OHCHR, *Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religions*, 5 September 2008, UN Doc. A/HRC/9/25; Report of the Secretary-General, *Combating defamation of religions*, 12 September 2006, UN Doc. A/61/325; and the seminal report of A. Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights and Practices, UN Document (1960)(reprinted)', 11 *NYU J.L. & Pol.* (1978), 227–298.

rights of religious actors, and beyond the incompatibility of religion with law to address the obligations of religious actors under international law. The book will systematically carve out the accountability framework of religious actors—be they non-state entities, international organizations, or states. The ultimate aim is to transcend the deadlock on whether religion is or is not compatible with international law in general, and human rights law in particular, by providing a new narrative that seeks to ensure the compliance of religious actors with international law.

III. From (In)compatibility Towards Accountability

In shifting the focus of the legal analysis away from debates over (in)compatibility of religion and law, the book introduces religious actors as an analytical category.³⁹ This analytical category presents religious actors as state and non-state entities, which assume the role of interpreters of religion, and draw on a 'special' legitimacy in demanding obedience from their adherents, members, or citizens.

At this stage it is important to express a caveat. The present study does not claim that the interpretation of religion is the exclusive right or attribute of religious actors; elsewhere, I have examined the role of non-religious courts in interpreting religion whilst adjudicating cases involving religious aspects.⁴⁰ The difference between non-religious courts and religious actors lies in the type of legitimacy they enjoy. The interpretations of religious actors are not regarded as legitimate by followers primarily because they result from processes of rationalization and have been enacted in a legal way, as is the case with judicial decisions; their legitimacy stems foremost from affect generated by tradition and charisma.⁴¹ If truth be told, this observation is somehow axiomatic, since it is precisely their religious character which places religious actors in a 'special' legitimacy regime compared to other actors.⁴² In practice, the 'special' legitimacy translates into influence, which may strengthen human rights and benefit the human rights movement; it may, however, also function as a societal taboo or a symbolic shield against outside interference or critique of manifestations of religious actors.

In the end, it is this, their legitimacy which makes the legal study of the rights and obligations of religious actors under international law so interesting and necessary, and prompts the fundamental question of this book: does the 'special' legitimacy of religious actors translate into a special legality regime?

³⁹ See Chapter 2, I and II.

⁴⁰ I. Cismas, 'Whose Belief: the Plaintiff's or the Judge's? Strategies to Preserve the Impartiality of Judicial Decisions in Cases Relating to Religion', *European Society of International Law*, 5th Research Forum, Amsterdam, 23–25 May 2013.

⁴¹ See Chapter 2, II.2.

⁴² For instance, Timothy Macklem attempts to answer why secular societies extend special protection 'to forms of belief that can be called religious' and argues that 'faith, understood as a mode of belief distinct from reason' has a special value since it is capable of contributing to human well-being. See T. Macklem, 'Faith as a Secular Value', 45 *McGill Law Journal* (2000), 1–63, at 1 and 35.

Let us illustrate the relevance of the above question with three cases which span across the state/non-state divide. The first example is ignited by a cautionary statement by the European Court of Human Rights (ECtHR) to the effect that states should refrain from interfering with the autonomy of religious organizations. The Court ruled that 'but for very exceptional cases... the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'.⁴³ Should this statement be considered to affirm a near-absolute guarantee of church autonomy that discounts the possible duties of religious organizations towards respecting the rights of third parties such as employees or adherents?

Second, the Holy See claims a dual personality in international law, as the government of the Vatican on one hand and, separately, as the government of the Catholic Church on the other. This interpretation opens the door to what this project describes as a shifting of the two international personae. For instance, the Holy See has claimed and benefited from state immunity in relation to civil suits over its handling of clerics involved in cases of child sexual abuse in the US, whereby no differentiation has been made by courts as to the capacity in which the Holy See acted, *qua* church or *qua* state.⁴⁴ In turn, the review process of the Holy See by the Committee on the Rights of the Child shows that the actor does not assume its obligations under the Convention on the Rights of the Child as a state, but portrays them as moral obligations, drawing on its personality as the government of the Catholic Church.⁴⁵ The questions that need to be answered are whether this dual personality is consistent with international law and the practice of states and whether the Holy See enjoys the privileges of a state, but not the corresponding obligations?

Third, the Organization of Islamic Cooperation (OIC) assumed the role of interpreter of human rights in the context of Islam by adopting the Cairo Declaration on Human Rights in Islam to 'serve as a guide for Member States in all aspects of life'.⁴⁶ Several of the provisions of the Cairo Declaration diverge from universal human rights standards.⁴⁷ Can states escape their international human rights obligations by joining an organization which apparently proposes an alternative understanding of human rights derived from a particular religious interpretation, a sort of 'religionism'? As important, was this the goal of states in joining the OIC?

Against the backdrop of these three challenging illustrations, the aim of this study is to demonstrate that religious actors do not form an autonomous legal category in international law and, thus, share the accountability framework with their

⁴³ *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Judgment of 26 October 2000, para. 78.

⁴⁴ See Chapter 4, VI.2.3.

⁴⁵ See Chapter 4, VI.4.1 and 4.2.

⁴⁶ OIC, Resolution No. 49/19-P, Nineteenth Islamic Conference of Foreign Ministers, Cairo, 5 August 1990, para. 1. In the cited resolution OIC member states adopted the Cairo Declaration on Human Rights in Islam, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, UN Doc. A/CONF.157/PC/62/Add.18 (1993) (hereafter CDHRI or Cairo Declaration).

⁴⁷ See Chapter 5, IV.1.

non-religious peers. To make this case, the book will develop in relation to the three types of religious actors—non-state entities, states, and international organizations—the following two central arguments:

- Religious actors do not enjoy special or exclusive rights compared to their non-religious peers.
- Religious actors have the same legal obligations as their respective non-religious peers.

Whilst it ensures a certain balance among the religious actors that it analyses in what concerns the religions which they propagate, this book does not aim to exhaust the entire array of religions—this is perhaps also in an effort to underline that it is not religion that is the focus of study here but the actors. As such, the two central arguments are verified in relation to the three case studies we have just touched upon: a diverse array of religious legal entities under the European Convention regime, the Holy See-Vatican, and the Organization of Islamic Cooperation. As these cases span across the state/non-state spectrum it is possible to envisage extrapolation of the results to actors similar in *genre* which nonetheless expound different religions.

At least two other classes of actors might qualify as religious non-state actors for the purpose of this study, but they are beyond its scope: individual clerics and non-state armed groups with a religious doctrine. Some rights and obligations of clerics are addressed throughout this book, however a chapter specifically dedicated to clerics was considered unnecessary in the light of the research objective. Based on a preliminary assessment, and several interviews undertaken in the course of the research it was concluded that the claim to religious legitimacy of a non-state armed groups might have a bearing on the adherence and obedience of the group's members.⁴⁸ Appeals to religion by humanitarian workers or negotiators may also facilitate, legitimate, or contribute to the success of humanitarian dialogue with non-state armed groups which have religious inclinations; however nothing specifically indicated that the claim to religious legitimacy had an impact on their position in international law by comparison with non-religious armed groups. These are certainly interesting topics to explore in a future study; they are, however, beyond the ambit of the present project.

Structurally, the study is in two parts. The two chapters in Part I, titled *Religion, Its Actors, and International Law*, lay the foundation on which the legal analysis in Part II builds.

Chapter 1 explores narratives on religion and international law and describes the separation of international law from religion as it asserted itself as a distinct discipline; it also examines the more recent pull towards religion in an attempt to draw upon its legitimating features. The chapter proposes a different narrative by demonstrating that the options at hand are not ignoring or acknowledging

⁴⁸ In literature see for instance, P. Otis, 'Armed with the Power of Religion: Not Just a War of Ideas', in J.H. Norwitz (ed.), *Armed Groups: Studies in National Security, Counterterrorism, and Counterinsurgency*, (Newport, RI: Naval War College Press, 2008), 215–224.

religion, but rather taking stock of *religious actors* that are present and, to a certain extent, influential in international law. This ‘taking stock’ narrative seeks to ensure the accountability of religious actors in their engagement with the law. To support this alternative, the chapter also surveys human rights, humanitarian, and criminal law instruments to show their human-centred approach, whereby an individual or individuals acting as a collective enjoys protection of their beliefs, not religion as such.

Chapter 2 introduces the analytical category of religious actors that functions as a heuristic device in this study’s endeavour to verify the two central arguments. The chapter provides the definitional contours of religious actors—they transcend the state/non-state divide, assume the role of interpreters of religion, and claim ‘special’ legitimacy. It clarifies these contours further by analyzing the interaction of religious actors in international fora on issues of sexuality and defamation of religions thereby also showing their potential impact on international law. Last, the chapter discusses the framework of acquisition of rights and obligations in international law of relevance also to religious actors.

Part II has three chapters, each dedicated to one case study aimed at *Operationalizing the Analytical Category of Religious Actors*. The methods and perspectives that the chapters employ are varied. These have been tailored to tackle the particular challenges which the ‘speciality’ of each religious actor poses: absolute church autonomy in the case of religious organizations, shifting international legal personalities in the case of the Holy See-Vatican, the carving out of exceptions to international human rights standards in the case of the OIC. At the same time, the chosen methods also enhance the potential to make comparisons between each religious actor and its corresponding non-religious peer: religious organizations versus non-religious legal entities, Holy See-Vatican versus non-religious states, OIC versus non-religious intergovernmental organizations.

Chapter 3 utilizes the capacity approach to ‘extract’ from the jurisprudence of the Strasbourg mechanisms the various rights which religious organizations have claimed under the European Convention on Human Rights and to demonstrate that the process of acquisition of rights functions in a similar fashion to that of non-religious legal entities. A detailed assessment of article 9 jurisprudence discloses why churches and other religious organizations were initially refused the protection granted by the right to freedom of religion under the Convention, and why today they are the exclusive holders of this right among legal entities. It discards this exclusivity—which would otherwise falsify one of the central arguments of the study—by showing that religious organizations enjoy a derivative right based on the freedom of individuals to collectively manifest their religious beliefs. The analysis goes on to look at the positive state obligations in the context of church autonomy, which it argues reveal the existence of human rights responsibilities of religious organizations, including towards employees and adherents, and the scope of such duties.

Chapter 4 examines the Holy See and the Vatican by first exposing the legal challenges posed by the dual personality scenario. One such problem is the

shifting nature of the two personalities, which creates a situation in which the actor may legitimately avail itself of the privileges deriving from statehood but may choose when it complies with a state's obligations. In contrast to this dual personality portrayal—dominant in the current literature—the chapter advances a new argument, that of a construct formed by the Holy See and the Vatican which enjoys a single personality grounded in two sources: international custom recognizes the religious legitimacy of the Holy See, while a resemblance of statehood is conferred by the Lateran Treaty. It draws on a variety of methods—legal positivism, jurisprudential analysis, examination of diplomatic practice, insights from social constructivism—in order to first establish the personality of the entities under international law and then discuss the rights and obligations which flow from this personality. By exploring the responsibilities of the Holy See-Vatican under human rights law in the context of child sexual abuse by Catholic clerics in Ireland it illustrates that the actor's obligations do not appear to be different in nature from those of other states, whereas their extraterritorial applicability may be of greater significance.

Chapter 5 seeks to understand what drives the OIC's codification of human rights and reflect upon it within the framework of regionalism under two guises: as an approach aimed at carving out exceptions to universal human rights norms and as a context-sensitive approach to interpreting and applying international human rights standards. The Cairo Declaration on Human Rights in Islam is examined against the background of OIC member states' obligations under international human rights treaties and their commitment to these obligations. In this light, it is submitted that the Cairo Declaration, which subjects the rights entailed therein to sharia law, does not reflect the majority of its member states' understanding of human rights, nor does it succeed in guiding their conduct in this area; by all accounts, this would be a failure for an organization that portrays itself as 'a guide for Member States in all aspects of life'. At the same time, the analysis sheds light on the non-accommodation by international law (in other actors and its mechanisms) of claims to religious exceptionalism made by some OIC states and also on the accountability of the OIC as such. More recent instruments, such as the Covenant on the Rights in Islam and the Statute of the OIC Independent Permanent Human Rights Commission, have a certain potential to promote human rights in the context of the 'Muslim world'⁴⁹ in a manner that is context-sensitive, yet more in accordance with the practice of other regional human rights systems.

The findings of the research are appraised in the Conclusions which offer an answer to the central question of the study: does the analytical category of religious actors form an autonomous legal category in international law? The Conclusions also articulate the need for a process of two-sided legitimation: religious actors have come to need the legitimacy of international law to strengthen the legitimacy of their authority to interpret religion, and international law itself may benefit

⁴⁹ This expression is used here to echo the OIC's own description.

from religious actors fostering its legitimacy in different cultural contexts. In an effort to place Ms. Lubna Hussein's archetypal case in a wider context, an interactional⁵⁰ approach to legitimating international law is explored. Such an approach draws on the interpretative role of a variety of actors, including religious ones, and on the recognition that international law itself is dynamic (as is religion) while its 'force' relies on legality and shared understandings of such legality.

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⁵⁰ See J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: an Interactional Account*, (Cambridge: Cambridge University Press, 2010).