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**Pilgrimage to Religious Shrines: An Essential Element
in the Human Right to Freedom of Thought,
Conscience, and Religion***

*Who would true valour see,
Let him come hither;
One here will constant be,
Come wind, come weather.
There's no discouragement
Shall make him once relent
His first avowed intent
To be a pilgrim.¹*

I. INTRODUCTION

For thousands of years, pilgrims have traveled to religious shrines to witness places of fundamental importance to their religion and to join in worship with a greater religious community.² Today, the development of air travel and other forms of modern transportation has result-

* The author would like to thank Professors Peter Joy, Kenneth Klothen, Virginia Leary, Sidney Picker, Jr., and Petar Sarcevic for their valuable comments on earlier drafts of this Note.

¹ JOHN BUNYAN, *THE PILGRIM'S PROGRESS* 268 (Catharine Stimpson ed., New American Library, Inc. 1964) (1678, 1684).

² SURINDER M. BHARDWAJ, *HINDU PLACES OF PILGRIMAGE IN INDIA* 3 (1973) (the practice of pilgrimage in India is estimated to have begun between 1500-1000 B.C.); Juan E. Campo, *The Mecca Pilgrimage in the Formation of Islam in Modern Egypt*, in *SACRED PLACES AND PROFANE SPACES*, 145, 146 (Jamie Scott & Paul Simpson-Housley eds., 1991) (the annual pilgrimage, or "Hajj", to Mecca has figured prominently in the religion of Islam since the seventh century A.D.); John Wilkinson, *Jewish Holy Places and the Origins of Christian Pilgrimage*, in *THE BLESSINGS OF PILGRIMAGE* 41, 44 (Robert Ousterhout ed., 1990) (Christians may have been making pilgrimages to shrines in Palestine as early as 150 A.D.); Steven R. Weisman, *Ise Journal: An Ancient Shrine is Testing a Modern Emperor*, *N.Y. TIMES*, Oct. 9, 1989, at A4 (for nearly 2,000 years, followers of the Shinto religion have made the pilgrimage to the shrine of Ise located in the coastal area of central Japan); Christopher S. Wren, *To Be Left Alone, China's Buddhists Open a Door*, *N.Y. TIMES*, Oct. 16, 1984, at A2 [hereafter Wren, *China's Buddhists*] (Mount Wutai is a cluster of five summits and is the most revered of the four mountains sacred to Chinese Buddhists. The site reached its zenith as a center of enlightened piety in the 17th century when 2,000 monks, lamas, and nuns inhabited the mountains' 360 monasteries and temples, to which emperors made pilgrimages).

ed in pilgrims visiting shrines in unprecedented numbers.³ Pilgrimage thus continues to play a central role in the practice of religion throughout the world.

Although states generally make great efforts to accommodate pilgrims seeking to visit shrines located within their territory,⁴ in the past some states have prevented access for discriminatory reasons.⁵ In order to prevent such instances of discrimination in the future, it is necessary to recognize the right to make pilgrimages to religious shrines as an integral part of the international human right to freedom of thought, conscience, and religion.⁶

This Note will first discuss the recognition of the human right to freedom of thought, conscience, and religion within the international community and the obligations that states have to recognize and protect this right within their borders. The Note will next address the need to define the scope of this right for effective implementation and will argue that pilgrimage must be included within the scope of the right. The particular legal issues raised by national and international pilgrimage will then be discussed. Potential strategies for remedying abuses of this right will be investigated and their respective effectiveness will be addressed.

³ It is estimated that the number of persons traveling to Mecca increases by over 100,000 per year. Godfrey Jansen, *The Soldiers of Allah Advance*, ECONOMIST, Jan. 27, 1979, at 2. In 1977, pilgrims traveled to Mecca from some 60 countries stretching from Mauritania to the Philippines. *Cholera; Road to a Dusty Death*, ECONOMIST, Sept. 17, 1977, at 79 [Hereinafter *Cholera*]. During the years 1981-1985, the number of Egyptian pilgrims travelling to Mecca increased by 56%. Campo, *supra* note 2, at 149. Today, more people visit Hindu shrines located in India than ever before, due to modern means of transportation. BHARDWAJ, *supra* note 2, at 5.

⁴ On June 5, 1991, Saudi Arabia agreed to permit Iraqi Muslims to participate in the Hajj, mere months after the two countries were involved in hostilities relating to Kuwait. *Iraqi Pilgrims to Leave for Saudi Arabia*, Xinhua General Overseas News Service, June 5, 1991, available in LEXIS, Nexis Library, Xinhua File. See also *Iraq in Brief: Pilgrims to Leave for Saudi Arabia on 12th June*, The British Broadcasting Corporation, Summary of World Broadcasts, June 12, 1991, pt. 4. Each year, the Interior Ministry of Egypt sends Hajj committees to Saudi Arabia to arrange accommodations and transportation for Egyptian pilgrims. During the Hajj, the Egyptian government establishes offices in Mecca, Medina, and Jeddah to assist pilgrims where necessary. Campo, *supra* note 2, at 151. During the 12th century, pilgrims travelling from Italy, Germany, France, and England were able to reach the Sanctuary of St. James of Compostella in Spain via four roads travelling through France and into Spain. WALTER STARKIE, *THE ROAD TO SANTIAGO* 60, 81-82 (1957).

⁵ Prior to the Israeli occupation of the West Bank, Jordan categorically denied Jews living in Palestine access to religious shrines in Jerusalem, despite the Israel-Jordan Armistice Agreement of 1949 which guaranteed such access. ESTHER R. COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES: 1967-1983*, 209 (1985).

⁶ This right was first enumerated in article 18 of the Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration of Human Rights*].

Finally, necessary limitations on this element of the right to freedom of thought, conscience, and religion will be examined.

II. RECOGNITION OF THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION AS A FUNDAMENTAL HUMAN RIGHT

In order to establish that the right to freedom of thought, conscience, and religion is recognized by the international community as a fundamental human right, it is necessary to examine the sources of international law enumerated in article 38 of the Statute of the International Court of Justice.⁷ Because the right to freedom of thought, conscience, and religion has been recognized within each of the major sources of international law, one can argue that the right exists as an international norm which is binding on the international community.

A. *Conventional International Law*

The right to freedom of thought, conscience, and religion was formally recognized as a human right in 1948, in article 18 of the Universal Declaration of Human Rights (hereinafter UDHR).⁸ As a declaration, the UDHR technically is not a legally binding instrument.⁹ However, many scholars believe that the almost universal acceptance of the UDHR by the international community has given its provisions the force of binding law.¹⁰

⁷ The Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055, 1060 (1945), instructs the court to apply three sources of law in deciding disputes. These sources may be roughly defined as follows:

- a) Conventional law: examines treaty law or agreements between states. Conventional law operates much like private contract law.
- b) Customary law: examines the practice of states. If states behave in the same manner and understand this common behavior to be obligatory, a rule of customary law is said to exist.
- c) General principles of law recognized by civilized nations: examines the national legal systems of states for common rules and practices found in both the written law and its application in the courts and other governmental branches.

In addition, article 38(1)(d) provides that judicial decisions and the teachings of the most highly qualified publicists of the various nations may be used as a subsidiary means for the determination of rules of law. See generally J.L. BRIERLY, *THE LAW OF NATIONS* ch. II, § 4 (Sir Humphrey Waldock ed., 6th ed. 1963).

⁸ Universal Declaration of Human Rights, *supra* note 6. Article 18 states, "Everyone has the right to freedom of thought, conscience and religion; this right includes . . . 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." *Id.*

⁹ PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* § 6.2.1 (1983).

¹⁰ The UDHR is looked upon by some scholars to be the missing catalogue of human rights referred to in the United Nations Charter. *Id.* See also John Claydon, *The Treaty Protection of Religious Rights: U.N. Draft Convention on the Elimination of All Forms of Intolerance and of*

Nearly every human rights agreement subsequent to the UDHR includes the right to freedom of thought, conscience, and religion in its provisions.¹¹ In addition, the Covenant on Civil and Political Rights

Discrimination Based on Religion or Belief, 12 SANTA CLARA LAW. 403, 406 (1972) ("Although technically not a binding instrument, the Declaration has become increasingly authoritative because of its widespread acceptance."). Furthermore, the UDHR is increasingly looked upon as a list of customary norms recognized by the international community. See, e.g., Sidney Liskofsky, *The U.N. Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives*, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 441 (James E. Wood, Jr., ed., 1985) (asserting that the U.N. has supplemented the Charter with a three-part international bill of rights, consisting of: Universal Declaration of Human Rights, *supra* note 6; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966)).

One additional theory that has been advanced is that the UDHR provisions are binding on states that signed the Charter by a process of "reading back" these subsequent provisions into articles 55 & 56 of the Charter. The problem with this argument, however, is that the number of parties signing agreements has diminished substantially as the agreements have become increasingly specific in their definitions of human rights. As a result, it is difficult to say that these documents express the original intentions of the state parties to the Charter. Certainly, many of the rights included in subsequent documents are universally accepted, however, due to the specificity of certain provisions of these documents, states will often refuse to sign them. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 81-85 (1989).

¹¹ See, e.g., American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OIA/Ser. L/V-11.4 Rev., art. III (1965) reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 381 (Ian Brownlie ed., 1981) ("Every Person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private."); International Covenant on Civil and Political Rights, *supra* note 10, art. 18

((1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching . . . (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.);

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222, 230

((1) 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 worship, teaching, practice and observance. (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.);

declares the right to be a non-derogable right.¹² Thus, the right to freedom of thought, conscience, and religion has become a central part of conventional human rights law. Although the extent to which states are bound to act under these documents varies,¹³ it is clear that the ma-

American Convention on Human Rights, Nov. 22, 1969, art. 12, 9 I.L.M. 63 (entered into force July 18, 1978)

((1) Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private . . . (3) Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.);

African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, art. 8, 82 I.L.M. 58 (1981) (entered into force Oct. 21, 1986) ("Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."); *Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension* June 29, 1990, reprinted in 29 I.L.M. 1305, art. 9.4 (1990)

(Everyone will have the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom to manifest one's religion or belief, either alone or in community with others, in public or private, through worship, teaching, practice and observance. The exercise of these rights may be subject only to such restrictions as are prescribed by law and are consistent with international standards.);

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N., 36th Sess., 73rd plen. mtg. GAOR Supp. No. 51, at 171, art. 1 U.N. Doc. A/36/51 (1981) [hereinafter Declaration on Elimination of Intolerance]

(1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.)

Applicable sections are reprinted in SIEGHART, *supra* note 9, at § 23.3.1.

¹² International Covenant on Civil and Political Rights, *supra* note 10, art. 4. ("1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant. . . . 2. No derogation from . . . [article] 18 may be made under this provision."). See also Liskofsky, *supra* note 10, at 457.

¹³ See, e.g., Universal Declaration of Human Rights, *supra* note 6, preamble

(The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.);

jority of the states in the world have agreed to protect this right within their territories.

B. The Freedom of Thought, Conscience, and Religion as a Customary Norm Under International Law

State practice provides further evidence that the international community has recognized the right to freedom of thought, conscience, and religion as a human right. Although a complete empirical study of the practice of the nations of the world regarding religious freedom is beyond the scope of this Note, several unique examples of state practice suggest that the human right to freedom of thought, conscience, and religion exists as a binding customary norm under international law.¹⁴

International Covenant on Civil and Political Rights, *supra* note 10, art. 2

(1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.);

Declaration on Elimination of Intolerance, *supra* note 11, art. 4

(1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. 2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.).

¹⁴ An extremely thorough study regarding religious freedom throughout the world is discussed in M. SEARLE BATES, *RELIGIOUS LIBERTY: AN INQUIRY* (1945). However, due to the substantial international developments that have occurred since this study was published, it may no longer be relied upon as evidence of the current practice of the international community.

1. Freedom of Religion Within Palestine

The first example of state practice involves actions by states, either individually or collectively, to ensure the freedom of religion within the city of Jerusalem and the territory surrounding it.¹⁵ In response to instances of violence immediately preceding the termination of the British mandate over Palestine, the United Nations Security Council passed a number of resolutions intended to avoid military conflict in the region.¹⁶ Significantly, these resolutions include provisions designed to protect the right to worship within Palestine and to secure access to all religious shrines.¹⁷ Although these resolutions failed to prevent violence from occurring, it should be noted that the international community viewed religious freedom to be important enough to include these provisions in the resolutions.

The Israel-Jordan Armistice Agreement of 1949¹⁸ also contains provisions designed to insure freedom of religion throughout the area.¹⁹ Unfortunately, however, the Armistice Agreement was violated by Jordan when it denied Israeli Jews, Muslims, and Christians access to religious shrines within Jordanian territory.²⁰ Although these acts clearly constitute violations of the right to freedom of thought, conscience, and religion, it is important to note that Jordan signed the Armistice Agreement which contained provisions intended to protect freedom of religion. Accordingly, these actions by Jordan arguably did not constitute a denial of the existence of the right to freedom of thought, conscience, and religion, but instead were intentional violations of both conventional and customary law.

After gaining control over East Jerusalem during the 1967 War, the Israeli government quickly enacted the Protection of Holy Places Law on June 27, 1967, which included the following provisions:

1. The Holy Places shall be protected from desecration and any other

¹⁵ Jerusalem and the territories surrounding it contain holy places important to three religions — Judaism, Christianity, and Islam. COHEN, *supra* note 5, at 209.

¹⁶ See UNTSO, 12 Whiteman DIGEST § 21, at 523-31.

¹⁷ See, e.g., S.C. Council Res. 46, U.N. Doc. S/723 (1948) (calling on parties to “[r]efrain from any action which will endanger the safety of the Holy Places in Palestine and from any action which would interfere with access to all shrines and sanctuaries for the purpose of worship by those who have an established right to visit and worship at them.”) (emphasis added).

¹⁸ Hashemite Kingdom of Jordan-Israel General Armistice Agreement, Apr. 3, 1949, 42 U.N.-T.S. 304. See also COHEN, *supra* note 5, at 209.

¹⁹ COHEN, *supra* note 5, at 209.

²⁰ *Id.* at 209-10 (these prohibitions even extended to non-Israeli Jews; however, Israeli Christians were permitted to enter Jordanian territory at Christmas and Easter).

violation and from anything likely to violate the freedom of access of the members of the various religions to the places sacred to them or their feelings with regard to those places.

2.(b) Whoever does anything that is likely to violate the freedom of access of the members of the various religions to the places sacred to them or their feelings with regard to those places shall be liable to imprisonment for a term of five years.²¹

These laws were subsequently enforced in two important controversies involving the Temple Mount or Haram esh-Sharif,²² and the Tomb of the Patriarchs.²³ In addition, Israel has made special arrangements for Christians and Muslims seeking to visit holy places within Israel and the occupied territories.²⁴ Finally, Israel, along with most other Arab states, complies with the policy of "open bridges," which permits passage into and out of Israeli territory provided no security threat exists.²⁵

Thus, the consistent attempts by states to recognize and to protect the right to freedom of thought, conscience, and religion within Jerusalem and its surrounding territories suggests that the right has customary norm status.

²¹ No. 26, Protection of Holy Places Law, Sefer Ha-Chukkim, 5727-1967 no. 2(b) at 76. In addition to this law, a number of military orders were issued for the protection of Holy Places. COHEN, *supra* note 5, at n.133.

²² The Temple Mount is the site of the Al-Aqsa Mosque, one of the holiest shrines of Islam. The Temple Mount is also the site of the two destroyed Temples and the Holy of Holies and consequently is the holiest place of the Jewish religion. Despite this religious significance, however, control of the site was handed to the Muslim community in 1967. Due to the potential for violent conflicts, further regulations were promulgated which prohibited Jews from praying on the Temple Mount, in order to preserve public order. Thus, although access to the shrine has been limited, it is significant that the government of Israel has chosen to limit access of the Jewish majority in order to protect the freedom of religion for the Muslim minority. COHEN, *supra* note 5, at 213-14. See also Roger Friedland & Richard D. Hecht, *The Politics of Sacred Place: Jerusalem's Temple Mount/al-haram al-sharif*, in SACRED PLACES AND PROFANE SPACES 21 (Jamie Scott & Paul Simpson-Housley eds., 1991).

²³ The Tomb of the Patriarchs is the burial place of Abraham and Sarah, Isaac and Rebecca, and Jacob and Leah and is sacred to Jews, Christians, and Muslims. A mosque was built over the Tomb and access was prohibited to non-Muslims from the 19th century until the Six Day War. After the war, the Israeli government implemented a compromise which permitted non-Muslim worshippers access at all times except Friday (the Muslim day of rest) and at Muslim prayer times. A number of violent conflicts have occurred between groups unsatisfied with the compromise; however, the Israeli government has acted to quell such disturbances and restore the terms of the compromise. COHEN, *supra* note 5, at 215-16.

²⁴ *Id.* at 216.

²⁵ *Id.* at 202, 216.

2. The Annual Hajj to Mecca

A second example of state practice is Saudi Arabia's cooperation with other states in order to permit access for Muslims seeking to participate in the annual Hajj to Mecca.²⁶ On June 5, 1991, Saudi Arabia agreed to permit Iraqi Muslims to participate in the Hajj, mere months after the Gulf War.²⁷ Convoys of Iraqi pilgrims left for Saudi Arabia on June 12, 1991, along a route specified by the Saudis.²⁸ Although the Gulf War ended prior to Saudi Arabia's decision to allow Iraqis to participate in the Hajj, it is remarkable that the Saudis permitted Iraqi nationals to enter their territory just months after the cessation of hostilities.

Saudi Arabia has also developed a long standing relationship with Egypt concerning the annual Hajj.²⁹ Egyptian pilgrims seeking to make the pilgrimage to Mecca are carefully screened and processed by Egyptian officials in order to comply with requirements imposed by the Saudi Government.³⁰ The Egyptian government, with Saudi consent, also establishes governmental offices in the cities of Mecca, Medina, and Jeddah during the Hajj period in order to assist in the organization of the pilgrims.³¹

Thus, Saudi Arabia, in conjunction with other states, has made substantial efforts to ensure the ability of Muslims to participate in the Hajj to Mecca.³² Accordingly, these practices provide further evidence of the existence of the human right to freedom of thought, conscience, and religion as a customary norm.³³

²⁶ The Hajj is a series of ritual practices that occur annually during the twelfth month of the Muslim lunar calendar. Muslims from all over the world travel to the city of Mecca and the holy precincts that encompass it, many of them travelling on foot through neighboring countries. Campo, *supra* note 2, at 146-48; *Be Clean, By Order*, ECONOMIST, Oct. 22, 1977, at 66; *Cholera*, *supra* note 3, at 79. For a thorough history of access to Mecca see F.E. PETERS, *JERUSALEM AND MECCA: THE TYPOLOGY OF THE HOLY CITY IN THE NEAR EAST*, ch. II (1986).

²⁷ *Iraqi Pilgrims to Leave for Saudi Arabia*, *supra* note 4.

²⁸ *Id.*; *Iraq in Brief: Pilgrims to Leave for Saudi Arabia on 12th June*, *supra* note 4.

²⁹ For centuries, regimes that have governed Egypt have been involved in the pilgrimage to Mecca. Campo, *supra* note 2, at 148.

³⁰ *Id.* at 149-52.

³¹ *Id.* at 151.

³² In 1990, King Fahd paid the travel expenses for 1,525 pilgrims from the Soviet Union seeking to participate in the Hajj. *Political News: Regional Tension, Makkah Tragedy, Communist Countries*, ECONOMIST, Aug. 1, 1990.

³³ Three additional examples of state practice regarding the protection of the right to freedom of thought, conscience and religion are: a) the signing of a non-aggression treaty by India and Pakistan in 1982 which allows Indian pilgrims to visit two religious shrines located in the territory of Pakistan, Barbara Slavin et al., *The World; Neighbors Try a Fresh Start*, N.Y. TIMES, Feb. 7, 1982, § 4 at 2; b) the agreement between India and China to allow pilgrims to visit

3. International Agreements as Evidence of Customary Norms

The numerous international agreements containing this right, as discussed above, provide further evidence of the right's status as a customary norm. Although these agreements do not establish customary law by themselves, they are important for several reasons. First, by signing the agreements, state parties are making open and notorious statements to the international community that they recognize the rights contained therein.³⁴ In addition, the various obligations imposed on these states illustrate their understanding that they are legally bound to observe these rights and in certain circumstances to act to protect individuals from governmental and non-governmental violations of these rights.³⁵ Furthermore, Theodor Meron has argued that the repetition of the right to freedom of thought, conscience, and religion throughout many human rights agreements is evidence of state practice and may show the emergence of an international customary norm.³⁶

Hindu shrines located in Tibet, Milt Freudenheim & Barbara Slavin, *The World in Summary; Hands Across the Himalayas?*, N.Y. TIMES, July 5, 1981, § 4 at 2; and c) the participation of Chinese Muslims in the Hajj. Visas for these pilgrims are arranged through Pakistan because China does not have diplomatic relations with Saudi Arabia. Christopher S. Wren, *Islam, After Persecutions, Rebounds in China*, N.Y. TIMES, June 15, 1983, at A1 [hereinafter Wren, *Islam, After Persecutions*].

³⁴ One problem with this argument is that the Middle East in general has refused to accept international human rights norms as binding, particularly the right to change one's religion. In several Islamic countries, changing one's religion is a crime with very severe social ramifications. Because such a right posed a threat to the legal and social structure of these nations, the right was opposed, although all except Saudi Arabia voted for the UDHR. As a result, one might be able to argue that the Islamic nations, and Saudi Arabia in particular, have openly and notoriously opposed the imposition of religious human rights within their territories. ANN E. MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 164-69, 186-87 (1991). However this refusal may be seen as a limitation on the scope of the right rather than a refusal to recognize the right itself.

³⁵ Some human rights agreements permit international human rights organs to apply customary law in addition to the terms of the agreement in determining whether a violation occurred. MERON, *supra* note 10, at 80-81 (citing to African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights).

³⁶ MERON, *supra* note 10, at 91-93. *See also* AM. SOC'Y INT'L L., PROC. 73RD ANN. MTG. 324, 328-29 (1979) (statement by Prof. Myres McDougal that in order to decide whether a U.N. statement reflects an accurate statement of international law, one should consider: "Who voted for the statement? Who voted against it? What was the relative and effective power of these voters? How compatible is the asserted policy with past expectations? What followed from the resolution? What were the expectations coming from other sources? and so on."). *But see* Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, AM. SOC'Y INT'L L., PROC. 73RD ANN. MTG. 301 (1979) (arguing that the General Assembly should not have the power to make law because there is no real representation of individuals and the process is subject to international politics); Oscar M. Garibaldi, *The Legal Status of*

4. Practice of States in Violation of the Right to Freedom of Thought, Conscience, and Religion

It must be noted, however, that violations of this norm do occur. Two notable examples are the People's Republic of China's repression of religion,³⁷ particularly in occupied Tibet,³⁸ and the religious repression in the former Union of Soviet Socialist Republic³⁹ and Eastern Europe.⁴⁰ Based upon these examples and other less frequent violations of the right by other states, it may be argued that the right to freedom of thought, conscience, and religion is not protected by customary international law. However, this argument fails to take into account two very important developments. First, although patterns of gross violations were clearly occurring in these states, each of these states has attempted to demonstrate compliance with international minimum standards for the protection of religious freedom.⁴¹ Secondly, the break up of the former

General Assembly Resolutions: Some Conceptual Observations, AM. SOC'Y INT'L L., PROC. 73RD ANN. MTG. 324 (1979) (arguing that viewing General Assembly Resolutions as customary law is a revolutionary change to the international law making process and that selecting which resolutions have customary law status is practically impossible because of the inadequate account of custom included in these documents).

³⁷ Wren, *China's Buddhists*, *supra* note 2 (during the Cultural Revolution, Buddhist monks living on Mount Wutai were abused and dispersed and their monasteries were closed); Wren, *Islam, After Persecutions*, *supra* note 33 (during the Cultural Revolution, Islamic clergymen were reportedly paraded through the streets with pig's heads tied around their necks).

³⁸ Edward A. Gargan, *Chinese Are Said to Restore Shaky Calm in Tibet*, N.Y. TIMES, Feb. 4, 1988, at A15 [hereinafter Gargan, *Shaky Calm*] (In 1959, a ban lasting two decades was imposed by authorities on the religious rite of renewal for Tibetan Buddhists. In addition, during the Cultural Revolution, virtually every monastery in Tibet was destroyed); Edward A. Gargan, *Chinese Leader Faults U.S. Lawmakers on Tibet*, N.Y. TIMES, Oct. 17, 1987, § 1, at 32 ("The Dalai Lama, the highest living Buddha in the Tibetan religion, went into exile in India in 1959 after Chinese troops crushed a rebellion intended to free Tibet from China's control.").

³⁹ Bill Keller, *Moscow Journal; Atheist Preaches Glasnost, So A Priest Has Hope*, N.Y. TIMES, June 8, 1987, at A4

(Despite occasional hints of greater tolerance, the freeing of some religious prisoners and the reopening of some churches, religious practices remain severely constrained in the Soviet Union Advocates of religion estimate that several hundred people are still serving time in prisons, labor camps or psychiatric hospitals for expressing their religious beliefs outside authorized channels.).

⁴⁰ Clyde Haberman, *Vatican and East Lowering Barriers at a Rapid Tempo*, N.Y. TIMES, Oct. 1, 1989, § 1, at 1 (Catholics were subject to repression in the Baltic republics for years); John Tagliabue, *Prague and East Berlin See Reform as Fine-For Moscow*, N.Y. TIMES, Mar. 13, 1988, § 4, at 3 (the Roman Catholic Church has been subject to repression in Czechoslovakia).

⁴¹ Gargan, *Shaky Calm*, *supra* note 38 (in 1988, the Chinese government permitted the festival of Monlam Chenmo, a three-week rite for Tibetan Buddhists, to be held. The festival at-

Soviet Union leaves China in a very isolated position within the international community.⁴² As a result China may now be considered to be an anomaly in the international community rather than the leader of a strong minority in opposition to the right.

Thus, a rather cursory examination of state practice reveals that the right to freedom of thought, conscience, and religion may be considered to be a customary norm of international law. Admittedly, violations occur and will continue to occur. However so long as most states continue to protect the freedom of thought, conscience, and religion within their territory, or find it necessary to assert that action is being taken to comply with international standards, the right must be considered to exist as a customary norm. This is important because this customary norm serves to bind states that have not signed human rights agreements subsequent to the Charter.⁴³ Nevertheless, due to the existence of state practice in violation of the freedom of thought, conscience, and religion, it is important to examine a third source of international law in order to confirm its status as a human right.

C. *The Freedom of Thought, Conscience, and Religion as a General Principle of Law Recognized by Civilized Nations*

The right to freedom of thought, conscience, and religion can be regarded as a "general principl[e] of law recognized by civilized nations," as provided in article 38(1)(c) of the Statute of the International

tracts thousands of pilgrims to the area. In addition, the Chinese Standing Committee of the Communist Party of Tibet has acknowledged that "religion remains strongly rooted in Tibet and cannot be tampered with."); Haberman, *supra* note 40 (Czechoslovakia allowed four new Roman Catholic Bishops to be named in 1989, after decades of repression. In addition, the Catholic Church has been permitted to appoint its first bishop in Byelorussia in six decades); Keller, *supra* note 39 (In 1988, Gorbachev condemned past religious repression and asserted that a law in the process of being drafted would give broader protection to the practice of religion); Wren, *China's Buddhists*, *supra* note 2 (by opening monasteries on Mount Wutai, the Chinese government hopes to illustrate its professed new tolerance of religious belief); Wren, *Islam, After Persecutions*, *supra* note 3, at A1 ("Peking has allowed a qualified return to overall freedom of religion in the last few years A display of religious tolerance also enhances China's image among the nations of Asia, the Middle East, and Africa."). Furthermore, China has specifically guaranteed the freedom of religious belief in its constitution. P.R.C. CONST. ch. II, art. 36.

⁴² In 1989, the Group of 7 soundly condemned China for its violent repression of human rights. The Group further stated, "[w]e look to the Chinese authorities to create conditions which will avoid their isolation and provide for a return to cooperation based upon the resumption of movement toward political and economic reform and openness." Finally the Group reiterated the need for protection of freedom of thought, conscience, and religion, "for without these freedoms, other rights cannot be fully realized." The Group of 7 Statement: Concern From East Europe to China, N.Y. TIMES, July 16, 1989, § 1, at 17.

⁴³ See BRIERLY, *supra* note 7, at 51-52.

Court of Justice (ICJ).⁴⁴ It is generally understood that article 38(1)(c) allows the ICJ to look beyond the conventional and customary rules which require the express or implied consent of states in order to be binding.⁴⁵ Therefore, the ICJ may "draw upon principles common to various systems of municipal law" in order to determine whether the right to worship at religious shrines constitutes a "general principle."⁴⁶

Although a comprehensive study of the presence of the right within the legal systems throughout the world is beyond the scope of this Note, the right is enshrined in the constitutions of most nations.⁴⁷ In addition,

⁴⁴ Statute of the International Court of Justice, *supra* note 7, art. 38(1)(c).

⁴⁵ General Principles of Law, 1 Whiteman DIGEST § 7, at 90. *See also* BRIERLY, *supra* note 7, at 63 (the inclusion of paragraph (c) is important because it rejects the positivist doctrine, which limits international law to only those rules to which states have given their consent).

⁴⁶ General Principles of Law, 1 Whiteman DIGEST § 7, at 91.

⁴⁷ *See, e.g.*, Constitution of the Republic of Afghanistan art. 40 (1990), *reprinted in* I CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 18 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992) [hereinafter CONSTITUTIONS] ("In the Republic of Afghanistan, the freedom to perform religious rites is guaranteed to all Muslims. Followers of other religions are free to perform their religious rites . . ."); Constitution of the State of Bahrain art. 22 (1973), *reprinted in* I CONSTITUTIONS 20-21 (1985) ("The State shall guarantee the inviolability of places of worship and the freedom to perform religious rites and to hold religious processions and meetings in accordance with the customs observed in the country."); Constitution of the People's Republic of Bangladesh art. 41 (1972), *reprinted in* I CONSTITUTIONS 23 (1989) ("Subject to law, public order and morality- (a) every citizen has the right to profess, practise or propagate any religion;. . ."); Belgian Constitution of February 7, 1831 art. 14 (Gisbert H. Flanz trans., 1988), *reprinted in* II CONSTITUTIONS 2 (1989) ("Freedom of worship and its public exercise . . . are guaranteed save for the repression of offenses committed in the exercise of these liberties."); Constitution of Belize art. 11(1) (1981), *reprinted in* II CONSTITUTIONS 10 (1981)

(Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.);

Constitution of Bolivia art. 3 (1967), *reprinted in* II CONSTITUTIONS 21 (1992) ("The State recognizes and upholds the Roman Catholic Apostolic Religion. It guarantees the public exercise of any other worship . . ."); Constitution of Botswana art. 11(1) (1966), *reprinted in* II CONSTITUTIONS 27-28 (1989)

(Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.);

Constitution of the Federative Republic of Brazil art. 5(VI) (1988), *reprinted in* II CONSTITUTIONS 2 (1990) ("The freedom of conscience and belief is inviolable, the freedom to hold religious services is assured, and protection of the sites of religious services and their liturgies is guaranteed pursuant to law."); Constitution of Burkina Faso art. 7 (1991), *reprinted in* III CON-

STITUTIONS 52, 53 (1992)

(The freedom of belief, of non-belief, of conscience, of religious, philosophical opinion, of religious exercise, the freedom of assembly, the free practice of custom as well as the freedom of procession and its demonstration shall be guaranteed by the present Constitution subject to respect of the law, of the public order, of good morals and of the human person.);

Canadian Charter of Rights and Freedoms, Constitution Act pt. 1 (2) (1982), *reprinted in* III CONSTITUTIONS 103 (1991) ("Everyone has the following fundamental freedoms: (a) freedom of conscience and religion . . ."); Constitution of the People's Republic of China art. 36 (1982), *reprinted in* III CONSTITUTIONS 43-44 (1992) ("Citizens of the People's Republic of China enjoy freedom of religious belief . . . The state protects normal religious activities . . ."); Political Constitution of Colombia art. 19 (1991), *reprinted in* IV CONSTITUTIONS 3 (1991) ("Freedom of religion is guaranteed. Every individual has the right to freely profess his/her religion and to disseminate it individually or collectively. All religious faiths and churches are equally free before the law."); Constitution of the Republic of Costa Rica art. 75 (1977), *reprinted in* IV CONSTITUTIONS 14 (1981) ("The Apostolic Roman Catholic Religion is that of the state, which contributes to its maintenance, without impeding the free exercise in the republic of other worship that is not opposed to universal morality or good customs."); Constitution of the Republic of Croatia art. 40 (1990), *reprinted in* IV CONSTITUTIONS 43 (1992) ("Freedom of conscience and religion and free public profession of religion and other convictions are guaranteed."); Constitution of the Republic of Cuba art. 54 (1976), *reprinted in* IV CONSTITUTIONS 21 (1979) ("The Socialist state . . . recognizes and guarantees freedom of conscience and the right of everyone to profess any religious belief and to practice, within the framework of respect for the law, the belief of his preference. The law regulates the activities of religious institutions."); Constitution of the Kingdom of Denmark Act art. 67 (1953), *reprinted in* IV CONSTITUTIONS 22 (1985) ("The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done."); Constitution of the Arab Republic of Egypt art. 46 (1980), *reprinted in* V CONSTITUTIONS 18 (1991) ("The State shall guarantee the freedom of belief and the freedom of practice of religious rites."); Constitution of the Republic of El Salvador art. 25 (1983), *reprinted in* V CONSTITUTIONS 32 (1992) ("The free exercise of all religions, without other restriction than that required by morals or the public order, is guaranteed. No religious act shall serve as evidence of the civil status of the persons."); Constitution Act of Finland art. 8 (1919), *reprinted in* VI CONSTITUTIONS 17 (1991)

(Every Finnish citizen shall have the right publicly and privately to practice a religion, insofar as the law or good morals are not thereby offended, and also, in accordance with what has been separately prescribed regarding it, the freedom to renounce the religious community to which he belongs, and the freedom to join another religious community.);

Basic Law of the Federal Republic of Germany art. 4 (1949), *reprinted in* VI CONSTITUTIONS 81 (1991)("(1) Freedom of faith, of conscience, and freedom of creed, religious or ideological (weltanschaulich), shall be inviolable. (2) The undisturbed practice of religion is guaranteed."); Constitution of Greece art. 13(2) (1975), *reprinted in* VI CONSTITUTIONS 21 (1988) ("All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of law. The practice of rites of worship is not allowed to offend public order or moral principles. Proselytism is prohibited."); Political Constitution of the Republic of Guatemala art. 36 (1985), *reprinted in* VI CONSTITUTIONS 34 (1986)

(The exercise of all religions is free. Any individual has the right to practice his religion or belief, both in public and in private, through education, worship, and observance, without other limits than the public order and the re-

several states have enforced this right in their national courts.⁴⁸ Because this right appears to be "common to the various systems of municipal law," the right may be considered to have the status of a general principle of law recognized by civilized nations which states are bound to protect within their territories.⁴⁹

spect due to the dignity of the hierarchy and the faithful of other beliefs.); Constitution of India art. 25(1) (1989), *reprinted in VII CONSTITUTIONS* 54 (1988) ("Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."); Constitution of Ireland art. 44(2)(1) (1937), *reprinted in VIII CONSTITUTIONS* 71 (1988) ("Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."); Constitution of Italy art. 19 (1947), *reprinted in VIII CONSTITUTIONS* 51 (1987) ("All are entitled to freely profess their religious convictions in any form, individually or in associations, to propagate them and to celebrate them in public or in private, save in the case of rites contrary to morality."); Constitution of Japan arts. 19, 20 (1947), *reprinted in VIII CONSTITUTIONS* 16 (1990) ("Freedom of thought and conscience shall not be violated. Freedom of religion is guaranteed to all."); Constitution of the Islamic Republic of Pakistan art. 20 (1981), *reprinted in XIII CONSTITUTIONS* 14 (1986) ("Subject to law, public order and morality, (a) every citizen shall have the right to profess, practise and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."); Constitution of the Republic of the Philippines art. 4(8) (1986), *reprinted in XIV CONSTITUTIONS* 21 (1986) ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed . . ."); Constitution of the Kingdom of Thailand sec. 25 (1978), *reprinted in XVIII CONSTITUTIONS* 6 (1990)

(Every person shall enjoy full liberty to profess a religion, a religious sect or creed, and to exercise a form of worship in accordance with his belief; provided that it is not contrary to his civic duties or to public order or good morals. In exercising the liberty referred to in paragraph one, every person is protected from any act of the State, which is derogatory to his rights or detrimental to his due benefits, on the ground of professing a religion, a religious sect or creed, or of exercising a form of worship in accordance with his belief different from that of others.);

U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

⁴⁸ See, e.g., *Devaru v. State of Mysore*, (1958) A.I.R. (S.C.) 255 (Indian Supreme Court held that the rights of persons classified as "untouchable" according to Hindu law must not be denied the freedom to manifest their religion, as dictated in article 25(2) of the Indian Constitution). U.S. courts have developed a two-part test to be applied in cases involving the "Free Exercise" clause of the first amendment to the Constitution. First, governmental action must be determined to burden the exercise of plaintiff's religion. If such a burden is found, the action violates plaintiff's first amendment rights, unless the government can establish an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

⁴⁹ One example of the protection of a general principle by a national legal system is *Filariga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980) (holding that the violation of the general principle of law prohibiting the use of torture provided sufficient grounds for jurisdiction of a U.S. district court over foreign nationals living within the U.S.).

III. SCOPE OF THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION

General legal principles are prevalent throughout both national legal systems and the international legal system. Because these general principles must be applied to particular factual situations, however, it is necessary to define and interpret them through subordinate legal rules in order for the general rules to be effectively implemented.⁵⁰ Therefore, legal rules which define the scope of the human right to freedom of thought, conscience, and religion must be promulgated in order to effectively protect the general right.

Several important goals will be achieved by further specifying the right to freedom of thought, conscience, and religion. First, states will be made more aware of what their particular obligations are towards individuals within their territories regarding this right. Consequently, states will be better able to bring their national laws into compliance with international law and to monitor their own actions and actions of persons within their territories in order to prevent violations of the right.⁵¹ Disputes involving the freedom of thought, conscience, and religion will be more effectively and efficiently resolved when all parties involved are aware of what specific actions constitute violations of the right.⁵²

Second, individuals will be increasingly aware of the scope of the right to freedom of thought, conscience, and religion and will be able to understand more readily when these rights are being violated by a state.⁵³ Moreover, individuals will be more aware of the rights of others and so may avoid violating those rights. If the violation of another's rights is unavoidable, individuals may be more willing to negotiate a resolution which imposes the minimum amount of infringement possible on the rights of each party.⁵⁴ In addition, individuals will be more will-

Theodor Meron has suggested that as human rights laws are incorporated into national legal systems, article 38(1)(c) will increasingly be a method for making norms into general international law. MERON, *supra* note 10, at 88-89.

⁵⁰ Of course these subordinate rules must not be too specific, as they also must be applicable to the variety of religions, societies, and situations presented by the world today.

⁵¹ Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), U.N. Pub. No. 60. XIV.2., *reprinted in* 11 N.Y.U. J. INT'L. L. & POL. 227, 277-78 (1978).

⁵² *Id.* at 276-78. By defining the right, suits based on alleged violations which fall outside of the scope of the right would be discouraged and legitimate suits might be quickly settled by the parties.

⁵³ *Id.*

⁵⁴ *Id.*

ing to challenge the authority of a state if they are able to show that the state conduct has violated specific rights.⁵⁵

Finally the rights of minority groups will be more effectively protected because activities which are not prevalent in the majority of religions may be protected by a listing of specific rights included within the freedom of thought, conscience, and religion.⁵⁶ By enumerating these rights, a minority sect may thus be protected against oppression by the state and/or the majority religion(s).⁵⁷

The United Nations has recognized this need for further specificity and has endeavored to clarify the scope and meaning of the right to freedom of thought, conscience, and religion. The first clarifications of the right were included in article 18 of the UDHR, stating, "this right *includes* freedom . . . , either alone or in community with others and in public or private, to manifest his religion or belief in . . . worship and observance."⁵⁸

Eleven years after the passage of the UDHR, United Nations Special Rapporteur Arcot Krishnaswami prepared a "Study of Discrimination in the Matter of Religious Rights and Practices"⁵⁹ which included a list of sixteen "basic rules" designed to assist in the implementation of article 18 of the UDHR. These basic rules specifically enumerated religious practices which needed protection in order for the right to freedom of thought, conscience, and religion to be guaranteed.⁶⁰

Further efforts by the U.N. led to the specific provisions of article 18 of the International Covenant on Civil and Political Rights,⁶¹ and

⁵⁵ *Id.*

⁵⁶ *Id.* at 235-36.

⁵⁷ *Id.*

⁵⁸ Universal Declaration of Human Rights, *supra* note 6, art. 18 (emphasis added).

⁵⁹ Krishnaswami, *supra* note 51. Mr. Krishnaswami was appointed special rapporteur by the U.N. Subcommittee on the Prevention of Discrimination and the Protection of Minorities, which had been requested to prepare a study on the subject by the Commission on Human Rights. Liskofsky, *supra* note 10, at 441.

⁶⁰ Krishnaswami, *supra* note 51, at 277.

⁶¹ In addition to repeating the text of article 18 of the UDHR, article 18 of the Covenant further provides:

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own

both the Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief⁶² and a draft convention of the same name.⁶³

Thus it is clear that subordinate rights which are integral elements of the right to freedom of thought, conscience, and religion must be enumerated in order to effectively protect the general right. Although the U.N. has taken steps towards identifying these subordinate rights, the enumeration of these rights and their implementation through national and international law remains to be completed.

IV. THE RIGHT TO MAKE PILGRIMAGES TO RELIGIOUS SHRINES

One essential element of the right to freedom of thought, conscience, and religion is the right to make pilgrimages to religious shrines. Due to the central role that pilgrimage plays in most of the world's religions, it is important to recognize that national and international pilgrimage must be protected under international human rights law.

convictions.

International Covenant on Civil and Political Rights, *supra* note 10 (Because the Covenant is a multilateral treaty, all signatories to the agreement are bound to comply with these provisions).

⁶² Declaration on Elimination of Intolerance, *supra* note 11, at 171.

⁶³ The draft convention remains to be fully completed. A partial draft containing the preamble and thirteen articles was originally prepared in 1965 by the Subcommission on Prevention of Discrimination and Protection of Minorities. Draft International Convention on the Elimination of All Forms of Religious Intolerance, U.N. ESCOR, 37th Sess., U.N. Doc. E/CN.4/882 and Corr.1, para. 321, resolution 1 (XVII) (1964) [hereinafter Draft Convention]. This draft was transmitted to the Commission on Human Rights which considered it between 1965 and 1967 but was only able to adopt the preamble and twelve articles of the convention. These provisions were forwarded to the Economic and Social Council in 1967, which then transmitted the draft along with other relevant materials to the General Assembly. See *Elimination of All Forms of Religious Intolerance, Note by the Secretary General*, U.N. GAOR, 25th Sess., at 6, U.N. Doc A/7930 (prov. ed. 1970). After discussing the draft convention in 1967, consideration of the convention was postponed until 1972, at which point the General Assembly decided to give priority to the completion of the draft declaration. G.A. Res. 3027, U.N. GAOR, 27th Sess., Supp. No. 30, at 72, U.N. Doc. A/8730 (1972); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the U.N. Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L. L. 487, 487 n.3 (1988).

For the history of both the declaration and the convention see Liskofsky, *supra*, note 10; MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 677-84 (1980); Roger S. Clark, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197 (1978); Claydon, *supra* note 10, at 406; Natan Lerner, *Toward a Draft Declaration Against Religious Intolerance and Discrimination*, 1981 ISREAL Y.B. HUM. RTS. 82.

A. *The Prima Facie Case: The Hajj to Mecca*

The clearest case for the protection of pilgrimage under the right to freedom of thought, conscience, and religion is the annual Hajj to Mecca.⁶⁴ Islamic law imposes a mandatory duty on every Muslim to make a pilgrimage to the Kaba⁶⁵ in the city of Mecca at least one time during that person's life.⁶⁶ In addition to fulfilling this mandatory requirement, the Hajj also constitutes an enormous religious rite in which Muslims gather to worship and to commune with Muslims from every corner of the world.⁶⁷ Participation in the Hajj has tremendous significance both for the individual making the pilgrimage,⁶⁸ and the Islamic community.⁶⁹ Because participation in the Hajj is a mandatory obligation for every Muslim and because pilgrimage plays such a fundamental role in the practice of Islam, the denial of an individual's right to make the pilgrimage to Mecca must be seen as a violation of that individual's right to freedom of thought, conscience, and religion.

B. *Other Pilgrimages*

Although the mandatory nature of pilgrimage is lacking in other religions, pilgrimage does play an important role in the practice of most of the world's religions. In India, annual pilgrimages to religious shrines play a central role in the practice of the Hindu religion.⁷⁰ Participation over thousands of years has created an extensive network of pilgrimage routes which circulates pilgrims throughout the entire nation.⁷¹ Throughout Asia, pilgrimage to religious shrines is an integral part of the prac-

⁶⁴ See *supra* note 26.

⁶⁵ God's Sacred House. Campo, *supra* note 2, at 146.

⁶⁶ IGNAZ GOLDZIEHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 14 (Andras & Ruth Hamori trans., 1981). See also Peter Martin, *The Empty Country*, *ECONOMIST*, Dec. 10, 1977, at 9.

⁶⁷ In 1977, over two million people participated in the Hajj, representing approximately 60 countries. Cholera, *supra* note 3, at 79. During the 1980s the largest increase ever in participation in the Hajj occurred, with about two of every thousand Muslims in the world making the pilgrimage each year. Campo, *supra* note 2, at 149.

⁶⁸ See, e.g., MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X, 323 (1965) (describing the impact that participation in the Hajj had on the life of Malcolm X).

⁶⁹ See generally Campo, *supra* note 2, at 156.

⁷⁰ Philip C. Engblom, Introduction to D.B. MOKASHI, PALKHI, AN INDIAN PILGRIMAGE 1 (Philip C. Engblom trans., 1987) (virtually every Hindu participates in a pilgrimage to a religious shrine at some point in his life).

⁷¹ BHARDWAJ, *supra* note 2, at 45-57. In addition to the pilgrimage network, a sophisticated system of ranking of religious shrines according to their importance has also developed. *Id.* at 97.

tice of Buddhism.⁷² Pilgrimage to the wailing wall and other shrines located in Palestine has been an important part of the practice of Judaism.⁷³ Although Christians have no duty to make pilgrimages, many Christians travel to religious shrines either for healing⁷⁴ or to witness the places of historical importance to the religion.⁷⁵ Finally, a number of smaller religions practice pilgrimages of some sort.⁷⁶

Thus, pilgrimage plays an important role in most of the world's religions. Therefore, it is necessary to recognize that the practice of pilgrimage must be protected as an essential part of the human right to freedom of thought, conscience, and religion.

C. *United Nations Recognition of Pilgrimage as an Element of the Right to Freedom of Thought, Conscience, and Religion*

On several occasions, U.N. organizations have recognized that the right to freedom of thought, conscience, and religion includes the right to make pilgrimages to religious shrines. The first instance of this recognition occurred in Arcot Krishnaswami's *Study of Discrimination in the Matter of Religious Rights and Practices*.⁷⁷ In his discussion of the right to worship in public, contained in article 18 of the UDHR, Krishnaswami states:

⁷² Kendall J. Wills, *On the Trail of the Buddha*, N.Y. TIMES, Mar. 8, 1987, § 10, at 21 ("[T]housands of Buddhists from Burma, China, Japan, South Korea and Thailand make pilgrimages each year to Lumbini, the place . . . that the scriptures say was Buddha's birthplace, and to temples in the Katmandu Valley and monasteries in the mountains to the north."); Amanda M. Stinchecum, *Kyoto Temple Markets*, N.Y. TIMES, Aug. 15, 1982, § 10, at 9 (once a month, pilgrims travel to the Buddhist temple of Toji in the city of Kyoto, Japan); Wren, *China's Buddhists*, *supra* note 72 (pilgrims regularly traveled to Mount Wutai, in China during the 17th century); Gargan, *Shaky Calm*, *supra* note 38 (Buddhist pilgrims traveled to Lhasa in Tibet to participate in the festival of Monlam Chenmo, until it was banned by the authorities in 1959).

⁷³ COHEN, *supra* note 5, at 210.

⁷⁴ *41 Mexicans Killed as Worshipers Panic at Religious Shrine*, N.Y. TIMES, Feb. 14, 1991, at A12 (religious shrine draws pilgrims from across Mexico who pray for healing); Chuck Sudectic, *In Shrine to Virgin, Threat of War Darkens Streets*, N.Y. TIMES, Sept. 28, 1991, § 1, at 2 (shrine in Medjugorje, Yugoslavia was visited by millions of Catholics pursuing reports of miraculous healings).

⁷⁵ Alan Cowell, *The Holy Land is Losing its Christians, Leading to Fears of Vacant Shrines*, N.Y. TIMES, Feb. 12, 1992, at A3 (pilgrims regularly visit the Church of the Holy Sepulcher, where believers say Jesus was crucified and buried, and the Church of the Nativity, which marks the traditional birthplace of Jesus).

⁷⁶ See, e.g., Michael J. Fischer, *Sacred Circles: Iranian (Zoroastrian and Shi'ite Muslim) Feasting and Pilgrimage Circuits*, in SACRED PLACES AND PROFANE SPACES 131 (Jamie Scott & Paul Simpson-Housley eds., 1991); Stinchecum, *supra* note 72 (the Shinto religion in Japan involves pilgrimage to religious shrines throughout the country).

⁷⁷ Krishnaswami, *supra* note 51.

While some faiths consider it to be a duty of every follower to undertake pilgrimages to one or more sacred places associated with special events in their history, others favour such pilgrimages without making them obligatory. Pilgrimages may be undertaken by individuals either singly or in groups Frequently they involve not only travel within a country, but also travel to a foreign country where the sacred places are located. Pilgrimages to foreign countries involve not only the possibility for the pilgrim to leave his own country, but also the possibility for him to enter the appropriate foreign country.

[W]hen a pilgrimage is an essential part of a faith, any systematic prohibition or curtailment of the possibility for pilgrims . . . to leave their own country or to enter a foreign country where the sacred place is located, would constitute a serious infringement of the right of the individual to manifest his religion or belief. Thus as a general rule the possibility for pilgrims to journey to sacred places as acts of devotion prescribed by their religion or belief-whether inside or outside their own country-should be assured.⁷⁸

Krishnaswami then went on to include the right as a "Basic Rule" necessary to ensure the achievement of the goals enumerated in article 18 of the UDHR.⁷⁹ This study subsequently served as the foundation for much of the discussion concerning the implementation of the right to freedom of thought, conscience, and religion within the U.N.⁸⁰

Several attempts were made to achieve official recognition of the right to make pilgrimages to religious shrines through international agreements. Pursuant to a General Assembly resolution,⁸¹ the Sub-Commission on Prevention of Discrimination and the Protection of Minorities prepared both a preliminary draft of a United Nations Declaration on the Elimination of All Forms of Religious Intolerance (Declaration)⁸² and a preliminary draft International Convention on the Elimination of All Forms of Religious Intolerance (Convention).⁸³ Both of these documents specifically included the right to make pilgrimages to religious shrines

⁷⁸ *Id.* at 247.

⁷⁹ Rule 4 states: "The possibility for pilgrims to journey to sacred places as acts of devotion prescribed by their religion or belief, whether inside or outside their own country, should be assured." *Id.* at 278.

⁸⁰ Lerner, *supra* note 63, at 84.

⁸¹ GA Res. 1781, 17 U.N. GAOR Supp. No. 17 at 33, U.N. Doc. A/5217 (1962).

⁸² *Preliminary Draft of A United Nations Declaration on the Elimination of All Forms of Religious Intolerance* U.N. ESCOR, 37th Sess., Supp. No. 8, para. 294, U.N. Doc. E/3873 (1964) [hereinafter *Draft Declaration*].

⁸³ This draft consisted of a preamble and thirteen articles. *Draft Convention, supra* note 63, para. 321, res. 1(XVII).

within the right to freedom of thought, conscience, and religion.⁸⁴ Neither of these provisions, however, has been incorporated into an international agreement sponsored by the U.N.⁸⁵ Consequently, the right to make pilgrimages to religious shrines lacks formal recognition in an international document, despite the efforts of various U.N. organizations.

Examination of the operation of the right in both the national and international context will serve to illustrate the continuing need to recognize pilgrimage as an essential part of the right to freedom of thought, conscience, and religion.

V. OPERATION OF THE RIGHT IN A NATIONAL CONTEXT

Within a national context, pilgrimages to religious shrines raise a number of practical legal issues which are unique when compared to most other forms of public worship. The following hypothetical fact scenario will help illustrate these issues.

Pilgrim is a national of the state where the religious shrine is located. Pilgrim must travel to reach the shrine which is located in another part of the state from where Pilgrim lives. However, the area where the shrine is located is populated by people who are culturally different from Pilgrim and who practice a different religion than Pilgrim. As Pilgrim seeks to enter the village where the shrine is located, Pilgrim is informed that Pilgrim may not enter the town and must return home.

As the hypothetical illustrates, a number of potential obstacles may discourage or prevent pilgrimages in the national context. First, local and/or state laws may be prejudicial to those seeking to make a pilgrimage into the area.⁸⁶ Second, national laws may unduly restrict pilgrimage to shrines. This is a special danger when Pilgrim is a member of a minority religious population which has little or no representation in the national government.⁸⁷ In addition, it should be noted that restrictive

⁸⁴ Article VI, section 6 of the Draft Declaration provided: "Everyone has the right to make pilgrimage to sites held in veneration, whether inside or outside his country, and every State shall grant freedom of access to these places." *Draft Declaration, supra* note 82. Article III, section 2(e) of the Draft Convention provided: "States parties shall in particular ensure to everyone . . . Freedom to make pilgrimages and other journeys in connexion [sic] with his religion or belief whether inside or outside his country; . . ." *Draft Convention, supra* note 63.

⁸⁵ The provision in the declaration was not included in the final version of the declaration. See Declaration on Elimination of Intolerance, *supra* note 11. The draft convention has yet to be adopted by the General Assembly. See Sullivan, *supra* note 63, at 487 n.3.

⁸⁶ One example of this type of law is the operation of Hindu Law in India, which prohibits persons considered "untouchable" from entering religious shrines. DANIEL C. KRAMER, *COMPARATIVE CIVIL RIGHTS AND LIBERTIES* 128 (1982).

⁸⁷ The U.S. has attempted to prevent such discrimination by passing the Protection and Preservation of Traditional Religions of Native Americans Act (American Indian Religious Freedom

national laws may be disguised in the form of special taxes on travelers, restrictions on travel passes, and restrictions on transportation.⁸⁸ Finally, nongovernmental entities may act to prevent people from making pilgrimages to shrines within their territory by force, threat of force, or other means of discouragement.⁸⁹

Recognition by the international community that the right to make pilgrimages to religious shrines is an integral part of the right to freedom of thought, conscience, and religion will greatly assist the national pilgrim in overcoming these obstacles in several ways. First, by protecting the right to make pilgrimages as a subordinate human right, nationals will obtain the right simply by being born human beings, instead of relying on the state to identify the right as being fundamental.⁹⁰ Furthermore, the state will be prohibited from limiting or denying the right through local or national legislation.⁹¹ Second, since international human rights law is binding on states, states are obligated to incorporate protection of the right into their national legal system. Pilgrims denied access to religious shrines could employ their national legal system either to invalidate laws which illegally infringe upon their rights, to enjoin the government from illegally denying them access, or to demand state action to prevent nongovernmental organizations from violating their right. Finally, in cases where national remedies have been exhausted or are unavailable, pilgrims could appeal to the international community to intervene on their behalf. One example of this process is the mechanism established by the protocol to the Convention on Civil and

Act), 42 U.S.C. § 1996 (1988), which provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

⁸⁸ A U.S. case involving this type of dispute is *Bandoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (holding that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into a sacred area outweighs plaintiff's religious interest, due to the importance of the lake for water storage and hydroelectric power, and that the government has a duty to insure plaintiff's access to the shrine, but does not have an affirmative duty to exclude tourists from visiting the shrine). Cf. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986) (enjoining road construction and timbering in sacred area because such activities would "virtually destroy the plaintiff Indian's ability to practice their religion").

⁸⁹ For example, locals might refuse to rent rooms or to sell food to pilgrims.

⁹⁰ John Langan, *Defining Human Rights: A Revision of the Liberal Tradition*, in *HUMAN RIGHTS IN THE AMERICAS: THE STRUGGLE FOR CONSENSUS* 69, 70-72 (Alfred Hennelly & John Langan eds., 1982).

⁹¹ *Id.* at 72.

Political Rights, which allows individuals to bring claims of human rights violations to the U.N.⁹²

Thus recognition of the right to make pilgrimages to religious shrines as an element of the right to freedom of thought, conscience, and religion is the most effective method to counter the unique obstacles that may arise in the national context. Because protection of human rights is often most effectively achieved through national legal systems, the imposition of a binding obligation on states to incorporate this subsidiary right into their domestic legal system will significantly further the more general right to freedom of thought, conscience, and religion. Furthermore, efforts by the international community to educate states and individuals about the right to make pilgrimages will encourage nationals to assert their rights in the event of violations. Finally, potential intervention by the international community on behalf of the national will encourage states to respect the right. However, because most pilgrimages involve international travel, it is necessary to extend the examination to the international context.

VI. OPERATION OF THE RIGHT IN AN INTERNATIONAL CONTEXT

Although international pilgrimage may involve the same issues as discussed in the national context above, several additional issues must be discussed. Once again, a hypothetical fact pattern will illustrate these issues.

Pilgrim leaves state A where Pilgrim is a national in order to travel to a religious shrine located in state C. Because Pilgrim has limited resources, Pilgrim travels on foot through state B and arrives at the border of state C. At the border of state C, Pilgrim is asked for a passport and other papers. After examining Pilgrim's papers, government border officials inform Pilgrim that he may not enter the territory of the state and must return home. Although Pilgrim inquires, no explanation is given for the refusal.⁹³

As illustrated above, several additional obstacles may be imposed on a pilgrim seeking to travel internationally. First, Pilgrim may not be permitted to leave his home state to travel abroad. Second, Pilgrim may be denied passage through state B which is necessary to reach the state where the shrine is located. Third, the state where the shrine is located

⁹² Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966).

⁹³ Under customary law, such a denial would be perfectly legitimate. See generally James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 16 (1991); Kenneth D. Greenwald, *Abourezk v. Reagan: The Need for Further Clarification and Reform of Alien Excludability Law*, 77 GEO. L.J. 217, 218 n.17 (1988).

may refuse to admit Pilgrim into its territory. Finally, it should be noted that even if Pilgrim is permitted to enter the territory of the state where the shrine is located, Pilgrim may face the same obstacles that the national pilgrim met and perhaps more, since Pilgrim is an alien.

Here too, international recognition of the right to make pilgrimages to religious shrines will greatly assist Pilgrim in overcoming these obstacles. In the first instance, recognition of this subordinate right will further strengthen the already recognized human right to leave one's country and return.⁹⁴ Thus Pilgrim would be able to assert the violation of two human rights by his home state.

More importantly, recognition of the right will provide Pilgrim with the means to challenge a foreign state which is denying Pilgrim access to its territory. Assertion of Pilgrim's right would have the practical effect of forcing a state to enumerate the reasons why Pilgrim was being denied access to the shrine. If the reasons given for the denial were illegitimate,⁹⁵ Pilgrim could pursue the matter further by asserting that Pilgrim's human rights were violated.

Accordingly, recognition of the right to make pilgrimages to religious shrines will assist pilgrims in overcoming obstacles which, particularly in the international realm, have been insurmountable in the past. Due to the central role that pilgrimage plays in the practice of religion and the extensive amount of international pilgrimage occurring today, it is imperative that the right to make pilgrimages to religious shrines be recognized as an essential element of the human right to freedom of thought, conscience, and religion.

VII. THE PROBLEM OF ENFORCEABILITY

One of the most common criticisms of human rights law, however, is that it is unenforceable and therefore merely provides a worthwhile goal for all nations to strive to achieve.⁹⁶ This criticism, however, ignores the international reality that states have "reputations" to uphold within the international community. Because of the publicity and criticism involved with accusations of human rights abuses, states are increasingly willing to comply with human rights agreements.⁹⁷ The pro-

⁹⁴ See Universal Declaration of Human Rights, *supra* note 6, art. 13(2) ("Everyone has the right to leave any country, including his own, and to return to his country.")

⁹⁵ For example, they fall outside the scope of allowable limitation on the right (discussed *infra*) or lack any factual basis whatsoever.

⁹⁶ See, e.g., Liskofsky, *supra* note 10, at 447-48.

⁹⁷ See *supra* note 41 (response of violating states to accusations of human rights abuses). See also MERON, *supra* note 10, at 153 (explaining that states are increasingly willing to submit complaints of human rights violations to international organs and increasingly willing to put hu-

liferation of private and public human rights organizations has made it increasingly difficult for states to "hide" their human rights abuses from the rest of the world. Furthermore, a number of international human rights agreements permit individuals, organizations, and states not directly affected by the violations, to bring such accusations before international organizations.⁹⁸ As a result, there have been a number of situations where states accused of violating human rights, even among their own nationals, have been subject to condemnation by the international community.⁹⁹ More importantly, in instances of gross violations or re-occurring violations, states and groups of states have sought to isolate the violating state by imposing trade sanctions or embargoes.¹⁰⁰ In certain cases, these actions, although informal, have had dramatic success in curbing the violations. Certainly these actions have not been successful in every case, nor have they been applied uniformly against all nations committing human rights violations, however, the threat of such actions together with the negative publicity it generates exerts a substantial amount of pressure on states that are actively violating human rights or are permitting non-state violations to continue within their territories. Thus an informal system exists which deters states from committing or allowing human rights violations and holds those who have violated human rights accountable for their actions. As public awareness of human rights issues increases, this system will become increasingly effective as a means of controlling and preventing human rights abuses.

Nevertheless, more formal systems of human rights enforcement exist. Indeed, it is becoming increasingly possible for states to bring violating states before judicial and quasi-judicial organs for human rights abuses.¹⁰¹ Although obtaining state submission to jurisdiction remains

man rights issues on the agenda for bilateral and multilateral international agreements). See generally Barbara Crossette, *U.S. Human Rights Office Grows in Influence*, N.Y. TIMES, Jan. 19, 1992, § 1 at 8.

⁹⁸ MERON, *supra* note 10, at 176-77 (explaining how individuals may be required to exhaust local remedies prior to resorting to international forums).

⁹⁹ The ability of individuals to obtain access to international forums in which to voice their claims has increased the focus of human rights investigations to include occasional and "lesser" violations.

¹⁰⁰ For an excellent discussion of the imposition of sanctions on Rhodesia and South Africa see RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 443-563 (2nd ed. 1991). It has been also argued that remedies should include customary remedies provided by international law. This may include the international remedy of suspending treaty obligations (excepting human rights agreements) with the violating state, i.e. trade obligations, landing rights, immigration, etc. MERON, *supra* note 10, at 230-42.

¹⁰¹ Theodor Meron asserts that it is generally accepted that, on the basis of the provisions of the Charter, states not directly affected by human rights violations may make representations directly to the violating state or may lodge an official complaint with United Nations or other

an obstacle, states have shown an increasing willingness to submit to compulsory jurisdiction in regional human rights agreements.¹⁰² A unique development is that in some cases individuals may bring claims on their own behalf, and states not directly affected may sue another state for human rights violations.¹⁰³ Remedies available may include injunctions, restitution, and damages.¹⁰⁴ As the United Nations grows in legitimacy and power, it is possible that additional formal legal enforcement procedures will be implemented. Thus, both formal and informal mechanisms are in place which can protect the right to make pilgrimages to religious shrines.

These mechanisms will be particularly effective in the area of pilgrimage for several reasons. First, most pilgrims belong, either officially or unofficially, to religious organizations which can be large, well-organized, and often well-financed. During disputes, these organizations will be able to mobilize public opinion and take action to oppose the policies of the offending state. Second, because most major religions have members throughout the world, truly international pressure can be exerted on the offending state. This will greatly increase the individual pilgrim's chances of securing access to the desired shrine. Finally, by forcing states to enumerate their reasons for denying access to pilgrims seeking to enter their territory, states will be subject to international scrutiny. Consequently, states will be much more reluctant to deny access for illegitimate reasons.

VIII. LIMITATIONS ON THE RIGHT

Because the right to make pilgrimages to religious shrines must inevitably conflict with state sovereignty and other human rights, the

international organizations. In addition, many human rights treaties provide states with standing before international judicial and quasi-judicial organs, without proof of material damage to that state or its nationals. Thus, Meron concludes, an international notion is evolving which perceives human rights violations as violations against the international community as a whole. MERON, *supra* note 10, at 195-205.

¹⁰² *Id.* at 153.

¹⁰³ *Id.* at 201-205. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at 237-38, which provides,

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions

See also, Liskofsky, *supra* note 10, at 459.

¹⁰⁴ MERON, *supra* note 10, at 205.

right must be subject to certain limitations.¹⁰⁵ These limitations should not, however, diminish the status of the right as a human right in any way.¹⁰⁶ If the only rights that may be recognized as human rights are those rights which are "absolute" and therefore are nonderogable under any circumstances, human rights law would only protect approximately four rights.¹⁰⁷ Clearly this cannot be the case, given the internationally expressed desire to protect a broad scope of rights under human rights law.¹⁰⁸ Therefore, the right to worship at religious shrines may be subject to limitations without surrendering its status as a human right.

In order to prevent abuse, however, it is necessary to determine the extent to which limitations can be tolerated before the protection afforded to the right is effectively removed. Human rights law has developed a two-part test to determine the validity of limitations on human rights.¹⁰⁹ First, the limitation must be "determined by law,"¹¹⁰ meaning that "the limitations envisaged in the article should be stated in general and objective terms in accordance with the characteristics of the law, as distinct in a sense from individual and concrete legal decisions

¹⁰⁵ Langan, *supra* note 90, at 73. See also Krishnaswami, *supra* note 51, at 230-31, 247.

¹⁰⁶ Langan, *supra* note 90, at 73-74.

¹⁰⁷ The rights forming this core would be: the right to life and the freedom from slavery, torture and retroactive penal measures. Because these rights have *jus cogens* status under customary international law, they are peremptory norms which may not be set aside by agreement or acquiescence. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 11 (1986).

¹⁰⁸ See, e.g., U.N. CHARTER arts. 55-56; Universal Declaration of Human Rights, *supra* note 6. Theodor Meron has suggested that a hierarchy of human rights is evolving in response to the proliferation of rights which are being recognized as human rights. Conceptually this must be the case, for if all rights were equal, it would be impossible to decide which right prevails when two or more inevitably conflict. For example, the international community would hardly conclude that a person's right to practice human sacrifice in worship supersedes the sacrificial victim's right to life. Yet the unique cultural differences between the various states has so far obstructed international codification of such a hierarchy. As may be illustrated by history, some cultures may in fact view individual human rights as subservient to societal rights such as the right to worship, etc.

Meron suggests that the hierarchy theory of human right is ineffective due to the inherent subjectivity and ethnocentrism involved in "ranking" human rights according to their importance. As an alternative, Meron suggests recognizing a certain "core" of *jus cogens* rights which would be clearly delineated as being superior to other human rights. These rights would supersede other human rights when conflicts arise and would make any international agreement that limited them in any way void. See MERON, *supra* note 7.

¹⁰⁹ Krishnaswami, *supra* note 51, at 232-33.

¹¹⁰ Universal Declaration of Human Rights, *supra* note 6, art. 29(2) ("everyone shall be subject only to such limitations as are determined by law"); Declaration on Elimination of Intolerance, *supra* note 11, art. 1(3) ("Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law").

resulting from decrees of courts or administrative acts.”¹¹¹ Second, the limitations must be “necessary” or justified according to one of four recognized exceptions.¹¹²

A. *Necessary to Protect Public Safety*

Due to the large numbers of people participating in pilgrimages to religious shrines, it may become necessary for a state to limit access to a religious shrine. Recently, a number of accidents resulting in the death and injury of large numbers of pilgrims have illustrated this need for limitation.¹¹³ Although some of these accidents have occurred due to the negligence or fault of the host state, they are often triggered or exacerbated by group panic and hysteria.¹¹⁴ Clearly the sheer number of persons entering a state like Saudi Arabia may justify a limitation on participation in the pilgrimage, however under no circumstances should this justify complete denial of access to the shrine.¹¹⁵

B. *Necessary to Protect Order*

International law has traditionally permitted a state to employ a wide range of actions in order to preserve its existence. As a result, states must have some means of excluding persons seeking to travel to religious shrines to incite violence or to undermine the authority of the host state. Given the large number of persons entering a state’s territory as pilgrims, the inability of a state to prevent such false or violent pilgrims from entering its territory could pose a significant threat to order within that state.¹¹⁶ One example of this is the riots that occurred in

¹¹¹ Krishnaswami, *supra* note 51, at 232-33.

¹¹² *Id.* Article One of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* further states, “are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” *Supra* note 11.

¹¹³ *41 Mexicans Killed as Worshipers Panic at Religious Shrine*, *supra* note 74, at A12 (41 people suffocated or crushed to death in panic during Ash Wednesday service); Nick B. Williams, Jr., *Religion; Crowds on the Road to Mecca Mark a Political Turnaround*, L.A. TIMES, May 31, 1991, at A5 (at least 1,400 pilgrims killed during a stampede in a pedestrian tunnel in Mecca in 1990).

¹¹⁴ *41 Mexicans Killed as Worshipers Panic at Religious Shrine*, *supra* note 74, at A12 (a group of street vendors inadvertently blocked one entry to the religious shrine. Due to the resulting congestion, people entering and leaving the shrine panicked and began pushing and shoving causing 41 people to be suffocated or crushed to death.); *Makkah Tragedy*, *supra* note 32 (rumors of failed air conditioning systems, locked safety exits, or police over-reaction may have caused pilgrims to stampede, resulting in the death of over 1,400 pilgrims).

¹¹⁵ Thus the imposition of a quota system by Saudi Arabia on participation in the Hajj could be justified, but the denial of access to religious shrines by Jordan prior to 1967 would not be justified.

¹¹⁶ Krishnaswami, *supra* note 51, at 244 (“[N]or can public authorities allow activities aimed

Mecca in 1987.¹¹⁷ Although the Saudi and Iranian governments still dispute the source of the violence, the Saudis assert that a contributing factor was Iranian fundamentalists protesting the legitimacy of the Saudi government.¹¹⁸ Therefor the Saudi imposition of quotas on the number of pilgrims permitted to participate in the Hajj would be justified as a legitimate protection of national security.¹¹⁹ However, a complete denial of access to all Iranian pilgrims would not be acceptable.

C. *Necessary to Protect Public Health or Morals*

The third acceptable justification for limiting the right to make pilgrimages to religious shrines is to preserve public health and morals.¹²⁰ Two examples of state practice will serve to illustrate this justification. First, approximately three months prior to the annual Hajj in 1977, a cholera epidemic which began in Syria, spread to Turkey, Lebanon, Jordan, the Israeli-occupied West Bank, and Saudi Arabia.¹²¹ If cholera had spread throughout the millions of pilgrims in Mecca, it would have created the potential for a world-wide epidemic when the pilgrims returned to their respective countries.¹²² Recognizing this, Jordan and Saudi Arabia required pilgrims to have a variety of immunization certificates in order to enter their territory.¹²³ Pilgrims lacking these certificates were prohibited from participating in the Hajj.¹²⁴ Obviously, this is the easy case for denial of access to religious shrines on public health grounds. However, not all cases will be so clear. Indeed, the application of the preservation-of-public-health justification may be very difficult in the unique situation where a pilgrim seeks to visit a

at the destruction of the state, such as rebellion or subversion, even though undertaken in the name of religion or belief.”).

¹¹⁷ *Makkah Tragedy*, *supra* note 32. See also OLIVER STATLER, JAPANESE PILGRIMAGE, 226-27 (1983) (prior to and during the 17th century, pilgrims seeking to worship at religious shrines in Japan were thoroughly interrogated at fief borders in order to screen out spies, beggars, criminals, and the sick and diseased).

¹¹⁸ Peter F. Sisler, *Iran Ends Row with Saudis*, WASH. TIMES, Mar. 27, 1991, at A10.

¹¹⁹ Krishnaswami, *supra* note 51, at 244 (any act to restrain or to limit manifestations of religion must be done in good faith to preserve the security of the state).

¹²⁰ Krishnaswami, *supra* note 51, at 243 (certain manifestations, such as “sacrifice of human beings, self-immolation, mutilation of the self or others, and reduction into slavery or prostitution” are so damaging to society that states are always entitled to limit or prohibit them).

¹²¹ *Cholera*, *supra* note 3, at 79.

¹²² *Id.*

¹²³ *Be Clean, By Order*, ECONOMIST, Oct. 22, 1977, at 66.

¹²⁴ *Id.* Cholera had previously been a reoccurring problem in Saudi Arabia due to the Hajj; however, strict enforcement of public health regulations and other actions such as individual and aerial spraying of pilgrims with insecticide has brought it and other epidemics under control. *Cholera*, *supra* note 3, at 79.

religious shrine in the hopes of becoming healed of a sickness or disease.¹²⁵ In these more difficult cases, the interests of the individual should be balanced with those of the state, preferably by a judicial or quasi-judicial organization.¹²⁶

A second illustration is the passage of laws within India which prohibit animal sacrifice at Hindu temples and the dedication of young virgins to the temple who often become temple prostitutes.¹²⁷ Although these laws do not deny access to these religious shrines themselves, a state could be justified in denying access to a shrine where these activities were occurring.¹²⁸ It is important to realize, however, that the validity of these justifications will often require factual findings and balancing by some sort of national or international organization.¹²⁹

D. Necessary to Protect the Fundamental Rights and Freedoms of Others

The final, and most difficult justification is that the right conflicts with the human rights of another person or persons. As discussed above, the right to worship at religious shrines lacks the status of a *jus cogens* norm.¹³⁰ Consequently, when a person's right to worship at a religious shrine conflicts with another person's human rights, the respective rights must be balanced and the conflict resolved.¹³¹

¹²⁵ See 41 *Mexicans Killed as Worshipers Panic at Religious Shrine*, *supra* note 74 (religious shrine draws pilgrims from across Mexico to pray before an icon for miraculous healing of the sick). Furthermore, the recognition of the human right to worship at religious shrines might pose a significant threat to the United States' policy of refusing persons with the AIDS virus entry into its territory.

¹²⁶ Whether or not a state's assertion of the threat-to-health-justification is valid would be a question of fact to be determined by a "close examination of the conditions and circumstances in which limitations are imposed . . ." Krishnaswami, *supra* note 51, at 243. The balancing test enumerated by Donna Sullivan (*infra* note 130) could be adapted to such a conflict between the individual and a state.

¹²⁷ KRAMER, *supra* note 86, at 125-26.

¹²⁸ Article 25(1) of the Indian constitution grants the freedom of religion but provides that this freedom shall be subject to the demands of public order, morality and health. *Id.* at 126. Clearly these restrictions constitute acceptable justifications under international human rights law.

¹²⁹ Krishnaswami, *supra* note 51, at 243.

¹³⁰ See *supra* note 107.

¹³¹ If the conflict were with a human right having *jus cogens* status, e.g. the freedom from torture, no balancing would occur. Instead, the right to worship at religious shrines would automatically be limited to the extent that it conflicted with the *jus cogens* right.

In her article *Advancing the Freedom of Religion or Belief Through the U.N. Declaration on the Elimination of Religious Intolerance and Discrimination*, Donna Sullivan states:

Conflicts that arise between the rights stated in the Declaration and other human rights may be best addressed by identifying those factors significant to a balancing of the rights and interests involved, rather than by relying

In considering the right to worship at religious shrines, two potential conflicts are likely to arise. The first involves conflicts between an individual's right to worship at a shrine and the right to manifest one's beliefs according to the religious laws and practices associated with worship at that shrine. For example, article 17 and article 25(2)(b) of the Indian Constitution effectively outlaw the Hindu practice of excluding Harijans (untouchables) from Hindu temples.¹³² This stands in direct conflict with orthodox Hindu practice that requires Harijans to worship in the temple courtyard and does not permit them to enter the temple itself.¹³³ Legislation enacted pursuant to these articles was challenged in the Indian Supreme Court case of *Devaru v. State of Mysore*,¹³⁴ which resulted in a court imposed compromise between the two parties. The Supreme Court held the law to be valid to the extent that untouchables must be admitted into the temple throughout most of the year, but invalid insofar as it prohibited excluding untouchables and other members of the general public when the Gowda Saraswath Brahmins sect held their most sacred ceremonies there.¹³⁵ Thus, as illustrated by the Indian Supreme court, it is important for the respective rights of the parties to be balanced in order to limit the derogation of the

upon ill-defined concepts of hierarchically ordered norms. A balancing approach that takes into account particularized facts concerning those factors generally relevant to conflict situations can provide a framework for resolving conflicts between norms.

Sullivan, *supra* note 63, at 510.

Sullivan suggests four factors to consider in the balancing process:

- (1) the significance of the particular religious practice to the religion;
- (2) the importance of the countervailing, nonreligious practice or interest to the right upon which it is premised;
- (3) the duration of the limitations to be imposed;
- (4) the degree to which each practice interferes with the other or with the underlying rights and interests of the parties.

Id.

¹³² Article 25(2) provides that "[n]othing in this article shall affect the operation of any existing law or prevent the State from making any law . . . (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." Constitution of India art. 25(2), *reprinted in VIII CONSTITUTIONS, supra* note 47, at 54-55. Explanation II adds: "the reference to Hindus shall be construed as including a reference to the persons professing the Sikh, Jaina or Bhuddist religion, and the reference to Hindu religious institutions shall be construed accordingly." *Id.*

¹³³ KRAMER, *supra* note 86, at 127-28.

¹³⁴ *Devaru v. State of Mysore*, (1958) A.I.R. (S.C.) 255, *cited in* KRAMER, *supra* note 86, at 128.

¹³⁵ *Id.* An additional example is the Islamic law which denies access to Mecca to non-Muslims under penalty of death. This has created some problems for Westerners accepting jobs which take them into Mecca. See Debra L.W. Cohen, Note, *Equal Employment Opportunity For Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1306 (1987).

rights of the parties as much as possible.¹³⁶

A second potential problem is conflicting rights to worship at the same religious shrine. This has been a particularly difficult issue in Israel where religious shrines of three major religions are located. One example of this is the Temple Mount controversy in Jerusalem.¹³⁷ The Temple Mount contains the Al-Aqsa Mosque and the Mosque of Omar (or Dome of the Rock) and had been held by the Muslim community for 1,300 years before the Israeli occupation of 1967.¹³⁸ To the Jews, however, the Temple Mount is the holiest place of the Jewish religion, as the site of the two destroyed temples and the Holy of Holies.¹³⁹ Nevertheless, on June 17, 1967, the Israeli Defense Minister handed over control of the Temple Mount to the Muslim community and prohibited Jews from worshiping there.¹⁴⁰ Since then, Jews have challenged the order on several occasions on the grounds that they have a right to worship at the site. The Israeli government, however, has not permitted Jewish worship services in order to preserve public order in the area.¹⁴¹

A particularly graphic example of this problem is the recent destruction of the 16th-century Mosque of Babar, in Ayodhya, India, by Hindu militants.¹⁴² The Mosque has been the focus of controversy for several years because Hindus claim that the mosque was built on the exact birthplace of the Hindu god Ram.¹⁴³ On December 7, 1992, tens of thousands of Hindus destroyed the mosque with their bare hands in order to construct a temple to Ram, despite a ruling by the Supreme Court of India that there should be no construction of the temple and

¹³⁶ See also Clark, *supra* note 63, at 216 (the abolition of the practice of "untouchability" is a clear example of a limitation necessary to protect the "fundamental rights and freedoms of others").

¹³⁷ COHEN, *supra* note 5, at 213.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 214. A similar conflict arose over the Tomb of the Patriarchs in Hebron. The holy tomb is the burial place of Abraham and Sarah, Isaac and Rebecca, and Jacob and Leah, and so is sacred to Jews, Christians, and Muslims. The Muslims built a mosque over the tomb and forbade non-Muslims from entering the shrine from the nineteenth century until the war in 1967. The Israeli government devised a system which permitted both Jews and Muslims to worship at the shrine; however, this shrine also has been the cause of several violent and non-violent disturbances. *Id.* at 215-16.

¹⁴² The mosque had been an important shrine for Muslims since its construction in 1528. Edward A. Gargan, *Hindu Militants Destroy Mosque, Setting Off a New Crisis in India*, N.Y. TIMES, Dec. 7, 1992, at A1 [hereinafter Gargan, *Hindu Militants*].

¹⁴³ In 1990, approximately 1,000 people died in riots, after Hindu militants stormed the mosque in an unsuccessful attempt to destroy the mosque. *Id.* See also Sanjoy Hazarika, *Hindus Protest Quietly at Indian Shrine*, N.Y. TIMES, Dec. 7, 1990, at A3.

that the mosque should remain undamaged.¹⁴⁴ Although the government of India has regained control of the area and prevented the construction of the shrine,¹⁴⁵ over 1,300 people were killed and 4,600 were wounded in rioting between Hindus and Muslims throughout India.¹⁴⁶ Thus recognizing the right to worship at religious shrines presents the potential problem of conflicts arising between individuals and groups who are both asserting the same human right. It could be argued that a preferable situation is created by not granting the right "human right" status because it will merely intensify the conflicts already existing, but two arguments can be advanced in response to this claim. First, states often have a predominant religion within their population which carries substantial power within the government of the state. As a result, a conflict between the predominant religion and a minority religion or even members of a religion seeking to enter the state's territory, would predictably result in denial of access to the minority religion. Recognition of the human right, however, would allow those groups denied access to the shrine to appeal to national law and international law to resolve the conflict.¹⁴⁷ Second, because the pilgrimages often involve international movement of large groups of people, these conflicts are inherently international and so should be solved by the international community. Admittedly, this will be very difficult because religions traditionally have not been open to compromise.¹⁴⁸

Thus in certain circumstances, states should be allowed to limit the scope of the right to worship at religious shrines. However it is important to remember that the burden of proof rests on the state to show the necessity of limiting the right.

¹⁴⁴ Gargan, *Hindu Militants*, *supra* note 142, at A6.

¹⁴⁵ On December 8, 1992, 5,000 heavily armed soldiers seized control of the site and Prime Minister Rao promised Muslim leaders that the mosque would be rebuilt. Edward A. Gargan, *Deaths Mount in Rioting in Indian Cities*, N.Y. TIMES, Dec. 9, 1992, at A1.

¹⁴⁶ *India Arrests 700 in a Crackdown on Rioters*, N.Y. TIMES, Dec. 14, 1992, at A5 (The Government of India announced a casualty toll of 1,210 dead and 4,600 wounded; however, victims continue to be discovered and the toll is already believed to be higher than official figures); Sanjoy Hazarika, *Week of Rioting Leaves Streets of Bombay Empty*, N.Y. TIMES, Jan. 12, 1993, at A3 (Officials reported that 137 people had died in rioting in Bombay in one week).

¹⁴⁷ Krishnaswami, *supra* note 51, at 233

[I]n a multireligious society, certain limitations on religious practices, or on customs, which owe their origin to religious doctrines, may be necessary in order to reconcile the interests of different groups, notably minorities and the majority. Such limitations should not be of such a nature as to sacrifice minorities on the alter of the majority, but to ensure a greater measure of freedom for society as a whole. A good example of such legislation is the Indian constitutional provision forbidding the practice of "untouchability."

Id.

¹⁴⁸ See COHEN, *supra* note 5, at 217.

IX. CONCLUSION

The right to freedom of thought, conscience, and religion is recognized under international law as a human right. Substantial evidence of this recognition can be found in each of the three major sources of international law enumerated in article 38 of the Statute of the International Court of Justice.¹⁴⁹ Accordingly, states are bound to protect individuals within their territories against violations of this right. However, implementation of this right has proven difficult due to the broad nature of the right. Consequently, specific legal rules need to be promulgated in order to effectively protect the right.

One particular element of the right to freedom of thought, conscience, and religion which merits specific protection is the right to make pilgrimages to religious shrines. Because pilgrimage plays a central role in the major religions of the world, the right to make pilgrimages to religious shrines is an essential element of the right to freedom of thought, conscience, and religion.

Furthermore, it is important to confer specific protection on the ability to make pilgrimages due to the unique obstacles that pilgrims may face as they travel to religious shrines. Because these obstacles may include the denial of access to the territory of foreign states, pilgrimages raise uniquely international issues which are most effectively dealt with through the international legal system. Moreover, by using international human rights law as the means for protecting pilgrimages, individuals will be better able to obtain remedies for violations of their right to freedom of thought, conscience, and religion.

Because this element of the right to freedom of thought, conscience, and religion will inevitably conflict with the concept of state sovereignty and the fundamental rights of others, the right to make pilgrimages must be subject to limited restrictions. These restrictions, if imposed in good faith, will not unduly burden the pilgrim and should offer sufficient protection to states against threats to its existence or the welfare of its nationals.

Accordingly, the international community should afford protection for the pilgrim by recognizing that pilgrimage is an essential part of the right to freedom of thought, conscience, and religion.

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¹⁴⁹ Statute of the International Court of Justice, *supra* note 7.

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