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INTERNATIONAL STANDARDS FOR PROTECTION OF RELIGIOUS FREEDOM

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ABSTRACT

The Universal Declaration of Human Rights, inspired by the “four freedoms” articulated by Franklin D. Roosevelt, proclaims but does not define the religious liberty that is the birthright of all people. Four centuries ago, when few people were free, religious ideas fostered the development of some of the fundamental principles of the law of nations. As international law has matured, increasingly it has recognized the right of individuals and groups to pursue their own religions and beliefs. The United Nations system has generated an array of international conventions, covenants, and resolutions which today articulate the rights of adherents to all sects and no sect. Religious freedom – sometimes used as shorthand for freedom of religion, belief, and conscience, is spelled out in the International Covenant on Civil and Political Rights, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and other progeny of the U.N. Charter. Regional-level agreements have addressed religious rights, but regional tribunals such as the European Court of Human Rights have not been as discerning as they should be in dealing with cases involving headscarves, missionaries and other issues. The United States, despite its strong constitutional

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tradition and generally good enforcement of First Amendment rights, has not consistently interpreted freedom of religion in a manner conformance with international standards. For decades the Supreme Court and Congress went back and forth on trying to arrive at a formula on protection of religious minorities adversely affected by facially neutral laws. President Trump's actions against immigrants and visitors from Muslim countries are a tragic departure from the values that were espoused by the American leaders since the founding of the Republic.

I. UNIVERSAL DECLARATION: RELIGIOUS FREEDOM WITHOUT DEFINITION

The Universal Declaration of Human Rights (UDHR),¹ adopted by the United Nations General Assembly in 1948, was a breakthrough in establishing formal worldwide recognition of religious and other freedoms.² It proclaimed "equal and inalienable rights of all members of the human family."³ It called for "freedom of speech and belief and freedom from fear and want,"⁴ to be enjoyed "without distinction of any kind, such as . . . religion."⁵ And it demanded action: "All States shall take effective measures to prevent and eliminate discrimination on grounds of religion or belief"⁶

In a key provision, UDHR Article 18 declares:

Everyone has the right to freedom of thought, conscience and religion; this right includes the right to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁷

Produced by a Commission to Study the Organization of Peace chaired by Eleanor Roosevelt,⁸ the UDHR, the Universal Declaration, was in-

1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 25 (Dec. 10, 1948) [hereinafter UDHR].

2. Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *BYU L. REV.* 217, 227 (2002) ("in terms of its path-breaking qualities, the Universal Declaration would undoubtedly be the most important").

3. UDHR pmbl.

4. *Id.*

5. *Id.* art. 2.

6. *Id.* art. 4(1).

7. *Id.* art. 18.

8. BAHYYIH G. TAHZIB, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* 70 (1996).

spired by the 1941 State of the Union speech of President Franklin D. Roosevelt.⁹

II. RELIGION, HISTORICALLY IMPOSED IN DISREGARD OF INDIVIDUAL CONSCIENCE, LATER FOSTERED INTERNATIONAL LAW, WHICH EVENTUALLY PROCLAIMED THE RIGHTS OF CONSCIENCE

As I will delineate in this paper, international law has much to say about religion, but the term *religion* itself is not really defined in international law.¹⁰ It commonly is understood that religion involves the exercise of conscience in teaching and other activities traditionally associated with institutions of faith.¹¹ And religion encompasses not only the voice emanating from one's conscience but also outer manifestations can encompass regimens of ceremony, diet, attire, ritual, and language.¹²

The freedom of religion today is regarded as a basic human right, not merely a boundary area for tolerance that is ceded by civil authority.¹³ But, it was not always so. The 1555 Religious Peace of Augsburg had asserted the maxim *cuius region, eius religio* – “each prince determines

9. Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 6, 1941) (“four essential human freedoms,” including “freedom of every person to worship God in his own way,” to be attained “everywhere in the world,” along with freedom of speech, freedom from fear, and “freedom from want”), available at <http://www.presidency.ucsb.edu/ws/?pid=16092> (last visited Apr. 29, 2018).

10. Robert Taer, “Religion” in *International Law*, RELIGION AND HUMAN RIGHTS (“International law, in fact, does not define religion. It simply uses the word to refer to what countries mean by religion.”), <http://www.religionhumanrights.com/Research/religion.intlaw.htm> (last visited Jan. 31, 2018).

11. Ahmad Masum & Nehaluddin Ahmad, *Freedom of Religion and Apostasy under International Law: With Special Reference to Article 11 of the Malaysian Federal Constitution*, 6 J. E. ASIA & INT’L L. 435, 436 (2013) (referencing UDHR Art. 18 and ICCPR Art. 18) (“Although international law does not define religion, it does identify religion with conscience . . . Religion may involve teaching, practice, worship, and observance.”); see CONSTITUTION OF MALAYSIA (reprint Nov. 1, 2010), available at <http://www.wipo.int/edocs/lexdocs/laws/en/my/my063en.pdf> (last visited May 8, 2018).

12. Human Rights Committee, General Comment No. 22 on the freedom of thought, conscience and religion, art. 18, para. 4, July 30, 1993 (“The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation with rituals associated with certain stages of life, and the use of a particular language, customarily spoken by a group.”).

13. LOUIS HENKIN, ET AL., HUMAN RIGHTS 639 (2d ed. 1999) (footnote omitted) (“Religious liberty . . . must be distinguished from religious tolerance. Tolerance as a legal concept is premised on the assumption that the state has ultimate control over religion and the churches, and whether and to what extent religious freedom will be granted is a matter of state policy. The right of religious liberty is a fundamental right, the essence of which is the right to entertain such beliefs as a person chooses, the right to declare such beliefs openly and without fear of hindrance or reprisal, and the right to manifest such belief by worship and practice or by teaching and dissemination.”).

the religion of his subjects.”¹⁴ The Augsburg maxim implied that the only person who really had freedom of religion was the prince.

As John Stuart Mill surmised, civil authorities who claimed to receive divine revelation actually relied on messages from fellow mortals.¹⁵ He had no sympathy for authorities who effectuated “the tyranny of the majority.”¹⁶ Relying undoubtedly on his own conscience, Mill championed the idea that, if justice is to prevail, non-Christians must be treated the same as Christians.¹⁷ He took the cynical view that people are naturally intolerant,¹⁸ and said that religious fervor fosters hate.¹⁹

In most societies, most people have tended to be intolerant of the religious views of others – the exceptional tolerant being indifferent more often than appreciating the virtues of a pluralistic society. Whether people have tolerant views or not, whether they are indifferent to or embrace diversity, any system of civil law in an enlightened world must accept the equal rights of people of every religion and of no religion. And yet a public servant, whether having received a communiqué from God or not, is obliged to act on the basis of the public interest, respecting the equal rights of those who subscribe to every sect or no sect. International law, rightly conceived, promises that much.

Actually, international law does owe much of its formative development to religious thought.²⁰ The Jesuit priest Francisco Suarez, writing *DE LEGIBUS, AC DEO LEGISLATORE* in 1612, asserted that “there is some form of natural law” and that “the law of nature is rational nature

14. *Id.*

15. JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., 1978) (“It remains to be proved that society or any of its officers holds commission from on high to avenge any supposed offense to Omnipotence which is not also a wrong to our fellow creatures.”).

16. *Id.* at 4 (“Like other tyrannies, the tyranny of the majority was at first, and still is vulgarly, held in dread, chiefly operating through the acts of the public authorities.”).

17. *Id.* at 49 (“If Christians would teach infidels to be just to Christianity, they should themselves be just to infidelity.”).

18. JOHN STUART MILL, *supra* note 15, at 8 (“Yet so natural to mankind is intolerance in whatever they really care about that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale.”).

19. *Id.* at 7 (“the *odium theologicum*. . . in a sincere bigot, is one of the most unequivocal cases of moral feeling”).

20. Mark Weston Janis, *Religion and International Law*, 7 *AM. SOC. INT'L L. INSIGHTS* (Nov. 17, 2002) (“From its earliest days, international law has been intertwined with religion. The 16th Century Spanish Catholic priests, Suarez and Vitoria, who are often viewed as among the founders of the modern discipline of international law, argued from religious sources that the Spanish crown was obliged to treat native Americans as real peoples under the moral influence of the law of nations.”), available at <https://asil.org/insights/volume/7/issue/13/religion-and-international-law>.

itself.”²¹ Further: “Jurists usually distinguish the natural law from the *ius gentium* [law of nations],” Suarez reported, “in that the natural law is shared in common with brute creation, while the *ius gentium* is peculiar to men.”²² Another priest, Francisco de Vitoria, in 1696 endorsed the just war concept and referred to “the unlawfulness of the slaughter of children and other innocent parties”²³ Hugo Grotius, Protestant scholar also regarded as a founder of international law, likewise derived from the Bible rules to govern the conduct of nations.²⁴

III. CHARTER REQUIRES NATIONS TO GUARANTEE RELIGIOUS FREEDOM

A nation, like a religion, depends on people who believe in it.²⁵ At the conclusion of World War II, the leaders of nations around the world formed a common belief in the need for a global rule of law, to outlaw war and safeguard human rights. The United Nations Charter,²⁶ adopted in 1945, established a system for international peace and security. Significantly, the Charter also sought to promote “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”²⁷ The Charter is in effect “the constitution of the international community.”²⁸ Addressing the closing session of the San Francisco conference in which the Charter was signed, President Harry S Truman (who was adamant about never putting a period after his middle initial) said, “The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to

21. FRANCISCO SUÁREZ, *DE LEGIBUS, AC DEO LEGISLATORE* 178 (Gwadys L. Williams, Ammi Brown, & John Waldron trans., William S. Hein & Co. 1995) (1612).

22. *Id.* at 327.

23. FRANCISCO DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 181 (Classics of International Law Series ed., J. Bate trans., Carnegie Institute of Washington 1917).

24. Janis, *supra* note 20 (“Another founder of international law, the Dutch Protestant jurist, Hugo Grotius, relied heavily on Old and New Testament citations to demonstrate a universal law of nations. . . . Though Grotius depended on Christian texts for his proofs, he felt that much of the law of nations bound not only Christian states, but those of Islam and China, too.”).

25. See MICHAL ROZYNEK, *A PHILOSOPHY OF NATIONHOOD AND THE MODERN SELF* 29 (2017) (citing SLAVOJ ŽIŽEK, *TARRYING WITH THE NEGATIVE: KANT, HAEL AND THE CRITIQUE OF IDEOLOGY* 201 (1993)).

26. U.N. Charter (signed June 26, 1945, entered into force Oct. 24, 1945, ratified by U.S. Aug. 8, 1945).

27. U.N. Charter art. 55(c); see RICHARD B. LILICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 41 (1979) (“The Charter . . . furnishes considerable content to the notion of human rights.”).

28. See Tahzib, *supra* note 8, at 66.

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race, language or religion—we cannot have permanent peace and security.”²⁹

The international human rights provisions of the Charter, including the guarantee of freedom of religion, are generally regarded as “legally binding international obligations on its Member States.”³⁰

The U.N. Charter and the international system it introduced in 1945 were the consequence of worldwide revulsion at the horrors of world war and the Holocaust.³¹ The Charter was followed within three years by the adoption of the Genocide Convention,³² regarded as “a milestone for the recognition of the right of religious groups to exist as groups”³³ This convention criminalized genocide,³⁴ which it defines to include killing, seriously injuring, or attempting to destroy “a national, ethnical, racial or religious group.”³⁵

IV. CONVENTIONS, COVENANTS AND DECLARATIONS AFFIRM RIGHTS OF PEOPLE OF EVERY FAITH AND BACKGROUND, IN WAR AND PEACE

Many international instruments, progeny of the Charter, have incorporated the rights of religion, belief, and conscience in proclaiming the liberty of people in every station and circumstance of life.

The Genocide Convention was followed a year later by the Geneva Convention³⁶ that protects wartime rights of civilians, including “respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.”³⁷

29. Harry S Truman, Address at the Closing Session of the United Nations Conference (June 26, 1945), available at <http://www.presidency.ucsb.edu/ws/?pid=12188> (last visited Apr. 29, 2018).

30. Tahzib, *supra* note 8, at 68 n.18 (relying on HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 147-49 (1950), and on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21)).

31. KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 527 (2011).

32. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, G.A. Res. 260 (III) A, (Dec. 9, 1948) [hereinafter Genocide Convention] (entered into force Jan. 12, 1951, ratified by U.S. Nov. 25, 1988).

33. Tahzib, *supra* note 8, at 96.

34. Genocide Convention, *supra* note 32, art. I.

35. *Id.* art. II.

36. Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 27, 75 U.N.T.S. 287 (Aug. 12, 1949) (entered into force Oct. 21, 1950, ratified by U.S. Feb. 2, 1956).

37. *Id.* art. 27.

In 1951, still reacting to the Holocaust as well as postwar migrations, the international community adopted a convention for the protection of refugees facing religious or other persecution.³⁸ The Refugee Convention mandates, “The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.”³⁹

A convention adopted by the U.N. International Labour Organization in 1957⁴⁰ declared that signatories must take steps to protect their indigenous populations while taking “due account” of their “cultural and religious values.”⁴¹

The U.N. Educational, Scientific and Cultural Organization adopted in 1960 a convention prohibiting discrimination in education.⁴² It defines discrimination to include “any distinction, exclusion, limitation or preference which, being based on . . . religion . . . has the purpose or effect of nullifying or impairing the quality of treatment in education”⁴³

Religious and other rights of individuals took a significant step forward with the 1966 adoption of the International Covenant on Civil and Political Rights (ICCPR),⁴⁴ which is legally binding on states parties.⁴⁵ It says plainly in Article 18: “Everyone shall have the right to freedom of

38. Convention Relating to the Status of Refugees, G.A. Res. 429 (V), Dec. 14, 1950, (entered into force Apr. 22, 1954, *reprinted in* U.N. Docs. HCR/INF/29/Rev. 4, at 11-36 (1981). The Protocol Relating to the Status of Refugees in 1967 gave universal coverage to the substantive provisions of the Convention. See the Protocol, G.A. Res. 2198 (XXI) (Dec. 16, 1966) (entered into force Oct. 4, 1967, ratified by U.S. Nov. 1, 1968).

39. *Id.* art. 4.

40. Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957 (entered into force June 2, 1959, not ratified by U.S.), *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107. Convention No. 107 was updated by Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force Sept. 5, 1991, not ratified by U.S.), *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

41. *Id.* art. 4(a).

42. Convention against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962, not ratified by U.S.).

43. *Id.* art. 1.

44. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976; ratified by U.S. June 8, 1992).

45. Davis, *supra* note 2 (“in terms of . . . enforceability in the courts, the 1966 Covenant would be the most important”); see also Javaid Rehman, *Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities*, 7 INT’L J. ON MINORITY & GROUP RTS. 139, 144 (2000).

thought, conscience and religion.”⁴⁶ The promised freedom is spelled out as including a person’s right “to have or 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.”⁴⁷ This language is broad enough to encompass all forms of religion and analogous belief systems.⁴⁸

According to the United Nations Human Rights Committee (HRC), Article 18 of the ICCPR is understood to protect “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”⁴⁹ Expressing concern about “any tendency to discriminate against any religion or belief for any reason, the HRC construes ICCPR Article 18 to protect religions and beliefs that are new “or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”⁵⁰

Some scholars, when addressing “absolute” religious freedom, fail to specify that what is absolutely free pertains to that which is in a person’s mind or heart, as distinct from overt activity that can be subject to reasonable regulation by civil authority. That analytical shortcoming was evident, for example, when Miner wrote, referring to the ICCPR, “The plain language of Article 18 suggests that the right to freedom of religion, including the freedom to have, alter, or adopt a religion of one’s choice, is an absolute right which may not be restricted.”⁵¹ Legal historians say that some of those who were involved in the drafting of the article used such words as “absolute,” “sacred,” and “inviolable” to characterize the liberty being protected.⁵² It was recognized, however, that there is a legally significant difference between faith or opinion on the one hand⁵³ and practice or conduct on the other hand.⁵⁴ As John Stuart

46. ICCPR, *supra* note 44, art. 18.

47. *Id.*

48. Johan D. Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 18 EMORY INT’L L. REV. 499, 506 (2005) (footnote omitted) (ICCPR “Article 18. . . [is] not limited in its application to traditional religions or to religions and beliefs which traditional characteristics or practices analogous to those of traditional religions.”).

49. Human Rights Committee, General Comment No. 22, art. 18(2), 48th Sess., July 30, 1993, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 35 (1994), General Comment ICCPR/C/21/Rev.1/Add. 4 (Sept. 27, 1993) [hereinafter General Comment No. 22], available at <http://www.refworld.org/docid/453883fb22.html>.

50. *Id.*

51. Christopher J. Miner, *Losing My Religion: Austria’s New Religion Law in Light of International and European Standards of Religious Freedom*, 1998 BYU L. REV. 607, 627 (1998).

52. HENKIN, *supra* note 13.

53. *Id.* (“It was agreed that no restrictions of legal character could be imposed upon a person’s inner thought or moral consciousness, or his attitude towards the universe or its creator. . . .”).

Mill long ago discerned, “belief” consists of one’s inner thoughts, regardless of subject matter, and is not subject to control or regulation by civil authority.⁵⁵

Although “freedom of thought, conscience and religion” must broadly be construed, freedom does not mean unrestrained license. “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,” as ICCPR Article 18 provides.⁵⁶

The year 1966 heralded the adoption of not only the ICCPR but also a convention on economic, social, and cultural rights (ICESCR),⁵⁷ to be observed without discrimination on account of religion, political or other opinion, or other status.⁵⁸ The UDHR, the ICCPR (and its two original protocols⁵⁹), and the ICESCR are considered to be “the five constituent parts of the International Bill of Human Rights.”⁶⁰ This fulfills a forecast by President Truman who said when the U.N. Charter was adopted, “Under this document we have good reason to expect the framing of an international bill of rights . . . as much a part of international life as our own Bill of Rights is a part of our Constitution.”⁶¹

The Universal Declaration, UDHR, as a General Assembly resolution, articulates fundamental rights but does not does not *per se* make them

54. Ted Stankhe, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, *BYU L. REV.* 251, 261 (1999) (“While international human rights instruments recognize the right to have religious beliefs and the freedom to act on them, these instruments also confirm that states can limit this freedom to act in order to ensure other specified interests.”); *See also* HENKIN, *supra* note 52, at 217 (“Choice between competing rights involves particular complexities in respect of freedom of religion. . . . The free exercise of religion sometimes claims exception from general rules, including some rules that protect the rights of others.”).

55. MILL, *supra* note 15, at 9. (“The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of course, absolute. Over himself, over his own body and mind, the individual is sovereign.”).

56. ICCPR, *supra* note 44, art. 18(3).

57. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976, signed by U.S. Oct. 5, 1977).

58. *Id.* art. 2(2).

59. *See Summary: International Convention on Civil and Political Rights*, *CAN. CIV. LIBERTIES ASS’N* (ICCPR’s first optional protocol allows victims of human rights violations to be heard; the second seeks to abolish the death penalty), <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/> (last visited May 1, 2018).

60. Tahzib, *supra* note 8, at 69.

61. *See* Truman, *supra* note 29.

legally enforceable.⁶² The ICCPR and the ICESCR are multinational agreements that are more detailed and spell out rights that the states parties have a legal obligation to protect. Each nation has an obligation before the international community to conform its laws and policies to the human rights protections of the International Bill of Rights. Other international conventions that proclaim religious and other rights of particular groups – noncombatants, migrants, indigenous people, etc. – also create obligations that states owe to the community of nations. But, the International Bill of Rights articulates an overarching array of rights that belong to all members of the human community.

In 1981, a General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁶³ provided the most comprehensive statement on the subject.⁶⁴ Although the declaration does not have legally binding force in itself, it does have value in that it may be used as an aid in interpreting the relevant parts of the ICCPR.⁶⁵ “Everyone shall have freedom of thought, conscience and religion,” it declares.⁶⁶ The declaration proclaims religious rights of parents⁶⁷ and children,⁶⁸ and asserts the right to maintain places of worship, charitable and humanitarian institutions, and to publish, teach, receive contributions, and observe days of rest and holidays.⁶⁹ It provides, “All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief,”⁷⁰ and calls for national legislation to ensure that these rights shall be available in practice.⁷¹ The declaration does not presume that church and state are to be

62. Donna J. Sullivan, *Advancing the Freedom of religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 488 (1988).

63. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 5(3) (Nov. 25, 1981) [hereinafter Elimination of Intolerance and Discrimination Based on Religion].

64. Davis, *supra* note 2, at 227; see also *Resources on Faith, Ethics and Public Life*, GEORGETOWN UNIV. BERKLEY CTR. (Nov. 25, 1981), <https://berkeleycenter.georgetown.edu/publications/declaration-on-the-elimination-of-all-forms-of-intolerance-and-of-discrimination-based-on-religion-or-belief>.

65. Christian Walter, *Religion or Belief, Freedom of, International Protection: (C.) The 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief – Functions and Legal Relevance*, MAX PLANCK ENCYCLOPEDIA OF INT'L L., <http://opil.ouplaw.com.library.ggu.edu/view/10.1093/law:epil/9780199231690/law-9780199231690-e867?rskey=6rhK7w&result=1&prd=EPIL> (last visited Dec. 5, 2018).

66. Elimination of Intolerance and Discrimination Based on Religion, *supra* note 63, art. 1(1).

67. *Id.* art. 5(1).

68. *Id.* art. 5(2-5).

69. *Id.* art. 6(a)-(i).

70. *Id.* art. 4(1).

71. *Id.* art. 7.

separated,⁷² although joining religion to the state implies discrimination between faiths, favoring one over others. An official state religion, even if approved by a majority of the population, means there is not truly a level playing field or true equality of rights for people of all religions and belief systems.

The Honorable Judge Carlos Bea of the Ninth Circuit U.S. Court of Appeals contends that “psychoanalysis and personal feelings of effrontery” should not be used by the courts “to put the brakes on democratically approved governmental expressions of religion.”⁷³ Instead, he suggests: “In the future, the remedy for such emotional bruising may be at the ballot box, rather than the courtroom.”⁷⁴ However, the better view, more consistent with international norms, is that fundamental rights of the individual are not to be derogated on the basis of either the ruler’s whim or majority rule. As Fellmuth observes, “a state that adopts Islam as an official religion not only violates the substantive right to freedom of religion, it also discriminates against non-Muslims (and Muslims with dissenting views or those who wish to live in a secular state).”⁷⁵

The links between state and religion in many nations, as diverse as the United Kingdom and Saudi Arabia, make it impracticable to promulgate a universal declaration that would call for a wall of separation between church and state. It appears that this is one point on which universal practice of nations has not become customary law.

A 1989 convention⁷⁶ mandates that states “shall respect the rights of the child to freedom of thought, conscience and religion.”⁷⁷ The convention, which gives binding legal force to some of the aspirations of the 1981 declaration, also provides that states shall respect parents’ rights “to provide direction . . . consistent with the evolving capacities of the child”⁷⁸ Child protective officers and family law judges should respect the internationally protected rights of children and parents.

72. Sullivan, *supra* note 62, at 490.

73. Hon. Carlos Bea, Paper for the Sons of the American Revolution, San Francisco Chapter, on U.S. Supreme Court decisions concerning First Amendment prohibition of an “establishment of religion” (2017) (on file with author).

74. *Id.*

75. AARON XAVIER FELLMUTH, PARADIGMS OF INTERNATIONAL HUMAN RIGHTS LAW 182 (2016).

76. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990, signed by U.S. Feb. 16, 1995).

77. *Id.* art. 14(a).

78. *Id.* art. 14(2).

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Another convention, adopted in 1990, affirms the right of migrant workers and families to follow “a religion or belief of their choice,” free from coercion.⁷⁹

A Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,⁸⁰ adopted by General Assembly resolution in 1992, provides for the right of minorities to practice their own religion⁸¹ and maintain contact with related groups everywhere.⁸² It also requires steps to “encourage conditions for the promotion” of the “identity” of minorities within the state’s territory.⁸³

A resolution passed by the General Assembly in 2000 reaffirmed that discrimination based on religion or belief is “an affront to human dignity and a disavowal of the principles of the Charter”⁸⁴ It added that “all Governments” have a duty “to counter intolerance and related violence based on religion or belief, including practices of discrimination against women and the desecration of religious sites”⁸⁵ The resolution expressed “grave concern” about attacks on religious sites and urged all states to take “utmost efforts” to protect such places.⁸⁶

An underlying purpose of international measures in support of religious liberty is to prevent not only destruction of property but also violence against people. After all, religious extremism has unleashed violence from the era of the Crusades to the era of 9/11.⁸⁷ Addressing a disturbing trend that is no less true today,⁸⁸ the U.N. Commission on Human Rights

79. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 93. (entered into force July 1, 2003, not ratified by U.S., Art. 12(2)).

80. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135 (Dec. 18, 1992).

81. *Id.* art. 2(1).

82. *Id.* art. 1(1).

83. *Id.*

84. Resolution on Elimination of all forms of religious intolerance, G.A. res., 55/97, Dec. 4, 2000, <http://www.un-documents.net/a55r97.htm> (accessed June 13, 2018).

85. *Id.*

86. *Id.* para. 8.

87. David Llewellyn & H. Victor Condé, *Freedom of Religion or Belief under International Humanitarian Law and International Criminal Law*, 12 TRINITY L. REV. 39, 41 (2004) (“religion has often been the definitive divisive element for disputes that degenerate into systemic violence of terrorism, rebellions, revolutions, civil wars and both non-international and international armed conflicts”).

88. See Erich Follath, *Europe’s Capital of Anti-Semitism: Budapest Experiences a New Wave of Hate*, DER SPIEGEL ONLINE, <http://www.spiegel.de/international/europe/europe-s-capital-of-anti-semitism-budapest-experiences-a-new-wave-of-hate-a-722880.html> (last visited May 8, 2018); see also Nilanjana Bhowmick, *As India’s Muslims Are Lynched, Modi Keeps Silent*, THE WASHINGTON POST, June 28, 2017, <https://www.washingtonpost.com/news/global-opinions/wp/2017/06/28/as-in->

observed in 2005, “the overall rise in instances of intolerance and violence directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia”⁸⁹ The Commission urged that everyone in government “cultivate respect for all religions or beliefs, thereby promoting mutual understanding and tolerance.”⁹⁰

Another U.N. body, the Human Rights Council, in 2007, called upon states to adopt measures to “effectively guarantee the freedom of religion or belief of women.”⁹¹

V. RELIGIOUS FREEDOM BECOMES PART OF CUSTOMARY LAW OF NATIONS

The religious liberty declared in the UDHR has acquired legally binding force insofar as its precepts have been acknowledged through the customary practice of nations worldwide. The primary sources of international law are conventions, custom, and recognized general principles.⁹² Writings by the foremost academicians in the field are a subsidiary source.⁹³ In *The Paquete Habana*, customary international law was enforced by the United States Supreme Court even in the absence of a treaty or congressional enactment – a renowned case that arose from U.S. Navy seizure of Cuban fishing boats when the Spanish-American War was about to begin.⁹⁴

dias-muslims-are-killed-modi-keeps-silent/?noredirect=on&utm_term=.d6b9c7ab640d; see also Daryl Johnson, *Holy Hate: The Far Right's Radicalization of Religion*, S. POVERTY L. CTR. (2018), <https://www.splcenter.org/fighting-hate/intelligence-report/2018/holy-hate-far-right%E2%80%99s-radicalization-religion>.

89. U.N. Comm'n on Human Rights, Res. 2005/40 on Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief, E/CN.4/RES/2005/40 (Apr. 19, 2005), available at <http://www.refworld.org/docid/429c3774.html>.

90. *Id.* at 8(c).

91. Human Rights Council, Res. 6/37, 9(c) (Dec. 14, 2007), available at http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_6_37.pdf.

92. Statute of the International Court of Justice, art. 38(1), June 26, 1945, T.S. 993, available at http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (accessed June 13, 2018). *But see* Rumiana Yotova, *Challenges in the Identification of the 'General Principles of Law Recognized by Civilized Nations': The Approach of the International Court*. (Aug. 1, 2017) (Univ. Of Cambridge Faculty of Law Research Paper No. 38/2017) (decisions of courts and writings of the most qualified academicians are subsidiary sources), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020190.

93. *Id.*

94. *The Paquete Habana*, 175 U.S. 677, 700, 711 (1900). (“[B]y the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law” that noncombatant fishing vessels “are exempt from capture as prize of war. . . . International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly

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A majority of legal scholars in the field have concluded that the UDHR, including its assertion of religion freedom, has become part and parcel of customary international law.⁹⁵ Machado advises that “national courts would do well to take advantage of an existing *jus commune* [common law], developed by the most influential and international courts, whose core values are freedom of conscience and equality. Its formal corollaries are the prohibition of coercion, persecution and discrimination in the name of religion.”⁹⁶

Sullivan, writing in 1988, contended, “There is no consensus on whether the prohibition of discrimination on grounds of religion or belief already constitutes a norm of customary law.”⁹⁷ She suggested that, as the Declaration on the Elimination of Religious Intolerance and Discrimination acquires “concrete material content through its implementation, it will contribute to the acceptance of the customary law status”⁹⁸ She says, “The Declaration stands as a major advance in the development of international norms”⁹⁹

According to Higgins, “It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world”; it is her view this idea is held mainly by states and some scholars but “rarely advanced by the oppressed.”¹⁰⁰ Enlightened legal scholars recognize that the fundamental norms of human rights are part of the customary law of nations.

presented for their determination. . . . Upon the facts proved . . . it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause”) The use of the term *civilized* in this context is problematic. In a regrettable fallacy, Eurocentric mentality used to deem indigenous tribes uncivilized. Is any *nation* uncivilized? Surely the Taliban-ruled state was uncivilized, but the Afghan people could not fairly be so characterized.

95. John P. Humphrey, *The Revolution in International Human Rights*, 4 HUM. RTS. 205 (1975) (footnote omitted) (“Most lawyers who have studied the matter – and I do not include writers of text books who merely repeat what they have read elsewhere – now say that . . . the Universal Declaration of Human Rights is now part of the customary law of nations and therefore binding on all states.”).

96. Jonatas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 477 (2004-2005).

97. Sullivan, *supra* note 62, at 488.

98. *Id.* at 488-89 (footnote omitted).

99. *Id.* at 518.

100. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 96 (1994), quoted in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 219 (1996).

VI. GLOBAL TRIBUNALS HAVE MADE EFFORTS TO PROTECT RELIGIOUS MINORITIES BUT SUCCESS HAS BEEN LIMITED

Cases from the former Permanent Court of International Justice (PCIJ) and the International Tribunal for the Former Yugoslavia illustrate efforts of global tribunals to enforce rights of people of diverse religious backgrounds.

The PCIJ, under the League of Nations system, held that the German-Polish Convention of May 15th, 1922, concerning Upper Silesia, did give every national the right freely to declare that he “does or does not belong to a racial, linguistic or religious minority” and to declare what is the language of a “pupil or child for whose education he is legally responsible.”¹⁰¹

In a verdict at The Hague, Dusko Tadic, citizen of the former Yugoslavia, of Serb ethnic descent, resident of the Republic of Bosnia and Herzegovina at the time of the crimes, was found guilty of persecutions and beatings.¹⁰² The offenses included an attack on the Bosnian town of Kozarac and its outlying villages where Tadic took part in the calling-out of four Muslim men from a column of civilians, and the beatings, separation and forced transfer of non-Serb civilians.¹⁰³

Sundararajan contends that “international law does very little work toward protecting the right to free exercise of religion for minority communities outside the context of an armed conflict.”¹⁰⁴ He says this is partly due to “jurisdictional constraints placed on international tribunals,” and he adds, “It is rare for a question concerning the exercise of religion to be heard by a body like the ICC [International Criminal Court] or the ICJ [International Court of Justice] outside the context of armed conflict, or at least hostility. This lack of protection is also driven by the conceptualization of religion as a communal right”¹⁰⁵

101. Case Concerning the Rights of Minorities in Upper Silesia (Minority Schools) (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26), available at http://www.worldcourts.com/pcij/eng/decisions/1928.04.26_upper_silesia.htm.

102. Prosecutor v. Du[Ko Tadi] , Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf>.

103. *Id.*

104. Anagha Sundararajan, *Religious Freedom and International Law: The Protection of Religious Minorities in International Tribunals* 67 (2017) (University of Chicago Law School International Immersion Program Papers).

105. *Id.*

The persecution of religious minorities in today's world, from Malaysia to the Middle East, reflects the fact that international tribunals generally have been ineffectual in attempts to achieve the proclaimed objective of universal freedom of religion. This state of affairs is a sad commentary on the actual performance of the international legal system.

VII. INSTRUMENTS ADDRESS RELIGIOUS RIGHTS ON THE REGIONAL LEVEL

Minorities Treaties after World War I were entered between the Principal Allied and Associated Powers (US, British Empire, France, Italy and Japan) and 14 "newly created or expanded states in Europe and the Middle East (Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Greece, Hungary, Iraq, Latvia, Lithuania, Poland, Romania, Turkey, and Yugoslavia).¹⁰⁶ These agreements governed eligibility for citizenship in the latter states, granting religious and other minorities certain rights.¹⁰⁷ The League of Nations was to guarantee implementation but failed to do so when there were mass killings of Jews in Ukraine, anti-Jewish violence in Romania, and other anti-Semitic trends.¹⁰⁸

The American Convention on Human Rights (ACHR)¹⁰⁹ provides, "No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs."¹¹⁰ It also says, "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 and freedoms of others."¹¹¹ Further, "[e]veryone has the right to freedom of conscience and religion."¹¹²

Another instrument, the American Declaration on the Rights and Duties of Man, proclaims, "Every person has the right to freely profess a religious faith, and to manifest and practice it both in public and private."¹¹³

106. *Minority Treaties*, THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, http://www.yivoencyclopedia.org/article.aspx/Minorities_Treaties.

107. *Id.*

108. *Id.*

109. American Convention on Human Rights, Nov. 22, 1969, *reprinted in* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 638 (2002), *available at* <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

110. *Id.* art. 12(2).

111. *Id.* art. 12(3).

112. *Id.* art. 12(1).

113. Inter-Am. Comm'n H.R., American Declaration on the Rights and Duties of Man, art. 3, May 2, 1948 [hereinafter American Declaration], *available at* <https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states:

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.¹¹⁴

Norway, upon the ratification of the ECHR, made a reservation to the convention because the Norwegian Constitution of 1814 included a ban on the Society of Jesus.¹¹⁵ Later, considering that its prohibition of the Jesuit order was “anachronistic,” Norway amended the national constitution so as to conform to the ECHR and withdrew the reservation.¹¹⁶

Regional instruments are an attempt to foster practical recognition of universally recognized rights by states in the various parts of the world.

VIII. ATTIRE, CONVERSION, EVANGELISM CONFOUND REGIONAL TRIBUNALS

Some authorities go to the extreme, over-regulating or prohibiting religious behavior that poses no threat to “safety, order, health, or morals” or rights of anyone else. For example, the European Commission of Human Rights, in *Karaduman v. Turkey*, decided that a university graduate could not receive a provisional certificate of her qualifications because she refused to be photographed with her head uncovered.¹¹⁷ The court reasoned that the scholar, by pursuing higher education in a secular university, agreed to follow its rules.¹¹⁸ The Commission cited Article 9(2) regarding “protection of public order, health or morals,” etc.¹¹⁹

114. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR] (entered into force Sept. 3, 1953).

115. A. H. Robertson, *The European Convention on Human Rights*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 110 (Evan Luard ed., 1967) (footnote omitted).

116. *Id.*

117. *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

118. *Id.*

119. ECHR, *supra* note 114, art. 9(2).

It would seem reasonable to regulate the wearing of a burqa, which covers the face as well as the body, when there is a legitimate basis for surveillance such as in the secure area of an airline terminal or military base. However, it is difficult to see how wearing a headscarf while posing for a university photograph would harm anyone's safety, order, health, morals, or other rights. If the argument be made that disorder would ensue because others saw her photograph showing the headscarf, it would seem more logical to find that those engaging in disorderly conduct should be disciplined, not the religious person who simply wants to wear her headscarf when photographed. The European Convention on Human Rights (ECHR) provides essentially the same standard as the ICPPR.¹²⁰ Yet, the Commission reasoned that pursuing studies in the secular university *constitutes agreement* to the university's rules, which include submitting to be photographed with one's head uncovered.¹²¹ Thus the tribunal decided the case on the basis of a rule of contract law, not an interpretation of the human rights convention. However, a better legal analysis would determine that, where the religious conduct poses no harm to safety, order, etc., the guarantee of religious freedom should take precedence over a contract rule. The *Karaduman* case has been cited as reflecting an unfortunate trend in decisions by international tribunals on the issue of attire as a form of religious expression.¹²²

The European Court of Human Rights (ECtHR) in *Dahlab v. Switzerland*, a 2001 case, decided that a primary school teacher barred from wearing the hijab in class was not protected by ECHR Article 9.¹²³ The hijab, a scarf, covers the hair and neck but not the face. The court's decision was reached despite the fact that there had been no complaints from any parents.¹²⁴ The court based its reasoning on "the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children."¹²⁵ And yet the headscarf ban would seem "hard to square with the principle

120. *Id.* art. 9 ("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.").

121. *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

122. INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 161 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010).

123. *Dahlab v. Switzerland*, App. No. 42393/98, Eur. Ct. H.R. (2001).

124. *Id.*

125. *Id.*

of gender equality” though the (weak) argument is made that it “might have some kind of proselytizing effect.”¹²⁶

The right (guaranteed in the ICCPR) to “have or adopt” a religion or belief implies that one has the right to convert from one religion or belief system to another.¹²⁷ This tenet has been rejected by representatives of some predominantly Muslim nations.¹²⁸ Davis wrote:

Since Muslim law generally considers conversion from Islam to any other religion to be an act of blasphemy, the Muslims objected to language in these instruments that would have made converting from one religion to another an unqualified right. Based on this belief, most Muslim regimes have little tolerance for non-Muslim missionaries, viewing their proselytizing as encouraging Muslims to commit blasphemy.¹²⁹

Hozapfel, seeing the dilemma, commented, “The difficulties inherent in blasphemy laws have no solution if the belief in the equal human rights freedom of religion and freedom of speech are also maintained.”¹³⁰ In the final analysis, the international norm requires protection of an individual’s rights to follow, change, and express her own religious convictions.

The European Commission of Human Rights (ECtHR) rendered a sensible finding in the case of *Glavno Myuftiistvo v. Bulgaria* that affirmed “the right of believers and of the religious community to govern their own affairs and to choose their leadership,” under Article 9 of the ECHR.¹³¹ There, the Chief Mufti Office of the Bulgarian Muslims and three individuals complained of “an interference with their religious liberties, in that “measures undertaken by the State had the effect of replac-

126. See *Law and Legal Cases*, MINORITY RIGHTS GROUP (Jan. 15, 2001), <http://minorityrights.org/law-and-legal-cases/dahlab-v-switzerland-2/>.

127. General Comment No. 22, *supra* note 49 (“freedom to ‘have or adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain”).

128. Robert Taer, “Religion” in *International Law*, RELIGION AND HUMAN RIGHTS (“right to give up her religion for a belief, or to change to a different religion. . .strongly contested by some Muslim countries in the United Nations, who assert that no Muslim has the right to abandon Islam”), <http://www.religionhumanrights.com/Research/religion.intlaw.htm> (last visited Jan. 31, 2018).

129. Davis, *supra* note 2, at 229.

130. Caleb Hozapfel, *Can I Say That: How an International Blasphemy Law Pits the Freedom of Religion against the Freedom of Speech*, 33 EMORY INT’L L. REV. 597, 646.

131. *Glavno Myuftiistvo v. Bulgaria*, App. No. 30985/96, Eur. Ct. H.R. (1997), available at [https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22glavno%22\],\[%22itemid%22:\[%22001-46071%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22glavno%22],[%22itemid%22:[%22001-46071%22]}).

ing the statute and the leadership of the Muslim religion in Bulgaria.”¹³² The Commission declared the application admissible.¹³³

In another case, the European Court of Human Rights found “no breach of Article 9” where Minos Kokkinakis, born into a Greek Orthodox family in Crete, was arrested more than 60 times for proselytism after he became a Jehovah’s Witness.¹³⁴ The court conceded that generally “there is no justification for the State to use its power ‘to protect’ the proselytised,” and that “the ‘public order’ argument cannot justify use of coercive State power in a field where tolerance demands ‘free argument and debate.’”¹³⁵ Nonetheless, the arrest of Kokkinakis was declared permissible.¹³⁶ The court reasoned, “The persistent efforts of some fanatics to convert others to their own beliefs by using unacceptable psychological techniques on people, which amount in effect to coercion, cannot in our view come within the ambit of the natural meaning of the term ‘teach.’”¹³⁷ The ruling came notwithstanding the fact that the ECHR says religious freedom includes the right to engage in “teaching,”¹³⁸ which arguably should be understood to include a faith’s peaceful evangelism.

Jayawickrama comments that “[t]he right to manifest one’s religion or belief in teaching includes in principle the right to try to convince one’s neighbor,” and says the European Court has distinguished between “bearing Christian witness” and “improper proselytism.”¹³⁹

The trend of religious freedom denied may be broader than rulings on cases involving headscarves. In *Arrowsmith v. United Kingdom*, the European Commission on Human Rights held that a pacifist, who distributed leaflets urging soldiers not to go to Northern Ireland, was not protected by Art. 9 of the ECHR.¹⁴⁰ The Commission reasoned that the leafleting “did not constitute a ‘practice’ of pacifism, but rather political opposition to . . . government policy.”¹⁴¹ According to the *Arrowsmith*

132. *Id.*

133. *Id.*

134. Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397 (1993).

135. *Id.*

136. *Id.*

137. *Id.*

138. ECHR, *supra* note 114, art. 9(1) (and associated text).

139. NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 638, 655 (2002), available at <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

140. *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n. H.R. Dec. & Rep. 5 (1978).

141. *Id.*

formula, the leafleting was not “necessary” in order for the applicant to practice her religion, but “simply inspired by religious motives or beliefs.”¹⁴²

A better legal analysis might have concluded that a religious person whose faith compelled her to express such opposition to the Troubles in Northern Ireland was exercising free speech that was, for her, an exercise of religious duty that should be protected by international law.

IX. UNITED STATES SUPREME COURT STRUGGLES WITH RELIGIOUS EXEMPTION TO FACIALLY NEUTRAL LAWS, AND OTHER ISSUES

United States Supreme Court decisions implicating religious freedom generally are unpredictable, as these issues tend to be decided on the basis of very case-specific analysis. Federal law in the realm of religious liberty sometimes is the subject of conflicted policy goals and interplay between the high court and Congress. A series of developments over the span of years from 1963 to 2000 reveals the push and pull between the judicial and legislative branches of the U.S. government on the subject, what to do when a facially neutral statute impedes religious freedom.

In 1963 the Supreme Court, citing longstanding precedent, held in *Sherbert v. Verner*¹⁴³ that a “neutral statute may not infringe religious freedom without strict scrutiny” (*i.e.*, requires compelling government interest and narrowly tailored measure).¹⁴⁴ The alleged persecutor, to prevail according to *Sherbert*, must prove nondiscriminatory intent, if application of the “neutral” statute would infringe a complaining party’s religious freedom.¹⁴⁵ The court decided that unemployment benefits would be paid to Sherbert not as a Seventh-Day Adventist but as an unemployed worker. Consequently, the payments indirectly would benefit her church, but not more than would the salary of any public employee, according to the court’s rationale.¹⁴⁶ Holding the Seventh-Day Adventist immune from a state requirement to work on the Sabbath and therefore entitled to receive certain unemployment benefits, the Supreme Court explained, “Plainly enough, appellant’s conscientious objection to Satur-

142. *Id.*

143. *Sherbert v. Verner*, 374 U.S. 398 (1963).

144. *Id.*

145. *Id.*

146. *Id.* at 412-13.

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day work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.”¹⁴⁷

In 1990, the Supreme Court in *Oregon v. Smith* reversed *Sherbert* outright.¹⁴⁸ The judicial change of course meant that Smith, a Native American Indian who used peyote (a cactus-derived hallucinogen) in religious ceremony, was found to be criminally liable under Oregon’s drug laws.¹⁴⁹

Modifying the rule it had enunciated, the Supreme Court in a split decision in *INS v. Jairo Jonathan Elias Zacharias*, in 1992, imposed an “intent requirement.”¹⁵⁰ This meant that a party claiming religious exemption from a facially neutral state act may prevail by presenting evidence of officials’ discriminatory intent.¹⁵¹

Members of Congress did not agree with the course the Supreme Court was on. Exercising its power to make the laws, Congress enacted the Religious Freedom Restoration Act,¹⁵² which reversed *Smith* and restored the *Sherbert* rule. The statute itself said that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”¹⁵³ The act of Congress said its purpose was to “to restore the compelling interest test as set forth in *Oregon v. Smith* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . provide a claim or defense to persons whose religious exercise is substantially burdened by government.”¹⁵⁴

In a 1997 case, *City of Boerne v. Flores*,¹⁵⁵ the Supreme Court justices, disapproving of the Religious Freedom Restoration Act, struck down the federal act on constitutional grounds insofar as it applied to state and local government.

Congress responded by enacting the Religious Land Use Act,¹⁵⁶ which requires strict scrutiny of facially neutral state laws impacting freedom of

147. *Id.* at 403.

148. *Oregon v. Smith*, 494 U.S. 872 (1990).

149. *Id.*

150. *INS v. Jairo Jonathan Elias Zacharias*, 502 U.S. 478 (1992).

151. *Id.*

152. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

153. *Id.*

154. *Id.*

155. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

156. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).

religion.¹⁵⁷ This restored the *Sherbert* rule¹⁵⁸ and restored the United States to following the international norm of safeguarding religious liberty. The religious exemption to facially neutral acts of federal and state government stands, consistently with the Constitution and international law.

Following a different track, the Supreme Court in the 1985 case of *U.S. v. Elder* decided that “enforcement of criminal laws can be constitutionally achieved even if the laws interfere with the religious practices of individuals.”¹⁵⁹ The high court said it “cannot interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration.”¹⁶⁰ On that rationale, the *Elder* court allowed the criminal prosecution of an American Catholic who aided Salvadorans illegally to enter United States.

Despite the imperfect and at times erratic U.S. record on protection of religious freedom, Congress enacted a law called the International Religious Freedom Act of 1998, which declares that it is the policy of the United States to support freedom of religion worldwide.¹⁶¹

On the side of religious freedom, the Supreme Court decided in *Torcaso v. Watkins* that the State of Maryland may not require a notary public to declare faith in God.¹⁶²

On the side of sometimes denying religious freedom, the Supreme Court in *Gillette v. U.S.* ruled that selective conscientious objection is not protected by the Constitution.¹⁶³ According to the Court, “incidental burdens felt by persons in petitioner’s position are strictly justified by substantial governmental interests . . . in procuring the manpower necessary for military purposes.”¹⁶⁴ To the extent that this ruling conforms to current international law on the issue, I believe that international law should be reformed to support the rights of the selective objector. Denying a soldier’s right to refuse to participate in a war he deeply believes to be immoral cannot be reconciled with the fundamental right to adhere to one’s religion and conscience.

157. *Id.*

158. *Id.*

159. *U.S. v. Elder*, 601 F. Supp. 1574, 1577 (S.D. Tex. 1985).

160. *Id.* at 1581.

161. International Religious Freedom Act, 22 U.S.C. § 6401 *et seq.* (1998).

162. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

163. *Gillette v. U.S.*, 401 U.S. 437 (1971).

164. *Id.* at 462.

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X. TRUMP'S MUSLIM TRAVEL BAN IS AN ABERRATION FROM COMMITMENT TO RELIGIOUS FREEDOM AND RULE OF LAW AFFIRMED BY FOUNDERS

The freedom of religion, belief, and conscience is a universally recognized norm. The United States, because of its history, has a special obligation to be true to this standard. The United States proclaimed that it was founded on such liberty, welcomed people of every faith to its shores (regrettable aberrations notwithstanding), and promised their protection under its laws. The United States, which played a leading role in the inception of the Universal Declaration of Human Rights, should strive to be an exemplar of the liberty envisioned in it.

The most recent tragic aberration, Executive Order 13780 of March 6, 2017, a travel ban that has been brought before the Supreme Court, suspends immigration from six predominantly Muslim countries, and imposes special requirements on immigrants from a seventh, Iraq.¹⁶⁵ I joined with other international law scholars in an *amicus curiae* brief filed with the Supreme Court, challenging President Trump's ban on travel from the selected countries.¹⁶⁶ The brief cites the supremacy clause of the Constitution, the UDHR, the ICCPR, the American Declaration of the Rights and Duties of Man,¹⁶⁷ *The Paquete Habana*, and other authorities.

It was the intent of the Framers that the Constitution be understood to require that the President adhere to the requirements of both customary international law and treaty law.¹⁶⁸ It was hoped that the Supreme Court will reject the travel ban that was created to keep people of predominantly Muslim countries from America's shores. It is hard to imagine a more un-American policy. The United States is, after all, a nation of immigrants.

The travel ban was upheld by the high court in a sharply divided 5-4 decision in *Trump v. Hawaii*, No. 17-965 (June 26, 2018). The majority ironically used *dicta to* overturn *Koromatsu v. United States*, 323 U.S.

165. Brief of International Law Scholars and Nongovernmental Organizations as Amici Curiae Supporting Respondents, *Trump v. International Refugee Assistance Project*, 582 U.S. ____ (brief filed on March 30, 2018) (Nos. 16-1436 (16A1190) and 16-1540 (16A1191)) [hereinafter Amicus Brief] (on file with author).

166. *Id.*

167. American Declaration, *supra* note 113.

168. *Id.* at 7 (citing Alexander Hamilton, *Pacificus No. 1* (June 29, 1793)), reprinted in *THE PAPERS OF ALEXANDER HAMILTON* 33, 33-43 (Harold C. Syrett, ed., 1969). See also U.S. Const. art. I, § 8 ("the law of nations") and art. IV, cl. 2 ("treaties made, or which shall be made").

214 (1944), which had found wartime internment of Japanese Americans constitutional. Of more practical and tragic significance, the court now upheld President Trump's anti-Muslim travel ban.

A future Supreme Court, or a future Congress, should overturn the *Trump v. Hawaii* anti-Muslim travel ban.

President Dwight Eisenhower told American Muslims in 1957, "Indeed, America would fight with her whole strength for your right to have here your own church and worship according to your own conscience."¹⁶⁹ John F. Kennedy, as a presidential candidate in 1960, said government should not be used by a religious group "to compel, prohibit, or persecute the free exercise of any other religion. And that goes for any persecution, at any time, by anyone, in any country."¹⁷⁰

The aspiration for religious liberty, to be guaranteed by a secular state, arose in the American colonies before the Revolution. As Judge Carlos Bea of the Ninth Circuit U.S. Court of Appeals wrote:

Before the American Revolution, the colonists objected to the Anglican Church's control over worship. The Anglican Church, an arm of England, required the use of the King James Bible and forced adherence to Anglican doctrine. The first Congress did not want the federal government to establish a federal church, so they approved an amendment forbidding it from doing so.¹⁷¹

Roger Williams, Puritan minister and founder of Rhode Island, said other religions – "*Jewes, Turks, or Antichristians*" – do not offend against the civil state or peace.¹⁷²

The Virginia Declaration of Rights, adopted in 1776, declared:

The religion, or the duty which we owe to our CREATOR and the manner of discharging it, can be directed only by reason and

169. President Dwight D. Eisenhower, Speech at the Opening of the Islamic Center Mosque in Washington, D.C. (June 28, 1957), *available at* <https://berkeleycenter.georgetown.edu/quotes/dwight-eisenhower-on-muslims-in-america-at-ceremonies-opening-the-islamic-center>.

170. Senator John F. Kennedy, Campaign Address at the Houston Ministerial Association (Sept. 12, 1960), *available at* <http://www.brighteningglance.org/jfk-address-to-the-greater-houston-ministerial-association-12-september-1960.html>.

171. Hon. Bea, *supra* note 73.

172. Roger Williams (1644), *quoted in* DENISE A. SPELLBERG, THOMAS JEFFERSON'S QUOR'AN 41 (2013) (*ital.* in original).

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conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.¹⁷³

James Madison in 1803 wrote to the U.S. general consul in Algiers:

The universal toleration in matters of religion in most States, and the entire want of a power respecting them in the general Government, has as we understand induced the Barbary powers, to view us more favorably than other Christian nations, who are exclusively so, and with whom these powers consider themselves in perpetual hostility.¹⁷⁴

Early United States treaties signed with Algiers¹⁷⁵ allowed consuls and other public agents in the territory of the other state to exercise their religion in their own houses. Treaties with Tripoli¹⁷⁶ provided that “no pretext arising from religious opinions” should interfere with harmony between the two states – a treaty with Tripoli in 1796 said the Government of the United States “is not in any sense founded on the Christian religion,” and a treaty in 1805 disclaimed for the United States any enmity against the “laws, religion or tranquility of the Musselmen.”¹⁷⁷

A surprisingly illuminating encounter took place when the Tunisian ambassador was in Washington at the same time as Native Americans were there negotiating treaties with the United States.¹⁷⁸ The Indians made a courtesy call on Ambassador Sidi Suleyman Mellimelli, who then asked them what God they worship.¹⁷⁹

The Minister asked them what God they worshipped. The Indians answered *The Great Spirit*. He then asked them if they be-

173. VIRGINIA DECLARATION OF RIGHTS of 1776, art. 14; THE STATUTES AT LARGE, IX 109-112 (William W. Hening, ed. 1890-1923) (caps in original), available at <http://www.history.org/almanack/life/politics/varights.cfm>.

174. Secretary of State James Madison to Tobias Lear, Consul General, Algiers, July 14, 1803, in NAVAL DOCUMENTS, 2:485, cited in DENISE A. SPELLBERG, THOMAS JEFFERSON'S QUUR'AN 209 (2013).

175. 1795 art. XVII, 1815 art. XV, and 1816, art. 15, cited in ROBERT RENBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 244 (1960).

176. *Id.* at 1796 art. XI and 1805 art. XIV.

177. *Id.*

178. DENISE A. SPELLBERG, THOMAS JEFFERSON'S QUUR'AN 41, 221 (2013)

179. *Id.*

lied in Mohamed, Abraham, or Jesus Christ? They answered neither. He then asked what prophet do you worship. They replied none. We worship the Great Spirit without an agent.¹⁸⁰

Thomas Jefferson wrote, “The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.”¹⁸¹ John Locke, whose writing influenced the American Founders, wrote that “Jews, Mohometans, and Pagans” do not forfeit civil rights of the commonwealth under English law.¹⁸² Jefferson wrote notes in his copy of Locke’s treatise, *A LETTER CONCERNING TOLERATION* (1689) – quoting Locke’s words, “neither Pagan nor Mohamaden nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion.”¹⁸³

American Founders across the political spectrum were conscious of diversity of the world’s religions. Jefferson, the first Democratic-Republican president, had purchased a copy of “Sale’s Koran,” an English translation of the Qur’an, in 1765.¹⁸⁴ John Adams, the first Federalist president, had bought a copy of the Qur’an in 1806.¹⁸⁵

American revolutionaries were inspired by the Whig view of individual rights,¹⁸⁶ which were set to verse by an Anglican bishop’s son, John Hoadley:¹⁸⁷

*No clergy here usurp the free-born mind,
Ordained to teach, and not enslave mankind;
Religion here bids persecution cease,
Without, all order, and within, all Peace
Religion to be Sacred must be free;
Men will suspect – where bigots keep the key.*¹⁸⁸

180. Memorandum from U.S. Sen. William Plummer (Federalist-N.H.), *quoted in* SPELLBERG, *supra* note 178, at 221.

181. Thomas Jefferson, Notes on Virginia, *in* LIFE AND SELECTED WRITINGS 254 [hereinafter Notes on Virginia], *quoted in* SPELLBERG, *supra* note 178, at 112.

182. John Locke (1692), *quoted in* SPELLBERG, *supra* note 178, at 41.

183. Notes on Virginia, *supra* note 181, at 106-07.

184. SPELLBERG, *supra* note 178, at 89.

185. *Id.* at 155.

186. *Id.* at 30.

187. *Id.* at 31.

188. Prologue, Voltaire, *Mahomet the Impostor*, adapted by James Miller & John Hoadly (London, J. Watts & B. Dod 1744), *quoted in* SPELLBERG, *supra* note 178, at 31 (popular stage play and book by the time of the American Revolution).

XI. CONCLUSION

People of every religion and belief system, and those who claim to have no beliefs, have the right to be treated equally, everywhere in the world. This fundamental right legally is enforceable under the customary law of nations and under multinational agreements. People of all faiths are not equal if the precepts and practices of one faith are adopted by the state itself (though this corollary is not conceded by some nations). The right of any person to wear a headscarf, crucifix, Star of David or other symbol of faith does not interfere with the legitimate rights of anyone else. To say that “public order” is imperiled if a woman wears a headscarf is analogous to saying neighbors will riot if a Black Muslim buys a house. Every person has the right to subscribe to the code that conscience dictates, and to engage in peaceful practices or wear ornaments that pose no harm to others. The wearing of a religious or peace sign is not to be equated, however, with the wearing of a sign that advocates violence against Jews or anyone else. The international norm and accordingly municipal law should be interpreted to protect the peaceful practice of one’s faith, including the wearing of ornaments that express no hostility to anyone.

Although the early development of international law derived largely from religious ideas, it is needful to have a secular state to protect the freedom of religion, belief, and conscience for all people. To be enforced in good faith, the obligatory customs and conventions that protect these freedoms must be interpreted and applied in a reasonable manner. Civilian and military officials should be familiar with international agreements and General Assembly declarations that contain provisions having relevance to their areas of responsibility, such as provisions concerning noncombatants, migrant workers, women, and children.

Creative efforts need to be undertaken to enlist the international judiciary – at the global and regional levels – to address hate crimes, ethnic cleansing, and other acts of violence against religious minorities.

The rights of sincere conscientious objectors, including those who selectively object to military actions that violate an upright conscience, should be respected consistently. Proclaiming religious liberty while denying the right of a conscript to refuse to bomb a populated city is analogous to declaring “all men are created equal. . .with certain unalienable rights” while engaging in the slave trade.

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Religious minorities should be allowed exemption from facially neutral laws that materially interfere with religious freedom. It would be reasonable to outlaw use of marijuana without a physician's prescription, but the Native American tribe whose members for generations have used ceremonial peyote should be allowed a special exception.

The United States Supreme Court should cite international law as well as the Constitution when rendering decisions in cases that implicate the freedom of religion.

The United States should embrace anew the dimly remembered or forgotten heritage of America's Founders who believed in the rights of conscience and the law of nations.

