AN EVOLVING INTERNATIONAL LEGAL NORM OF RELIGIOUS FREEDOM: PROBLEMS AND PROSPECTS

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> Tolerance is a very dull virtue. It is boring. Unlike love, it has always had a bad press. It is negative. It merely means putting up with people, being able to stand things. No one has ever written an ode to tolerance, or raised a statue to her.
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> —E. M. Forster[1]

In a sense, Forster is correct; toleration is a supremely unromantic virtue. Nowhere has it figured in crusades or revolutions; nor have liberty, equality, and fraternity ever appeared willing to admit it to their august company. Modest men, such as Sir Thomas More,[2] may capture our imaginations on isolated occasions, but it is usually their courage rather than their broadmindedness that gives lustre to their heroism.

Perhaps we should not be surprised that the poets and demagogues have neglected to stress toleration as a virtue. However, the fact that persons whose duty it is to build a just international legal order have been similarly neglectful would seem to justify some expression of dismay. This article will analyze the reasons for that neglect on the part of the international order. The analysis will focus not only on the historical reasons behind that failure, but also on the dilemmas that still remain.

The most fundamental question to be answered before deciding how to effectuate such a norm is to determine precisely what is meant

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1. E. FORSTER, *Tolerance*, in TWO CHEERS FOR DEMOCRACY 44 (Abinger ed. 1972).

2. *See* E. REYNOLDS, SAINT THOMAS MORE (1954); C. HOLLIS, ST. THOMAS MORE (1961); R. CHAMBERS, THOMAS MORE (1962); E. REYNOLDS, SIR THOMAS MORE (1965); *and* E. REYNOLDS, THE FIELD IS WON: THE LIFE AND DEATH OF SAINT THOMAS MORE (1968).

by "religious tolerance" or "religious freedom". It is important to recognize initially that two different types of religious discrimination have existed in the past and that they have generated two very different sets of problems. One problem arises when an individual's religious convictions and his government make inconsistent demands upon him. The other problem occurs when the state concedes that an individual's religious convictions must prevail in certain areas of life, but then proceeds to narrow those areas to an unacceptable degree.

There may appear to be little difference between these two situations from the standpoint of the individual. It is unlikely that he will perceive any functional difference between being told that he may not attend church because the State is atheistic and that he is not free to believe otherwise; as opposed to being told that he is perfectly free to be as devout as he wishes, but that state laws do not permit his church to hold services or allow him a holiday on his day of worship.

It is clear, however, that two entirely different conflicts are presented here. One conflict is between the State and the individual, while the other is between the State and the Church. In the first case, the individual's right to be loyal to his personal convictions is at stake; in the second, the right of a nongovernmental institution to compete with the State for the loyalty of its citizens is at stake. Lord Acton, in contending that the second situation presents the more fundamental dilemma, stated the matter in this way:

> [R]eligious liberty is not the negative right of being without any particular religion, just as self-government is not anarchy. It is the right of religious communities to the practice of their own duties, the enjoyment of their own constitution, and the protection of law, which equally secures to all the possession of their own independence.[3]

The key issue then, is whether "freedom of religion" means the removal of restrictions on the right of the individual to worship or believe as he wishes, or whether it means creating rules under which Church and State are to function without conflict. It is the purpose of this article to establish that even at this stage of development in international human rights law, there has been no definitive resolution of this basic question regarding freedom of religion.

3. J. Acton, *The Protestant Theory of Persecution*, in ESSAYS ON FREEDOM AND POWER 88, 90 (3d ed. 1948). Lord Acton could speak from experience about religious discrimination in that he had been able to attend neither Oxford nor Cambridge because of his Roman Catholic religion. The Test and Corporations Acts, which excluded non-Anglicans from the two universities, were not repealed until 1871, even though Roman Catholics had won the right to sit in Parliament in 1829. After their repeal, Acton became Regius Professor of Modern History at Cambridge.

The reason for the failure to resolve this basic question is historical in nature. In Western Europe the struggle over religious freedom took a very different form than it did in the domains of the former Ottoman Empire,[4] which included much of present-day Eastern Europe and the Middle East. The first part of this article will analyze how the two societies came to view the question of the role of religion in society so differently; the second part will discuss the various means which the international legal community has evolved to foster the goal of religious freedom. The unique problems which arose from foisting Western notions of religious toleration onto non-Western states also will be discussed. The third section will review the early post-World War II developments in the area of religious discrimination; and the fourth part will analyze the United Nations' present attempt to take a fresh, universalistic approach to this basic question.

4. One of the most striking aspects of Western European history is the fact that the problem of religious persecution played such a large role there, while it played so small a role in other cultures of the world such as the Middle East, India, and China. All of those civilizations have known persecution, but none have experienced anything remotely resembling the Inquisition or the Wars of Religion of the Sixteenth and Seventeenth Centuries. The explanation of this phenomenon is outside the scope of this article, however some points may be noted in passing. The most obvious characteristic that distinguished the Christian-European civilization was the presence of a prestigious and powerful priesthood. There is no question that India also had an immensely powerful priestly class in its Brahmin caste, but an important difference existed between the two. India's Brahmin caste was not corporately organized; a person became a Brahmin automatically through the operation of being born to Brahmin parents. The individual Brahmin, therefore, acknowledged no man as his superior. In contrast, the Roman Catholic clergy of Europe were necessarily a nonhereditary class, since priests could not marry; but more importantly, they were tightly organized into an authoritarian, wealthy, ubiquitous, and disciplined hierarchy whose resources vastly exceeded those of any secular state. 4 A. TOYNBEE, A STUDY OF HISTORY 518 (1939 ed.).

The Islamic Middle East and Confucian China present contrasting and intriguing pictures of theocracies which were religiously tolerant. They were theocracies in that they made no distinction between civil and religious government. The officials of the civil government tended to both secular and religious matters in the ordinary course of their business. The toleration which characterized these two societies sprang from different roots. In the case of Islam, the doctrines of the faith specifically enjoined toleration of "the people of the book", who were Christians and Jews explicitly, and Parsees (or Zoroastrians) by extension. W. WATT, THE MAJESTY THAT WAS ISLAM: THE ISLAMIC WORLD 661-1100, at 46-49 (1974). On the other hand, the tolerance showed by Confucianism resulted not so much from its humanity as from its exclusivity. It has been argued endlessly whether Confucianism is a "religion". Without taking definite sides on that issue, we may safely state that Confucianism was not a religion in the sense in which the term is normally used today. The reason is that Confucianism did not welcome all men into its fold and generally was the property of the aristocracy. In China, what the West called Confucianism was known as "the way of the sages" or "the way of the ancients", terms which are more accurate than the Western epithet "Confucian". Confucianism was not a creed so much as it was the entire life-style of the Chinese gentleman-landlord. This life-style necessarily included much leisure time, to be spent in

I. THE BACKGROUND OF RELIGIOUS TOLERATION: WEST AND EAST

In Western Europe the struggle for religious freedom traditionally has meant the struggle of the individual to worship as he pleases, and not the struggle of the Church against the State. Any view of Church-State relations in medieval Europe that makes a sharp distinction between the two institutions is fundamentally defective. The function of the secular monarchs and princes was not to govern their "states" in anything like the modern sense.[5] There was no conflict of principle between Church and State because there was no realistic distinction between the "religious" and the "secular" spheres of life.

> The distinctive feature of medieval thought is that contrasts which later were to be presented as irreconcilable antithesis appear in it as differences within a larger unity, and that the world of social organization, originating in physical necessities, presses by insensible gradations into that of the spirit. . . . Thus social institutions assume a character almost sacramental, for they are the outward and imperfect expression of a supreme spiritual reality.[6]

Consequently, the medieval "Church-State complex" was a totalitarian institution in the most literal sense.[7] Like all totalitarian

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the memorization of the classics and the study of the difficult Chinese writing system. The fact that other faiths were tolerated in China is proof not of the tolerance of Confucianism, but of its indifference to the spiritual well-being of the masses. *See* Graham, *Confucianism*, in THE CONCISE ENCYCLOPEDIA OF LIVING FAITHS 365, 383-84 (R. Zaehner ed. 1959). Yet today most people would be more at home with the gentility of the Confucian scholar than with the murderous sincerity of a medieval Christian inquisitor.

5. I regret the long-established habit of speaking of medieval government as a state when nothing justifies this sort of anachronism. For medieval thought, there were princes, lords, rule, and government (*principes, domini, dominium, regimen*). These were the subjects of political thought. . . . The difference is . . . considerable . . . because in the concept of the modern state unrestricted legislative power is central. Yet it was precisely such unrestricted legislative power which medieval natural law denied to the prince. . . . [C]rucial was the notion that all law was basically legal custom and that legislation had only the function of clarifying and elucidating such customary law.

C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 43 (1958).

6. R. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 20-21 (1936 ed.). Only in Renaissance Italy, and particularly in Florence, was it thought that a state could be something man-made, individual, or independent of any religious sanction. Machiavelli was a pioneer thinker in this regard. In *The Prince* he argued that morality and religion should be divorced from statecraft. *See* J. BURCKHARDT, THE CIVILIZATION OF THE RENAISSANCE IN ITALY 101-05 (1929 ed.). The fact that Machiavelli is capable of shocking even modern readers is evidence that vestiges of the medieval notions of political theory remain.

7. It should be pointed out that the Church was only totalitarian regarding matters within Christian society. Jews were permitted to exist in Christendom, and even to retain their status as Roman citizens, during the centuries of the so-called "Dark Ages". From

systems, its unity was necessarily fragile for it was achieved at the expense of individual liberty. Any dissenting movement became a threat to the system, no matter how reasonable or limited its aims may have been, because it undermined the major premise of universality.[8]

To be sure, friction could and did arise between Church and State. In fact, it was endemic from the Eleventh Century on. It should be noted, however, that in none of the conflicts was the basic notion of a partnership between Church and State disputed. The quarrels were purely ones of interest and not of principle. What was really at stake was which party, Church or State, would be the dominant one in the partnership that both agreed should continue.[9] In most of these medieval Church-State "conflicts", neither party had the slightest notion of separating the Church and State or of allowing freedom of worship to the individual Christian.

Even though the princes never challenged the church doctrine, there were some bolder spirits who did. At the beginning of the Eleventh Century, various heretical sects and societies sprang up over Europe, and all of them were ruthlessly suppressed by the Church.

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our vantage point, it appears somewhat bizarre that the Church was so ruthless about extirpating heresy at the same time when it was so unconcerned about outright nonbelief. We must remember that those were the days before the cult of nationalism had exalted the territorial nation-state to its present-day status. The Christian commonwealth was more a corporation than a state, and it was only within that context that it safely may be said that the Church was totalitarian. On the juridical aspects of the relationship between the Christian and non-Christian worlds of medieval Europe, see J. PARKES, THE JEW IN THE MEDIEVAL COMMUNITY (1938); see also Blumenkranz, ***The Roman Church and the Jews***, in THE WORLD HISTORY OF THE JEWISH PEOPLE: THE DARK AGES; JEWS IN CHRISTIAN EUROPE 711-1096 (C. Roth ed. 1966).

8. Actually, the medieval Church had always been a curious blend of broad-mindedness and paranoia, of profound scholarship and base superstition, and of reaction and progressivism. It was indeed very Catholic. The study of medieval heresies has been an area of contention in modern times, but in general it may be said that in the Church's decision of whether to embrace or suppress a given intellectual movement was based on neither its orthodoxy *per se* nor the life-style of its adherents. After all, the mendicant orders of Saints Francis and Dominic were taken into the Church in the Thirteenth Century, while the Lollards of Wycliffe were attacked in the Fourteenth Century. The distinction is that the former accepted the authority of the church hierarchy, while the latter did not. On the medieval heresies, see A. TURBERVILLE, MEDIEVAL HERESY AND THE INQUISITION (1964); J. RUSSELL, DISSENT AND REFORM IN THE EARLY MIDDLE AGES (1965); HÉRÉSIES ET SOCIÉTÉS DANS L'EUROPE PRE-INDUSTRIELLE, 11E-18E SIÈCLES (J. Le Goff ed. 1968); 2 G. LEFF, HERESY IN THE LATER MIDDLE AGES: THE RELATION OF HETERODOXY TO DISSENT, c. 1250-c. 1450 (1967); W. BAUER, ORTHODOXY AND HERESY IN EARLIEST CHRISTIANITY (R. Kraft & G. Drodel eds. 1971); SCHISM, HERESY, AND RELIGIOUS PROTEST; PAPERS READ AT THE TENTH SUMMER MEETING AND THE ELEVENTH WINTER MEETING OF THE ECCLESIASTICAL HISTORY SOCIETY (D. Baker ed. 1972); and M. LAMBERT, MEDIEVAL HERESY: POPULAR MOVEMENTS FROM BOGOMIL TO HUS (1976).

9. 2 H. PIRENNE, A HISTORY OF EUROPE 3-4 (1956).

The princes were nearly always aligned with the Church in its campaign against the heretics,[10] because many of the heresies involved demands for economic and social change which threatened the medieval order.[11] Even with the onset of the Reformation in the early Sixteenth Century, when many German princes embraced the new creed of Lutheranism, they did not commit themselves to the notion that individuals should have the right to choose their own faith. Their own conversions to the new faith had little to do with a sincere religious belief:

> We do not find in any one of [the princes who embraced Lutheranism] the least trace of idealism, the slightest evidence of any sincere and disinterested conviction. Doubtless they were dissatisfied with the Church, but doubtless also they would not have broken with it if this rupture had not afforded them the opportunity of secularizing its property and confiscating its revenues; and by proclaiming themselves, in their own principalities, the heads of their territorial Churches, they acquired a two-fold authority and influence over their subjects. Such were the wholly mundane considerations which determined the conduct of these defenders of the new faith. Of all religious confessions, Lutheranism is the only one which, instead of exhorting its protectors to sacrifice their life and their fortune to it, offered itself to them as a profitable business transaction.[12]

It is apparent that even the early Protestant leaders lacked an adequate conception of religious freedom. They were much more

10. The most extraordinary example of this fact is found in the carrer of Frederick II of the Holy Roman Empire (1194-1250), whose intellect and sophistication earned him the nickname of *Stupor Mundi*, which means Wonder of the World, from his contemporaries. He was at least a free-thinker, possibly an atheist, and certainly a deadly enemy of the Papacy. Yet, he engaged in savage persecution of heretics within his kingdom in southern Italy. *Id.* at 25. The same phenomenon was evident in the career of Henry VIII of England, whose defiance of the Church included substituting himself for the Pope as its head in England under the Act of Supremacy 1534. To the end of his reign, Henry ecumenically put to death both Catholics for treason and Protestants for heresy. H. FISHER, A HISTORY OF EUROPE 523-24 (1935). For a discussion of the juridical position of the present-day Church of England, see Paul, *Legal Straitjacket of the Church of England*, 220 CONTEMP. REV. 242 (1972).

11. *See* Evans, *Social Aspects of Medieval Heresy*, in PERSECUTION AND LIBERTY: ESSAYS IN HONOR OF GEORGE LINCOLN BURR 93 (1931). *See also* note 8 *supra*.

12. H. PIRENNE, *supra* note 9, at 287. It may seem curious that Luther, the most famous of all religious rebels, should prove to have been extremely conservative in social and economic matters. He believed in the absolutism of secular authorities and was horrified to find that the German peasants of the 1520s were demanding the end of serfdom. He believed that the message of the Christian faith was degraded if it was put to work for such mundane ends as political and social equality. R. TAWNEY, *supra* note 6, at 93.

interested in finding new sources of revenue through the confiscation and sale of church property, thereby avoiding the inconvenience and embarassment associated with imposing taxes upon an armed and often resentful peasant population.[13] Even the later, more radical Protestant movements had little interest in tolerating rival faiths. Calvinist Geneva, Anabaptist Munster, and Puritan Massachusetts Bay Colony were all fiercely intolerant of those who believed other than the official line.[14]

The significance of the Reformation did not lie in either the achievement of the separation of Church and State, or in the advancement of the ideal of freedom of individual worship. Rather, it lay in the fact that it finally shattered the dream that all of Western Europe had to be of one faith. Once it was conceded that different states could have different official religions, which is a principle that found juridical expression in the Peace of Augsburg of 1555,[15] then thoughtful men could begin to surmise that if Christendom could survive without the vital principle of religious unity, perhaps individual states could do so as well.

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13. The earliest example of a monarch in need of cash helping himself to the wealth of the Church was Philip IV of France, who dissolved the crusading order of the Knights Templars. The Templars had gone into the banking business and had become a substantial financial power and, thereby, a tempting target. 2 H. PIRENNE, *supra* note 9, at 139-40. A later, and more famous example was Henry VIII's dissolution of the English monasteries, for basically the same reasons, in the 1530s. One generally unknown aspect of this story is that Henry paid compensation to the individual monks whose establishments were dissolved in the form of state pensions. G. TREVELYAN, ENGLISH SOCIAL HISTORY: A SURVEY OF SIX CENTURIES CHAUCER TO QUEEN VICTORIA 106-08 (3d ed. 1946).

The phenomenon of monastic establishments accumulating great wealth was by no means confined to Western history. Buddhist monasteries in China were also notorious for their holdings of precious metal, often in the form of Buddha images. It would appear that the greed of secular princes for the treasure of churches was an ecumenical phenomenon, for in China during the 840s, as in Europe later on, the monasteries were secularized and all statues were ordered delivered to the government for melting down. W. EBERHARD, A HISTORY OF CHINA 179-81, 187-88 (3d ed. 1969). Similar instances abound in history, to the point that confiscations of church property virtually became *de rigueur* for modernizing states. On the seizures of church properties which occured in the various states of Latin America, see generally J. RIPPY, LATIN AMERICA: A MODERN HISTORY (1958).

14. For an exposition of the theory that Protestantism tends to be more intolerant than Catholicism, in that the former tends to persecute error *per se*, while the latter attacks only those who deviate *within* the faith, see ACTON, *supra* note 3; see also note 7 *supra*.

15. The Peace of Augsburg ended the first round of the religious wars of the Sixteenth and Seventeenth Centuries. It was based on the formula *cujus regio ejus religio,* which means that each prince was to decide what religion would prevail in his domain. However, the subjects of the princes were to have no choice in the matter, so that the Church-State bond would remain intact, as it had in England thirty years earlier.

Yet it required another century of carnage and persecution, climaxing in the ferocious Thirty Years' War,[16] before reigning monarchs could accept that idea. Only with the Peace of Wesphalia of 1648 did individuals achieve a recognized right in international law to worship differently from their rulers.[17] Even then the principle was not wholly free from doubt:

> Subjects who in 1627 had been debarred from the free exercise of a religion other than that of their ruler were by the Peace granted the right of conducting private worship, and of educating their children at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate, selling their estates or leaving them to be managed by others. Some ambiguity, however, attaches to the stipulations of the Peace on this head. One passage provides for the patient toleration of subjects not of the rulers' religion; but another seems to imply that, exceptions apart, the ruler may oblige such subjects to emigrate, though without forcibly abducting them or fixing their destination.[18]

The important point concerning the concept of religious toleration as it arose in the mid-Seventeenth Century was that it was based solely on expediency and not on principle. Religious uniformity had been found to be costly and unfeasible, rather than wrong or illegal. "Toleration was regarded not as a grand principle but as a necessary compromise with error."[19]

> The Peace of Augsburg cannot be reckoned among the great liberating documents of history. . . . But as a rough, serviceable solution of a grave controversy, it deserves to be honorably thought of, for, if it did not bring religious harmony, it kept war out of Germany for fifty years.

H. FISHER, *supra* note 10, at 557.

16. The destruction wrought by the Thirty Years' War has become legendary, partially because it has been somewhat exaggerated. *See* Coleman, *Economic Problems and Policies*, in 5 THE NEW CAMBRIDGE MODERN HISTORY: THE ASCENDANCY OF FRANCE 1648-88, at 19, 21 (F. Carsten ed. 1961).

17. Such a right had been granted previously in French domestic law with the promulgation of the Edict of Nantes of 1598 allowing Protestants (Huguenots) the right to worship freely. The king who permitted this right, Henry IV, was a former Huguenot. The Edict was revoked by Louis XIV in 1685, and toleration was not restored until 1763.

18. Ward, *The Peace of Westphalia*, in 4 THE CAMBRIDGE MODERN HISTORY: THE THIRTY YEARS' WAR 395, 412 (A. Ward, G. Prothero & S. Leathers eds. 1934). *See also* Gross, *Peace of Westphalia*, 42 AM. J. INT'L L. 20 (1948).

19. G. TREVELYAN, A SHORTENED HISTORY OF ENGLAND 351 (1942). In essence, this was the argument that Locke presented in his *Letter Concerning Toleration*:

> Civil power, right, and dominion . . . neither can nor ought in any manner to be extended to the salvation of souls, or can any such power be vested in the magistrate by the consent of the people . . . for no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consists in the inward and full persuasion of the mind. . . .

Holland and Prussia are two states which illustrate this last point because they carried the *realpolitik* of toleration to its furthest extent. Holland had an established faith in Calvinism, as enunciated in the Synod of Dort of 1619, but the economic interests of the Dutch Regent classes proved stronger than the dogmas of Calvin. One observer summed up the Dutch system best by noting that the Regents

> countenance only Calvinism, but for Trade's sake they *Tolerate* all others except Papists: which is the reason why the treasure and stock of most Nations is transported thither, where there is full Liberty of Conscience: you may be what the Devil you will there, so you be but peaceable.[20]

Later in the Seventeenth Century, Frederick the Great of Prussia proved that the granting of religious toleration could be just as profitable as the plundering of monasteries. Seeking to bolster the population of his little kingdom and to make its wastelands productive, Frederick actively encouraged the immigration of foreigners by offering them freedom of worship as an inducement.[21] The monarch himself succinctly summed up his attitude on the subject by stating that "[i]f Turks and heathern [*sic*] came and wanted to populate the country, we would build them mosques and churches."[22]

Two important points should be garnered from this historical discussion. First, the basic issue was the right of the individual to believe and worship as he chooses. Second, religious toleration as it evolved in Western Europe was a practice and not a juridical principle; a *modus vivendi* and not a recognition of a fundamental human right. The situation in the non-Western European states, however, was significantly different.

It is instructive to compare the Western approach to the problem of religious freedom with that of the Ottoman Empire, which was, in spite of its greater political unity, much more religiously heterogeneous than its western neighbor. The contrast between the religious

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The weakness of this approach under circumstances prevailing in today's world is apparent. The Lockean argument is based upon the factual premise that an individual's faith is not susceptible to being changed by government fiat, which is an assumption that is currently open to question. *See* note 160 *infra*. That the "necessary compromise with error" was officially thought to be only temporary is evident from the inclusion within the Peace Treaties of Westphalia of the proviso that the agreement would be valid *semper et ubique* (until the day of religious reunion). This proviso was also present in the Peace of Augsburg of the previous century. Ward, *supra* note 18.

20. J. MURRAY, AMSTERDAM IN THE AGE OF REMBRANDT 25 (1967).

21. E. WILLIAMS, THE ANCIENT REGIME IN EUROPE: GOVERNMENT AND SOCIETY IN THE MAJOR STATES 1648-1789, at 385 (1970).

22. *Id.* at 385-86.

policies of the two could hardly be more striking. In fact, it would even be inaccurate to think of the Ottoman polity as being a state at all, for it was more nearly a confederation of autonomous religious communities, or *millets*.[23]

The essence of the *millet* system of government was that it not only tolerated numerous religions, but also shared political power with them. Governmental functions were carefully parceled out and shared between the various religious communities and the Ottoman central government. The latter retained for itself a monopoly on the four most vital governmental functions: police, criminal justice, defense, and finance.[24]

In all other aspects, the subject peoples were left to govern themselves, not through territorial units such as cities or provinces as is true in federal states today, but rather through the various confessional communities.[25] The Patriarch of Constantinople was given the responsibility of governing all orthodox Christians wherever situated and whether they owed their ecclesiastical loyalty to him or to one of the three other patriarchs.[26] All unorthodox Christians were governed initially by a bishop of the Armenian Church. Later, however, the various individual unorthodox Christian factions, such as the Monophysites, Nestorians, Maronites, and eventually even the Protestants, became self-governing. The Muslim community was under the aegis of the grand mufti of Istanbul, and Jewish communities had their various *millets*.[27]

We may now begin to see how different the Ottoman world was from the Western world. In Europe, where Church and State were closely bound, the Church was assumed to be all-powerful; and the fundamental problem was the emancipation of the individual. The situation in the Ottoman Empire was the reverse; the freedom of the individual to be of a different faith from his ruler was taken for granted. The essential problem was how much authority was to be given to the various churches, and how much should be reserved for the central government.

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23. The word *millet* is from the Arabic *milla*, meaning community of worshippers.

24. 8 A. TOYNBEE, *supra* note 4, at 184.

25. Lebanon has occasionally been labeled a "confessional democracy". However, the Lebanese confessions are not self-governing, as was the case in the Ottoman system. They are merely the basis for the sharing of the central governmental power. *See* Suleiman, *Elections in a Confessional Democracy*, 29 J. POL. 109 (1967).

26. *See* Ainakis, *Greek Church of Constantinople and the Ottoman Empire*, 24 J. MOD. HIST. 235 (1952).

27. 8 A. TOYNBEE, *supra* note 4, at 184-86.

As long as the Ottomans were content to make only modest claims to power, there was little conflict over the division of authority between Church and State. However, with the onset of Western-style nationalism in the Nineteenth Century, and particularly with the advent of the totalitarian government in the Twentieth Century, such moderation diminished. How the international community reacted to that crisis will be discussed in the next section.

II. THE PROMOTION OF RELIGIOUS LIBERTY BY THE INTERNATIONAL LEGAL SYSTEM BEFORE WORLD WAR II

The international legal order has evolved three different methods of ensuring religious freedom. However, none of the methods contain a universally applicable norm of religious toleration, and it is questionable whether the fostering of religious freedom was anything but a subsidiary goal. These three methods, the bilateral treaty method, the humanitarian intervention method, and the conditional benefit method shall be dealt with in order.

A. The Treaty Method

The first strategy, the treaty method, was oriented primarily toward protecting Christian merchants and pilgrims from the Turkish infidels who ruled the Holy Land. The idea of binding one prince to observe the religious rights of the subjects of another prince by treaty is a venerable one. As early as the Seventh Century, Arab Caliph Omar had entered into such a treaty with the Byzantine Emperor. Omar promised to allow freedom of worship to those Christians in his domains who would pay a poll tax for the privilege.[28] The Emperor of Constantinople entered into a similar agreement in 944 with the Russian Prince Igor, who extended to the Emperor a right of protectorship *vis à vis* the officers of the Orthodox Church who resided in Russian territory.[29]

This system of achieving religious freedom through protection from an extraterritorial power became an established institution of the Middle East, particularly after the influx of Western Italian merchant

28. N. BENTWICH, THE RELIGIOUS FOUNDATIONS OF INTERNATIONALISM; A STUDY IN INTERNATIONAL RELATIONS THROUGH THE AGES 208 (1959) [hereinafter referred to as BENTWICH]. If the Emperor made any concession in return for this promise by Omar, then the treaty represented a diplomatic victory for the latter, because he promised nothing more than what his Islamic faith required him to do in any event. On the official toleration required by Islam toward the "people of the book", see W. WATT, *supra* note 4. See also Ishaque, *Human Rights in Islamic Law*, 12 REV. INT'L COMM'N JURISTS 30 (1974); and M. KHAN, ISLAM AND HUMAN RIGHTS (1967).

29. BENTWICH, *supra* note 28, at 209.

communities in the post-Crusade era.[30] The treaty of 1536 between Francis I of France and Suleiman the Magnificent of the Ottoman Empire, in which Francis I was given the right of protection for Christians residing in Ottoman domains, was the seminal event that led to the institution of protection from an extraterritorial power.[31] This treaty authorized French kings to protect all Christians. The English, however, proceeded to negotiate their own "capitulation", as this right had come to be known in 1583.[32]

In the course of the decay of Ottoman political power, a number of variations on this protection theme were played. The Treaty of Carlowitz (1699) gave the ambassador from Poland the right to bring demands on the subject of religion to the Sultan's attention.[33] A similar right was awarded to Russia in 1774 by the Treaty of Kuchuk Kainarji, along with an obligation on the Sultan's part to protect the Orthodox religion and its churches.[34] Meanwhile, in 1740, the French capitulations has been confirmed and made permanent.[35] It may be recalled that the nominal issue in the Crimean War of the mid-Nineteenth

30. 1 H. PIRENNE, *supra* note 9, at 179-80 contends that the only accomplishment of the Crusades was the resulting Italian commercial penetration of the Islamic world. Most historians, however, credit them with more substantive results than that.

31. BENTWICH, *supra* note 28, at 219.

32. Actually, there were two aspects to this capitulation system: first, the right of diplomatic protection, which was granted to the king of the merchants' home state; and second, the granting of juridical privileges to the merchants themselves. The former was generally a bilateral arrangement, while the latter often took the form of a unilateral grant of privileges to the merchants, such as exemption from the territorial laws of the host state. The charters granting these latter rights were divided into chapters, or *capitula* in Latin, hence the name capitulations. Therefore, the term capitulation properly applies only to this second type of grant.

Some uncertainty has always existed as to the precise nature of these capitulations, for if they were purely acts of grace, as they purported to be on their face, then they were freely revocable. On the other hand, if they were granted pursuant to a treaty with another monarch, with the merchants becoming third-party beneficiaries of that treaty, then they could not be revoked unilaterally. For the manner in which this problem was "solved", see the text at note 39 *infra*. See also 2 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: INTERNATIONAL PERSONS 484-88 (1969); N. SOUSA, THE CAPITULATORY REGIME OF TURKEY: ITS HISTORY ORIGIN, AND NATURE (1933); Y. ALTUG, TURKEY AND SOME PROBLEMS OF INTERNATIONAL LAW 5-40 (1958); and R. BULLARD, LARGE AND LOVING PRIVILEGES; THE CAPITULATIONS IN THE MIDDLE EAST AND NORTH AFRICA (1960).

33. BENTWICH, *supra* note 28, at 220.

34. *Id.* There is some dispute as to whether this treaty went so far as to confer upon Russia the right to resort to military means to rectify a situation if its diplomatic entreaties proved to be of no avail. M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 23-24 (1962), where this question is answered in the affirmative. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CALIF. W. INT'L L.J. 203, 207-08 (1974) disagrees.

35. *Id.* at 219.

Century was the legitimacy of Russia's claim to the same protectorship powers *vis-à-vis* orthodox Christians in Turkish domains that the French had won on behalf of Roman Catholic Christians.[36]

The treaty method of advancing religious freedom was established outside of the Middle East as well. An agreement in 1572 between England and France guaranteed the personal safety and the protection of property for English Protestants in France.[37] Note that the United States has made ample use of the treaty device, with provisions for religious liberty contained in treaties of amity, commerce, and navigation with the Netherlands, Sweden, Prussia, China, Japan, Siam, the Congo, Germany, Ecuador, Honduras, Austria, Norway, Poland, Finland, Liberia, and Iraq.[38]

Nevertheless, the treaty system had some drawbacks. One of the chief problems in the context of the Ottoman Empire was the fact that the privileged position enjoyed by foreign merchants by virtue of the capitulations eventually came to be resented by the Turkish government and its subjects. By 1914, the Ottoman government purported to abolish the capitulations unilaterally; but the Western powers protested, claiming that the act was a violation of Turkey's international obligations.[39] The issue remained open until 1923, when Convention IV Additional to the Treaty of Lausanne provided for the abolition of the capitulations with the Western states' consent.[40]

B. The Humanitarian Intervention Method

The second international legal mechanism which evolved at least in part for the protection of religious freedom was the method of

36. The early capitulations, including the permanent one of 1740, involved only the privileges of persons, and not cessions of territory. By the treaty of Kuchuk Kainarji, Russia had been granted substantially the same rights in this regard as France. With a new treaty in 1853, however, the French surged ahead in the carving up of the Ottoman polity. After two years of diplomatic pressure and threats of naval action by the French, Turkey agreed to allow Roman Catholic Christians a share in the actual administration of Christian holy sites. In theory, however, even that agreement did not allow for exclusive possession by the Christians. After the Latin Christians were allowed *de facto* full control of the Church of the Nativity in Bethlehem, the Russian government began contending, not unreasonably, that Orthodox Christians should have the benefit of a similar concession. Russia's show of force in support of this demand sparked the Crimean War. D. THOMSON, EUROPE SINCE NAPOLEON 243-46 (1966).

37. BENTWICH, *supra* note 28, at 218. French Huguenots did not receive a similar gift from their own government until twenty-six years later. *See* note 17 *supra*. The very year of the English treaty witnessed the appalling St. Bartholemew's Day Massacre of Huguenots in Paris.

38. M. BATES, RELIGIOUS LIBERTY: AN INQUIRY 479, 485-86 (1945). *See also* Note, *Toward International Freedom of Religion: A Proposal for Change in FCN Treaty Practice*, 7 U. MICH. J. L. REF. 553 (1974).

39. *See* note 32 *supra*.

40. VERZIJL, *supra* note 32.

humanitarian intervention. This method was like the treaty method in that it found its primary application in relations between the Western European states and the Ottoman Empire. There is some doubt,however, whether the doctrine of humanitarian intervention was ever a part of customary international law.[41] Moreover, substantial doubt is justified as to whether many of the incidents that are suggested as examples of the practice of humanitarian intervention do, in fact, merit the use of the term.[42] Examples commonly given include the use of armed force for the protection of Christians in Ottoman domains, such as interventions by Western powers in Greece (1832); Lebanon (1860); Crete (1866-67); Bosnia, Herzegovina, and Bulgaria (1875-77); Armenia (1895-96); and Macedonia (1905).[43]

The complex question of whether a doctrine of humanitarian intervention truly existed under customary international law and whether it exists today under the United Nations Charter will not be addressed in this article. Nor will the problem of whether any of the above interventions were truly "humanitarian" be examined.[44] Suffice it to say that the above questions are eventually answered, the doctrine was not and is not sufficiently defined or institutionalized to be utilized with any consistency in the present or predictability in the future.[45] An adequate international legal mechanism for the protection of religious freedom must be sought elsewhere.

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41. *See* Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217 (J. Moore ed. 1974).

42. *See* Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973).

43. Feinberg, *International Protection of Human Rights and the Jewish Question*, 3 ISRAEL L. REV. 487, 489 (1968).

44. For analyses from various points of view on these issues, see Rougier, *La Théorie de l'Intervention d'Humanité*, 17 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIQUE 468 (1910); Wright, *The Legality of Intervention under the United Nations Charter*, 51 ASIL PROCS. 79 (1957); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. J. 225 (1969); Claydon, *Humanitarian Intervention and International Law*, 1 QUEEN'S INTRAMURAL L. J. 36 (1969); de Shutter, *Humanitarian Intervention: A United Nations Task*, 3 CALIF. W. INT'L L. J. 21 (1972); Chilstrom, *Humanitarian Intervention under Contemporary International Law: A Policy-Oriented Approach*, 1 YALE STUD. WORLD PUB. ORDER 93 (1974); Fonteyne, *supra* note 34; HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); and Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229 (J. Moore ed. 1974).

45. The International Law Association's Subcommittee on the International Protection of Human Rights by General International Law considered writing a draft Protocol of Procedure for Humanitarian Intervention. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FOURTH CONFERENCE 641 (1970). However, in 1976 it concluded that the necessary consensus on the subject within the international legal community could not be obtained. *Report of the Subcommittee on the International Protection of Human Rights by General International Law* 3 (1976).

C. The "Conditional Benefit" Method

The third strategy for the protection of religious freedom also proved to be controversial. This method was actually a new, multilateral twist to the old treaty strategy. In the Eighteenth and Nineteenth Centuries, the practice arose of viewing the recognition of religious freedom as a condition for a state's receipt of some tangible benefit, such as a territorial concession. An early example is the Treaty of Paris of 1763, whereby England was awarded the French possessions in Canada, but with the proviso that it allow its new Roman Catholic subjects to worship freely.[46]

The Congress of Vienna (1814-15), which pieced together the map of Europe after the disruptions of Napoleon, faced the problem of freedom of religion in three different contexts. First, Holland committed itself by treaty[47] to allow freedom of worship within its territory.[48] The reason was obvious; Holland had been awarded the predominantly Roman Catholic Spanish Netherlands (present-day Belgium) as part of the settlement. Thus, the grant of freedom of religion to the Catholic community was simply the *quid pro quo*.[49] Another "winner" at the conference was the Protestant Swiss Canton of Geneva, which received a portion of the Catholic duchy of Savoy in return for allowing the inhabitants freedom of worship.[50] The third aspect of religious freedom that received attention at Vienna was the treatment of Jews in the Rhineland. The Final Act of the Congress recommended to the newly constituted German Confederated States that they grant full civil liberty to the Jews in their territory.[51]

Another area which proved fruitful for the use of this new type of treaty commitment was the admission of new states to the exclusive club of territorially and linguistically compact nation-states. The most significant event in this respect was the admission of Turkey to the "Public Law and System (Concert) of Europe" in 1856.[52] One condi-

46. BENTWICH, *supra* note 28, at 213-14.

47. *See* the text at note 20 *supra*.

48. Feinberg, *supra* note 43, at 490.

49. The union between the two was short lived. The Belgians revolted in 1830, only to be invaded and defeated by the Dutch the following year. At this point the French intervened and forced the Dutch to withdraw. The Treaty of the Twenty-Four Articles, adopted by a conference of powers which met in London in 1831, provided for the independence of Belgium, although the Dutch did not subscribe to the agreement until 1838. THOMSON, *supra* note 36, at 168-70.

50. BENTWICH, *supra* note 28 at 218.

51. Feinberg, *supra* note 43, at 489-90. The recommendation went unheeded.

52. THOMSON, *supra* note 36, at 248. The Concert of Europe might be identified as the executive committee of the club of nation-states. Originally it consisted of five

tion for this admission was the promulgation by the Ottoman government of the *Hatt-i Hamayoun*, which took control of the *millets* out of ecclesiastical hands and imposed a single, empire-wide Turkish citizenship upon all persons in the empire. Equality before the law and equal access to public office were guaranteed.[53]

The policy of conditionally admitting new states to the community of nations upon their granting "equality before the law" to their subjects continued long after 1856. At the Congress of Berlin in 1878, the creation of four new states, Rumania, Bulgaria, Serbia, and Montenegro, was made conditional upon the same guarantees.[54] It was at this conference that Bismarck, then chancellor of Germany, explicitly posited a link between the recognition of a state's independence and its guarantee of religious freedom to its citizenry.[55]

The problem in this arrangement was that the sovereignty that was being granted was deemed by the recipients as being more important than the conditions attached to it. Furthermore, since the notion of religious freedom evoked vivid memories of the churches wielding substantial political and judicial power, any promise of "religious freedom" was seen as an especially dangerous threat to state sovereignty. To the extent that an inconsistency between the two notions of religious freedom and state sovereignty existed, the former tended to be curtailed.

There is no evidence that Western statesmen were particularly sensitive to the dilemma of the new states, which were left on their own to try to reconcile Western Statecraft with Eastern Churchcraft. This difficult problem was compounded by the fact that the phenomenon of nationalism was taking root in a part of the world where compact territorial states could not be created without including substantial minorities within them. "Within the Ottoman frontiers . . .

states, whose chief function was to guarantee the viability of the 1815 Vienna settlement. Those states were the United Kingdom, Prussia, Austria, Russia, and again-monarchical France. The five met regularly until the Congress of Verona of 1822, after which they gathered only in *ad hoc* international conferences. As a tribute to the harmony in which they usually worked, it can be said that all five of the major territorial settlements of Europe between 1815 and 1860 were ratified by the Concert. Those settlements were the independence of Greece in 1832, the independence of Belgium in 1839, the Straits Question of 1840-41, the Schleswig-Holstein controversy of 1852, and the resolution of the Crimean War in 1856. Only on the first of these occasions were any of the five absent. In that case, Prussia and Austria did not participate. *Id.* at 244-45.

53. *Id.* at 341-42. *See also* R. DAVISON, REFORM IN THE OTTOMAN EMPIRE 1856-1876, at 52-80 (1963); *and* N. BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY 11-12 (1964).

54. McDougal, Lasswell & Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Non-Discrimination*, 74 MICH. L. REV. 865, 879-80 (1976).

55. Feinberg, *supra* note 43, at 496.

there were few districts whose population was even approximately homogeneous in linguistic nationality, and few which possessed even the rudiments of local statehood."[56]

Perhaps all of these problems would have been soluable were it not for the fact that these guarantees of Western-style civil liberties represented humiliations as well as impossibilities for the new states. By being compelled to subscribe to a general norm of religious toleration which the great powers had never recognized as applying to themselves, they were, in effect, being admitted to the international community as second-class citizens. In the United Kingdom, for example, the various religious disabilities of non-Anglicans disappeared only piecemeal during the course of the Nineteenth Century, and the disappearance was not pursuant to any generally acknowledged norm of religious freedom.[57] The situation was similar in France, where official separation of Church and State came only in 1905.[58] The Constitution of Norway forbade the settlement of Jesuits in the country until 1956,[59] and Switzerland did not emancipate its Jews until 1872.[60] Even today, the Federal Republic of Germany acts as the collection agent for the *kirchensteuer*, or church tax, which supplies about ninety percent of the revenue from both the Protestant and the Catholic churches of Germany.[61]

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56. 8 A. TOYNBEE, *supra* note 4, at 189.

57. Official freedom of worship was allowed in England by the Act of Toleration 1688, but various civil disabilities still continued to burden all non-Anglicans. The disabilities of Protestant dissenters, excepting Quakers, were finally removed in 1828. Disabilities of Roman Catholics were removed in 1829. Jews were "emancipated" in 1858, Quakers in 1868, and nonbelievers in 1888. Civil marriage was nonexistant in English law until 1836. The first nonconformist to sit in a cabinet was John Bright, who headed Gladstone's Board of Trade in 1868. Oxford and Cambridge Universities were finally opened to non-Anglicans in 1871. Even today, neither the monarch nor the Lord Chancellor can be a Roman Catholic.

58. 3 A. COBBAN, A HISTORY OF MODERN FRANCE 63-65 (1965).

59. Scheuner, *Comparison of the Jurisprudence of National Courts With That of the Organs of the Convention as Regards Other Rights*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 214, 233 (A. Robertson ed. 1968). This Norwegian case differs from the others in that the emancipation, when it finally did occur, was undertaken pursuant to the international legal standard of the European Convention for the Preservation of Human Rights and Fundamental Freedoms. *See also* Modinos, *Effects and Repurcussions of the European Convention on Human Rights*, 11 INT'L. & COMP. L.Q. 1097, 1102 (1962).

60. BENTWICH, supra note 28, at 222.

61. The *kirchensteuer* is a surtax on income which ranges from eight percent to ten percent, according to *lander*. It has existed in practice since at least the Nineteenth Century, although it only received constitutional sanction in 1919 with the establishment of the Weimar Republic. Later it was embodied in a 1933 concordat with the Papacy. The tax is voluntary in that only those taxpayers who register themselves as either Protes-

In light of all these practices, it is not surprising that the new states paid scant attention to their treaty obligations. Violations were common, particularly so in the case of Rumania, whose treatment of its Jewish citizens became one of the scandals of Europe.[62] Wherever nationalism took hold, it arrived hand in hand with a ferocious and new intolerance of differing ways. In 1881 the era of systematic programs against Russian Jews began.[63] In the 1890s the replacement of the traditionally tolerant Islamic religion with the jealous cult of nationalism in the Ottoman Empire resulted in the Armenian massacres.[64] Clearly, modernization was carrying with it some unintended consequences. The notion of religious freedom was, in fact, only a minor element of a "Westernization package" whose dominant element was a nationalism which tended to exacerbate hatred against minority groups, rather than alleviate it.

Nevertheless, the Powers continued to demonstrate their concern for providing international legal guarantees of religious freedom in faraway parts of the globe. The Constitution of the Congo Free State, drawn up by the Conference of Berlin in 1885, provided for religious

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tants or Catholics are asked to pay it. Curiously, many more persons appear to pay the tax then actually attend church regularly. C. PALLENBERG, VATICAN FINANCES 171-79 (1971). When the government of the Federal Republic of Germany introduced a mandatory civil surtax of ten percent on incomes in 1970, the result was a spate of deregistrations from the *kirchensteuer* lists. Apparently this was an effort by people to prevent their real incomes from falling. N.Y. Times, Aug. 21, 1970, at 12, col. 8.

62. 2 N. SOKOLOW, HISTORY OF ZIONISM 1600-1918, at 137-38 (1969). Although the United States was not a party to the Treaty of Berlin, it became concerned over the extent to which Rumania was flouting its obligations under the agreement. In 1902 the United States sent a note to its consul in Athens, with copies to all the signatories of the treaty, urging that the Powers call upon Rumania to honor its obligations by treating its Jews more humanely. Feinberg, *supra* note 43, at 493-94. Even before the signing of the Treaty of Berlin, the United States had been concerned about the fate of Jews in Rumania. In 1870 President Grant appointed Benjamin Peixotto as consul in Rumania to operate on behalf of the Jews. *Id.* at 492-93. *See also* C. ADLER & A. CARCALITH, WITH FIRMNESS IN THE RIGHT: AMERICAN DIPLOMATIC ACTIVITY AFFECTING JEWS (1946) *and* WORLD POLITICS AND THE JEWISH CONDITION (L. Henkin ed. 1972). Concerning the effect which the Jackson-Vanik Amendment to the Trade Reform Act 1974, 19 U.S.C. § 2432 (1974) has had on the position of Jews in Rumania, see Note, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example*, 8 LAW & POL'Y IN INT'L BUS. 193 (1976).

63. 2 L. GREENBERG, THE JEWS IN RUSSIA: THE STRUGGLE FOR EMANCIPATION 19 (1951).

64. *See* THOMSON, *supra* note 36, at 469-70. The contrast between the erstwhile humaneness of Turkish rule and the savagery inspired by the feelings of nationalism was quite sharp. During the centuries of warfare between the Hapsburgs and the Ottomans for the possession of the Balkan Peninsula, many Protestants in Transylvania and Hungary preferred the crescent to the cross for the simple reason that it was the Hapsburgs' avowed policy to stamp out all Christian rivals to Roman Catholicism in newly conquered lands. H. FISHER, *supra* note 10, at 813.

liberty.[65] That same conference declared that the Powers should favor and aid the work of religious missions and all institutions tending to the education of natives.[66]

This paternalistic approach of the Powers did not end with the close of the Nineteenth Century. In fact, it became more widespread than ever after World War I with the establishment of the League of Nations minority treaty system. At the Paris Peace Conference, there was intense concern over minority problems. One group expressing such concern was the Committee of Jewish Delegations.[67] Nine newly-created states were required to commit themselves to the guarantee of certain rights, among them religious freedom, to all of their citizens.[68] The states which made such promises regarded them as badges of inferiority and objected to the fact that the Powers appeared none too anxious to make similar commitments themselves. The minorities guarantee system had its one major triumph in the area of religious freedom when the Permanent Court of International Justice found that Albania had violated its declaration to the League Council[69] when it abolished its private school system.[70] In spite of this one triumph, the minorities guarantee system did not work well.[71]

The minorities approach to human rights issues was completely discredited by World War II. The cynical manipulation of the problem by Hitler was evident in his supposed concern at the Munich confer-

65. BENTWICH, *supra* note 28, at 223.

66. *Id.* at 225-26.

67. Feinberg, *supra* note 43, at 498.

68. The nine were: Austria, Bulgaria, Hungary, Yugoslavia, Greece, Poland, Czechoslovakia, Rumania, and Turkey. In addition, five states made special declarations before the Council of the League of Nations. They were Estonia, Latvia, Lithuania, Albania, and Iraq. Germany made a similar guarantee in the form of the German-Polish Convention on Upper Silesia, which applied only to that area, thus leaving the bulk of German Jews during the inter-war period without any protection from conventional international law. From this pattern one can discern what privileges accompany a status of seniority in the community of nations. Germany, even after losing World War I, was not required to make a general commitment submitting its religious policies to international supervision.

69. Advisory Opinion on Minority Schools in Albania, [1935] P.C.I.J., ser. A/B, No. 64.

70. The private school systems were generally run by the various religious communities.

71. Concerning the minorities treaties system, see J. STONE, INTERNATIONAL GUARANTIES OF MINORITIES RIGHTS (1932); M. MOSKOWITZ, HUMAN RIGHTS AND WORLD PUBLIC ORDER 117-23 (1958); T. BAGLEY, INTERNATIONAL PROTECTION OF NATIONAL MINORITIES (1950); I. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM (1955); T. MODEEN, THE INTERNATIONAL PROTECTION OF MINORITIES IN EUROPE (1969); D. SEN, THE PROBLEM OF MINORITIES (1940); J. ROBINSON, WERE THE MINORITIES TREATIES A FAILURE? (1943); and P. de AZCARATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES (1945).

ence over the rights of the German minority in the Sudentenland of Czechoslovakia. Nevertheless, the policy of according special attention to the problems of minorities had a beneficial effect in that it showed the world just how dangerous such an approach was to human rights issues. The time finally had come to take a universalist approach to human rights issues in general and to the problem of religious freedom in particular.

III. THE EARLY POST-WORLD WAR II PERIOD

After World War II the time-honored method of advancing human rights by imposing obligations on losing states continued with the inclusion of guarantees of religious liberty in the Paris Peace Treaties of 1947 with Bulgaria, Finland, Hungary, Italy, and Rumania. Unlike the minorities treaties, these post-World War II agreements contained no guarantee provisions on the part of the United Nations.

The ineffectiveness of this latest spate of treaty guarantees was established when allegations arose in 1949 that Hungary, Rumania, and Bulgaria were violating their commitments thereunder. A series of diplomatic notes emanated from the United States and the United Kingdom, supported by Canada, Australia, and New Zealand, charging the three states with systematically violating their obligations.[72] Replies by the three denied the allegations and alleged interference in their domestic affairs. The United States and the United Kingdom found these replies to be unsatisfactory and proposed that arbitration commissions be set up as provided for in the treaties. The commissions were to consist of three members. Each party to the dispute would appoint one commissioner, and a third would be chosen either by agreement of the two parties or, failing such agreement, by the Secretary-General of the United Nations. The three states denied the existence of any dispute and refused to appoint any commissioners.

The United Nations General Assembly then requested an advisory opinion from the International Court of Justice on 1) whether or not disputes that were subject to the resolution procedures outlines in the treaties existed, 2) whether the three states were obligated to appoint their commissioners, 3) if so obligated, whether the Secretary-General could appoint the "third" commissioner without the delinquent party having made its appointment, and 4) whether the resulting two person commission, consisting of the one Western-appointed commissioner and one appointed by the United Nations, would be legally competent

72. Hudson, *The Twenty-eighth Year of the World Court*, 44 AM. J. INT'L L. 1, 25-26 (1950).

to give a decision.[73] The Court answered the first two questions in the affirmative[74] and the last two in the negative.[75] Thus, the hope of advancing religious freedom by treaties with individual states effectively perished.[76]

In the meantime, the United Nations had embarked on an entirely different strategy in attempting to build a legal norm of universal application. The first step in this arduous process came in 1948 with the adoption of the Universal Declaration of Human Rights[77] by the United Nations General Assembly. This was the first authoritative pronouncement that a general principle of religious freedom was emerging in international law. Article 18 of the Universal Declaration provides:

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

During that same year, the Convention on the Prevention and Punishment of the Crime of Genocide was promulgated, giving protection, in article 2, to religious groups "as such".[78] Other international conventions which treat religious issues to some extent include: the Convention Relating to the Status of Refugees (1951),[79] the Convention Relating to the Status of Stateless Persons (1954),[80] the Discrimination (Employment and Occupation) Convention (1958),[81] the Convention Against Discrimination in Education (1960),[82] and the Interna-

73. G.A. Res. 294, U.N. Doc. A/1251, at 16 (1949).

74. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. 65.

75. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. 221.

76. For further commentary on this dispute, see Liang, *Observance in Bulgaria, Hungary and Romania of Human Rights and Fundamental Freedoms: Request for an Advisory Opinion on Certain Questions*, 44 AM. J. INT'L L. 100 (1950); Carlston, *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, 44 AM. J. INT'L L. 728 (1950); Lalive, *Interpretation of Peace Treaties Signed with Bulgaria, Hungary and Romania*, 77 JOURNAL DU DROIT INTERNATIONAL 1228 (1950); and Tamm, *Observance of Human Rights and Fundamental Freedoms in Bulgaria, Romania, and Hungary in Relation to the Peace Treaties and the United Nations' Charter*, JUS GENTIUM: NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 359 (1949).

77. G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (1948).

78. G.A. Res. 260 (III), U.N. Doc. A/810 at 174 (1948), 78 U.N.T.S. 277.

79. 189 U.N.T.S. 137.

80. 360 U.N.T.S. 117.

81. 362 U.N.T.S. 31.

82. 429 U.N.T.S. 93.

tional Covenant on Civil and Political Rights (1966).[83]

These conventions all adopted the approach of stipulating that a person's religion should not be used as a basis for discriminating against him. The underlying concern was the allowance of liberty of conscience to individuals. In the mid-1950s, however, the United Nations began to tread on more controversial ground by addressing the problem of guaranteeing persons the right to exercise or "manifest" their religion in a meaningful way, even if the granting of such a right were to necessitate transferring some of the natural prerogatives of governments to churches.

In 1956 the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Mr. Arcot Krishnaswami as special rapporteur to study the problem of religious discrimination. His final report in 1960[84] was basically optimistic and reached the conclusion that there was a discernable trend toward greater religious toleration.[85] This report, known as the Krishnaswami Report, formed the basis of the Sub-Commission's draft principles on freedom and nondiscrimination in the matter of religious rights and practices.[86] The full Commission on Human Rights considered these draft principles at its 1962 session.[87] It was expected that these draft principles would ultimately be embodied in a United Nations declaration, or if not a declaration, then at least in a recommendation to member states. There was no expectation that these draft principles would be embodied in a convention because the "general view" was that there was not to be an instrument with binding legal force.[88]

However while this work was taking place, a rash of anti-Semitic outbreaks occurred in 1959 and 1960 which had the effect of elevating the problem to a more urgent level. It was becoming increasingly apparent that the right of religious liberty was in a more precarious condition than it hitherto had been supposed.

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83. *See* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 18, U.N. Doc. ST/HR/1 (1973).

84. A. KRISHNASWAMI, REPORT ON STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960). For a study of discrimination by, rather than against, churches, see Shelton, ***Human Rights within Churches: A Survey Concerning Discrimination within Religious Organizations***, 6 HUMAN RIGHTS J. 487 (1973).

85. A. KRISHNASWAMI, *supra* note 84, at 55-60.

86. U.N. Doc. E/CN.4/800 (1960).

87. COMMISSION ON HUMAN RIGHTS, REPORT ON THE EIGHTEENTH SESSION, 34 U.N. ESCOR, SUPP. (No. 8) 13, U.N. DOC. E/3616/REV.1 (1962).

88. *Id.* at 15.

IV. THE PRESENT IMPASSE[89]

In 1962 the General Assembly began considering the question of religious toleration. The Assembly first handed the issue to the Economic and Social Council, requesting that it delegate the task of composing preliminary drafts of a declaration and a convention pertaining to religious discrimination to the Commission on Human Rights.[90] The Commission on Human Rights, in turn, asked the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake the project.[91]

A. The 1964 Draft Declaration

The Sub-Commission submitted a draft declaration in 1964,[92] and the Commission appointed a working group to study it. The working group merely revised the first six articles of the Sub-Commission draft, and this was the extent of their "study".[93]

A comparison of the revised six articles with the original six indicates that the fundamental uncertainty about the meaning of religious freedom as set out at the beginning of this article still is extant.[94] There was scant dispute on the subject of individual liberty of conscience. States appeared willing to grant that much, at least on paper. The major dilemma was the factor which played a minimal role in the Western struggle for religious toleration, but which played a more substantial role in the East: the problem of how much autonomy to grant to churches as institutions to function free from, or even in competition with governments.

In its 1964 draft declaration, the Sub-Commission stated a very

89. *See generally*, Claydon, *The Treaty of Protection of Religious Rights: U.N. Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 12 SANTA CLARA LAW. 403 (1971).

90. G.A. Res. 1781, 17 U.N. GAOR Supp. (No. 17) 33, U.N. Doc. A/5217 (1962).

91. COMMISSION ON HUMAN RIGHTS, REPORT ON THE NINETEENTH SESSION, 36 U.N. ESCOR, Supp. (No. 8) 78, U.N. Doc. E/3743 (1964). The Commission retained the earlier problem of the draft principles on freedom and nondiscrimination in the matter of religious rights and practices on its agenda. However, it continuously postponed further debate on the subject after 1962 and finally, in 1969, declined to even include it on its agenda.

92. *See* Appendix One of this article *infra*; U.N. Doc. E/CN.4/873 (1963), *reprinted in* COMMISSION ON HUMAN RIGHTS, REPORT ON THE TWENTIETH SESSION, 37 U.N. ESCOR, Supp. (No. 8) 70-75, U.N. Doc. E/3873 (1964) [hereinafter referred to as Sub-Commission Draft].

93. *See* Appendix Two of this article *infra*; U.N. Doc. E/CN. 4/873 (1963), *reprinted in* COMMISSION ON HUMAN RIGHTS, REPORT ON THE TWENTIETH SESSION, 37 U.N. ESCOR, Supp. (No. 8) 75-77, U.N. Doc. E/3873 (1964) [hereinafter referred to as the Working Group Draft].

94. *See* text accompanying note 2 *supra*.

broad interpretation of religious freedom. Article VI stated that a person has the "right to comply with what is prescribed by his religion,"[95] which is potentially a very far-reaching right indeed. Additionally, article VI provided the right "to form and maintain communities and institutions."[96] These religious communities were explicitly granted five rights under article VI. First was the right of "[e]very religious community and institution . . . to form territorial federations on a national, regional or local basis;"[97] and second was the right of "[e]very religious group or community . . . to write, to print and to publish religious books and texts and . . . to train the personnel required for the performance of its practices or rites. . . ."[98] Article VI additionally provided that "no religious group or community shall be prevented from bringing teachers from abroad. . . ."[99] and that "every religious group or community shall be enabled to have contacts with communities and institutions belonging to the same religion abroad."[100] Finally article VI assured the right of "any religious community . . . to acquire and produce all materials and objects necessary for the observance of prescribed ritual or practices, including dietary practices."[101]

Article VI of the Sub-Commission draft also provided the following rights for *individuals*: 1) the freedom to associate with fellow believers, without any limitation on number; 2) the right to teach one's beliefs in public; 3) the right to observe the dietary practices of one's faith; 4) the right to have the state "help provide" objects and possessions necessary for the rituals of one's faith if the state "controls the means of production and distribution;" 5) the right of pilgrimmage; 6) the right of legal protection for sacred places and objects; 7) and the right to have "due account" taken of the holy days and rest days of one's faith.[102]

The working group appointed by the full Commission modified these liberal provisions substantially. Instead of conferring the right to form communities, institutions, and federations, the revised article VI guaranteed the freedom "to assemble". The freedom to teach one's religion was maintained, but without a specific provision that this freedom be exercisable in public. The right to publish religious reading

95. Sub-Commission Draft, *supra* note 92, at 72. *See* Appendix One, art. VI, of this article *infra*.

96. *See* Appendix One, art. VI (2), of this article *infra*.

97. *Id.*, art. VI(2)(ii).

98. *Id.*, art. VI(4).

99. *Id.*

100. *Id.*

101. *Id.*, art. VI(5)(i).

102. *Id.*, art. VI generally.

matter became simply the right "to disseminate". The right to train and to import religious personnel from abroad went unmentioned, as did the right of pilgrimmage and the right of legal protection for holy places and objects. Dietary practices and religious holidays were not mentioned explicitly, although these concepts arguably could be considered to have been subsumed into the category of "freedom to observe the rites or customs" of a faith. The right to expect socialist states to help supply worshippers with necessary ritual objects was omitted.[103]

B. The 1965 Draft Convention

While the working group of the full Commission was revising its original draft declaration, the Sub-Commission was at work on a draft convention, which it completed and sent to the Commission in 1965.[104] Rather than appoint a working group to consider this new document, the Commission itself proceeded to consider and modify it.[105]

An extensive comparison of the two convention drafts would not be fruitful at this stage because the likelihood of the convention being approved in the near future is remote. However, several details pertaining to the two drafts are worthy of mention. First, there are subtle "ideological" differences between the two versions; and second, there are three different respects in which the Commission's draft is more liberal, and three other areas in which the Commission's draft is less liberal.

With regard to the first, the "ideological" difference between the two drafts is hardly a striking one, but it is revealing. The Sub-Commission's draft convention would have had all forms of religious discrimination condemned and simultaneously would have committed states to undertake to eliminate the phenomenon.[106] The full Commission draft, on the other hand, took a somewhat more doctrinaire approach in that it "recognize[d] that the religion or belief of an

103. Working Group Draft, *supra* note 93, at 75-77. *See* Appendix Two, art. VI, of this article *infra*.

104. E/CN.4/882 and Corr. 1 (1964) [hereinafter referred to as Sub-Commission Draft Convention]. *See also* Staff Study, *United Nations Draft International Convention on the Elimination of all Forms of Religious Intolerance*, 6 J. INT'L COMM'N JURISTS 288 (1965) *and* Abram, *Freedom of Thought, Conscience, and Religion*, 8 (No. 2) J. INT'L COMM'N JURISTS 40 (1967).

105. COMMISSION ON HUMAN RIGHTS, REPORT ON THE TWENTY-THIRD SESSION, 42 U.N. ESCOR, Supp. (No. 6) 30-35, U.N. Doc. E/4322 (1967) [hereinafter referred to as Full Commission Draft Convention].

106. Sub-Commission Draft Convention, *supra* note 104, at art. 2.

individual is a matter for his own conscience and must be respected accordingly."[107] The difference is a subtle one; while one text sought to attack a phenomenon or practice of states, the other recognized a right belonging to individuals.

As to other differences between the two convention drafts, the full Commission's convention draft offered broader protection than the Sub-Commission's draft in three instances. First, article 3(1)(g) in the full Commission draft granted to believers the "freedom to organize and maintain local, regional, national and international associations,"[108] while the Sub-Commission's draft failed to extend the principle to that extent. The Sub-Commission's draft would have allowed the formation of local, regional, and national associations only, and then would have restricted persons to the right merely "to participate in international associations."[109] The second instance in which the full Commission took a more liberal approach was in article 10 of the full Commission draft, which would have guaranteed "effective protection and relief" for violations of the rights secured by the document;[110] the Sub-Commission's draft article 10 mentioned only "appropriate remedial relief".[111] The third example of broader protection afforded by the full Commission was in article 11, which concerned the right of states to derogate from the convention. While both drafts specified that considerations of national security and friendly relations between nations can justify derogation, the Sub-Commission draft additionally would have countenanced states prohibiting religious activity aimed at prejudicing "national sovereignty".[112] On the other hand, the full Commission draft would have allowed only such derogation as would be necessary to promote the "purposes and principles of the United Nations."[113]

The final area in which the two convention drafts differ pertains to the protection to be afforded to religious freedom. In this respect the Sub-Commission's draft is broader, and there are three differences the exemplify this point. First, the Sub-Commission draft protected a person against being compelled "to undergo a religious marriage ceremony not in conformity with his religion or belief."[114] The Com-

107. Full Commission Draft Convention, *supra* note 105.
108. *Id.*
109. Sub-Commission Draft Convention, *supra* note 104.
110. Full Commission Draft Convention, *supra* note 105.
111. Sub-Commission Draft Convention, *supra* note 104.
112. *Id.*
113. Full Commission Draft Convention, *supra* note 105.
114. Sub-Commission Draft Convention, *supra* note 104, at art. 3 (1) (i).

mission draft had no corresponding article. Second, article 8 of the Sub-Commission's draft would have criminalized all incitement to religious hatred,[115] but corresponding article 9 of the Commission draft would have done so only for incitement "likely to result in acts of violence against any religion . . . or its adherents. . . ."[116] Finally, the Sub-Commission draft had a provision disallowing governments from favoring any religion over another through such channels as subsidies and tax concessions unless it is "provided for by law for reasons of public interest. . . . ,"[117] which is a substantial exception. The corresponding section of the full Commission draft protects not religions, but rather *individuals* against discrimination that is religiously motivated.[118]

It is difficult to conclude that one of the two convention drafts is superior to the other. However, it is reasonable to conclude that the Sub-Commission draft tended to go further than that of the full Commission in protecting institutional or group rights, as opposed to individual rights.

C. Reaction of the Roman Catholic Church

The most significant event regarding this institutional versus individual rights dilemma was the issuance by the Roman Catholic Church of its Declaration of Religious Freedom of 1965,[119] a product of the Vatican II Conference. Prior to this time, the Roman Catholic Church, in contrast to various Jewish organizations, had taken relatively little interest in the United Nations' efforts. Now, however, it was prepared to enter the struggle for religious freedom with all of the spiritual, popular, political, and financial resources at its disposal.[120]

The Roman Catholic Church was not reticent or uncertain about what it believed religious freedom to mean. As one of the most

115. *Id.*

116. Full Commission Draft Convention, *supra* note 105.

117. Sub-Commission Draft Convention, *supra* note 104, at art. 9.

118. Full Commission Draft Convention, *supra* note 105, at art. 5.

119. A declaration is the least authoritative pronouncement to emanate from a Roman Catholic Church Council. It is inferior to both a decree (*decretum*) and to a constitution (*constitutio*). G. MENSCHING, TOLERATION AND TRUTH IN RELIGION 7 (1971). It is important to note that the declaration involved no relaxation of the doctrine that the Roman Catholic Church is the exclusive means to salvation. On the contrary, it affirmed that the "only true religion has its concrete form of existence in the Catholic and Apostolic Church." *Id.* at 53. *See also* de Albornoz, *Ecumenical and World Significance of the Vatican Declaration on Religious Liberty*, 18 ECUMENICAL REV. 58 (1966).

120. On the extent of the material power and the organizational framework of the Roman Catholic Church, see PALLENBERG, *supra* note 61.

institutionalized of all of the churches of the world, it became a primary spokesman for the viewpoint that religious freedom means the right of churches to function without undue government interference. In comments which it submitted to the Secretary-General,[121] the Holy See frankly objected to the United Nations' adopting "too individual a conception of religious freedom." Among the rights which it felt should be guaranteed were (1) the right of the clergy to choose its personnel autonomously, (2) the right of church members to communicate with co-religionists abroad, (3) the right to erect religious buildings, (4) the right of churches to acquire funds and property, (5) the right of the clergy to teach, (6) the right of churches to transfer their personnel from state to another, (7) the right of persons to choose their own life style, including a monastic one, (8) the right of individuals to contribute to private charities, and (9) the right of individuals to refuse military service on the grounds of conscientious objection, provided they agree to serve the state in some alternate fashion.[122]

D. Reaction of the Soviet Union Bloc

If the proponents of the "institutional" view of religious freedom had won a valuable convert to their ranks in the Roman Catholic Church, the opposition had been active as well. Chief among the opponents was the Soviet bloc. A totalitarian state has an obvious interest in seeing that the notion of religious toleration does not entail granting to a nongovernmental, internationally-oriented organization, such as a church, the right to compete with it for the loyalty of its citizens. The Soviet bloc therefore has found itself in the uncomfortable position of having either to confine the basic concept of religious freedom to be acceptable to it, or to oppose religious freedom outright. It is not surprizing that the former alternative was chosen. Specifically, the Soviet bloc has put forth three of its own interpretations as to what this highly problematic freedom means.

First, they advanced the notion that freedom of religion must entail the freedom of the individual to refuse to adhere to any religion at all, if he so wishes. However, this position is only an extension of the notion of liberty of conscience.[123] No matter how ironic it may be to find the Soviet bloc advocating such a principle, the Western states had no trouble making an accommodation in this area. In proceedings

121. U.N. Doc. A/9134 (1973).

122. *Id.*

123. It is interesting to note that the Soviet Union wished to delete the words "freedom of conscience" from the declaration text. U.N. Monthly Chronicle, Dec. 1967, at 85.

of the Third Committee of the General Assembly on this subject, they simply agreed to add a specific provision to the effect that the principle of religious toleration extended as well to atheistic beliefs. A General Assembly resolution of 1967 noted this change.[124]

The Soviet bloc had a second issue, however, which was the doctrine concerning the separation of Church and State. Ukraine proposed an amendment to the declaration and stated the problem in the following terms:

> The church shall be separated from the State and the School from the Church. . . . No single church, religion or religious organization shall or may be accorded privileges of any kind or be subject to restrictions of any kind in its activities.[125]

Both the Sub-Commission and the full Commission convention drafts included provisions to the effect that

> [n]either the establishment of a religion nor the recognition of a religion or belief by a State nor the separation of Church from State shall by itself be considered religious intolerance or discrimination on the ground of religion or belief. . . ."[126]

There is some support for the Ukrainian point of view. McDougal, Lasswell, and Chen describe the Commission provision as "an unfortunate departure from the conventional wisdom. . . ."[127] Nevertheless, the Commission's approach is the more rational one. It would be dangerous to condemn a *de jure* link between Church and State without addressing the question of whether the link, in fact, does lead to discrimination against unestablished religions or their adherents. There appears to be no logical or historical reason why a state with an established church, or even a theocracy, cannot be tolerant of nonconformists.[128]

The experience involving the enforcement efforts of the International Convention on the Elimination of All Forms of Racial Discrimination[129] is illustrative of the problems encountered by placing too much reliance on an analysis of "official" state policy. The deliberations of the Committee on the Elimination of Racial Discrimination, the enforcing body of the convention, have tended to revolve around

124. G.A. Res. 2295, 22 U.N. GAOR Supp. (No. 16) 38, U.N. Doc. A/6716 (1967).

125. U.N. Doc. E/CN.4/1145 (1973).

126. *See* note 105 *supra*.

127. McDougal, Lasswell & Chen, *supra* note 54, at 890.

128. *See* note 4 *supra*.

129. G.A. Res. 2106 (Annex), U.N. GAOR Supp. (No. 14) 47, U.N. Doc. A/6014 (1965); 660 U.N.T.S. 195.

analyses of state constitutional and legislative provisions rather than around the reality of violations of the convention.[131] The United Nations could profit from this example and give states as little opportunity as possible to "comply" with human rights norms by taking purely *pro forma* measures.

There is an additional irony in this second Soviet proposal in that it represents a stance quite different from that which the Soviet Union maintains in practice. A recent report on the state of religious freedom in the Soviet Union was presented to the World Council of Churches documenting the intense involvement of the Soviet state in religious affairs. For example, Soviet law does not recognize churches as national organizations, but only as individual congregations. Even these congregations are not permitted to exist without permission from the Council on Religious Affairs in Moscow. In order to obtain this permission, the potential worshippers must first register officially, and then obtain an officially approved "prayer building", which in turn, will be rented from the authorities. After taking these steps, the group is then considered to be a "cult", which is a pejorative word in the communist vocabulary. The priest who officiates is legally an employee of the congregation's executive, which is a collective body whose members may not be elected by secret ballot and whose selection is subject to the veto of the Council on Religious Affairs. Inside the "prayer building", the priest may not teach any kind of religious dogma, and he must have official permission if he is to administer sacraments outside of his approved area. All religious objects used in the services belong to the state, and are subject to repossession at any time.[131]

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130. *See* the various annual reports which have been submitted by the Committee on the Elimination of Racial Discrimination to the General Assembly.

131. The Economist, Aug. 21, 1976, at 44, col. 3. Concerning the problems which the various religions have had in co-existing with the Soviet state, see J. CURTISS, THE RUSSIAN CHURCH AND THE SOVIET STATE, 1917-1950 (1953); L. GREENBERG, *supra* note 63; M. SPINKA, THE CHURCH IN SOVIET RUSSIA (1956); W. KOLARZ, RELIGION IN THE SOVIET UNION (1962); THE RUSSIAN REVOLUTION AND RELIGION (B. Szczesniak ed. 1959); S. TIMASHEV, RELIGION IN SOVIET RUSSIA (1917-1942) (1943); THE JEWS IN SOVIET RUSSIA SINCE 1917 (L. Kochan ed. 1970); R. CONQUEST, RELIGION IN THE USSR (1968); Bociurkiw, *The Shaping of Soviet Religious Policy*, 22 (No. 3) PROBLEMS OF COMMUNISM 37 (1973); Fletcher, *Religious Dissent in the USSR in the 1960s*, 30 SLAVIC REV. 298 (1971); *Religious Dissent*, 17 (No. 4) PROBLEMS OF COMMUNISM 21 (1968); Powell, *The Effectiveness of Soviet Anti-Religious Propaganda*, 31 PUBLIC OPINION 366 (1967); Rothenberg, *Status of Cults*, 16 (No. 5) PROBLEMS OF COMMUNISM 119 (1967); Gitelman, *The Jews*, 19 (No. 5) PROBLEMS OF COMMUNISM 92 (1967); Lawrence, *Soviet Policy Towards the Russian Churches, 1958-1946*, 16 SOVIET STUD. 276 (1965); THE UNREDEEMED; ANTI-SEMITISM IN THE SOVIET UNION (R. Rubin, ed. 1968); and T. TAYLOR, COURTS OF TERROR; SOVIET CRIMINAL JUSTICE AND JEWISH EMIGRATION (1976). The

Thus, the fact that Church and State are theoretically separate in the Soviet Union does not mean that there exists an appreciable degree of religious freedom. The focus of the international community should be to attack the facts of religious intolerance and not the mere formalities of Church-State ties.

The Soviet Union's third assertion is a claim that the right of religious toleration is not a one-way street and that the state has a right to pursue its own legitimate goals such as social equality, or domestic and international peace, free from any subversive tactics by religious groups. The Soviet Union has pressed for guarantees in the declaration that the freedom of religion not be used to mask political movements or to instill hatred between peoples or between religious or ethnic groups.[132] This could be interpreted as a frank acknowledgment of the standing threat that religious organizations pose to governments.

The Soviet Union found an ideal issue in the last-mentioned concept that a state also has a right to pursue its own legitimate goals free from the influence of religious groups. Here is an issue that could attract a broad spectrum of support. It is a stance that carries strong appeal to Third World states which have believed that missionaries and religions served first as trailblazers and then as ideological bulwarks of colonialism.[133]

Soviet Union has not always been content with the policy of merely creating difficulties for churches. During the late 1950s and early 1960s, Kruschev embarked on a campaign of outright persecution. One indication of the determination with which the state confronted the churches is found in the fact that from 1959 to 1962, the number of church buildings in the Soviet Union was reduced from 22,000 to 11,500. An indication of the suspicion with which the state looks upon synagogues in particular is found in the fact that as of 1967, only 60 were licensed to exist in all of the Soviet Union. In the late 1920s, however, there had been some 500 in Byelorussia alone. Gitelman, *The Jews*, 19 (No. 5) PROBLEMS OF COMMUNISM 92 (1967).

132. Similar beliefs have surfaced in the draft of the new Soviet constitution which was published in June 1977. It provides that "the exercise of rights and freedoms shall be inseparable from the performance by citizens of their duties." N.Y. Times, June 4, 1977, at 1, col. 1.

133. *See* L. WRIGHT, RELIGION AND EMPIRE; THE ALLIANCE BETWEEN PIETY AND COMMERCE IN ENGLISH EXPANSION, 1558-1625 (1943); P. COHEN, CHINA AND CHRISTIANITY; THE MISSIONARY MOVEMENT AND THE GROWTH OF CHINESE ANTI-FOREIGNISM (1963); J. SCHERER, MISSIONARY, GO HOME! A REAPPRAISAL OF THE CHRISTIAN WORLD MISSION (1964); J. AJAYI, CHRISTIAN MISSIONS IN NIGERIA, 1841-1891; THE MAKING OF A NEW ELITE (1965); R. ROTBERG, CHRISTIAN MISSIONARIES AND THE CREATION OF NORTHERN RHODESIA, 1880-1924 (1965); J. MACDONALD, TRADE, POLITICS AND CHRISTIANITY IN AFRICA AND THE EAST (1969); J. GRABILL, PROTESTANT DIPLOMACY AND THE NEAR EAST: MISSIONARY INFLUENCE ON AMERICAN POLICY, 1810-1927 (1971); G. MOORHOUSE, THE MISSIONARIES (1973); S. LATUKEFU, CHURCH AND STATE IN TONGA: THE WESLEYAN METHODIST MISSIONARIES AND POLITICAL DEVELOPMENT, 1822-1875 (1974); *and* D. MARKOWITZ, CROSS AND SWORD: THE POLITICAL ROLE OF CHRISTIAN MISSIONS IN THE BELGIAN CONGO, 1908-1960 (1973).

Other states that could readily find Soviet fears to be justified are conservative states, such as the Islamic nations. A declaration on religious freedom, particularly the type desired by the Roman Catholic Church, would be a threat to them if it provided for such rights as a right to federate, a right to assemble with one's co-religionists abroad, and a right of pilgrimage. These last two rights could allow subversive ideas to filter into the state under the guise of religious discussion.[134]

Finally, the Soviet stance is attractive to totalitarian states, whether they be of the left or the right, particularly those that are heavily Roman Catholic. For example, both Brazil[135] and the Philippines[136] have voiced fears quite similar to those of the Soviet Union in this regard.

E. Other Problems Facing the Establishment of An International Norm of Religious Toleration

The problem of religious toleration is that it cannot attract support in the same way that, for example, a crusade against racial discrimination can. This is because the goal of toleration for all religions is unlikely to appeal to those who would be the most obvious beneficiaries—religious persons. Perhaps it is asking too much of a believer that he exert himself to protect other faiths when he profoundly believes them to be erroneous. The Islamic world, particularly Saudi Arabia, Sudan, and Libya, where fundamentalism is a potent political force, provides some illustrations of this phenomenan. In 1973 the world witnessed a riot in Homs, Syria where twenty-three people were killed and fifty injured while protesting the "laxness" of the ruling regime's religious policy. One indication of this "laxness" had been the government's issuance of a decree of religious toleration.[137]

Another serious problem with which the advocates of toleration must deal is the fact that their own approach to the issue is essentially nonreligious. For example, McDougal, Lasswell, and Chen point to

134. *See* Borthwick, *Islamic Sermon as a Channel of Political Communication*, 21 MIDDLE EAST J. 299 (1967).

135. U.N. Doc. E/CN.4/1145, at 13 (1973). Concerning Church-State relations in Brazil, see Kiemen, *Political Transformation of the Brazilian Catholic Church*, 32 AMERICAS 134 (1975).

136. U.N. Doc. E/CN.4/1145, at 18 (1973).

137. N.Y. Times, Mar. 11, 1973, at IV, 11, col. 1. Concerning the general relationship between government and religion in Syria, see Kelidar, *Religion and State in Syria*, 61 ASIAN AFFAIRS 16 (1974). In 1977 Egypt also showed signs of moving away from the dogmatic secularism of the Nasser era and toward traditional Islamic legal principles. The Times, July 16, 1977, at 6, col. 1. Most disturbing was a proposed law mandating the death penalty for apostacy from Islam.

the "specious nature of claims to a monopoly of truth" and to the freedom of individuals "to pursue their own search to relate the ego to other beings and to the universal manifold of events."[138] A secular lawyer brought up in a pluralist, empiricist society would find such an argument reasonable enough.[139] On the other hand, a religious person might feel that a universal norm of religious toleration necessarily carries the unacceptable implication that other beliefs are as "true" or as "worthwhile" as his own.

It could be validly argued that the principle of religious toleration does not involve such a value judgment and that it is simply a principle by which to organize a stable and rational international order. This argument, while tempting, is unacceptable because it is consistent with the proposition that governments can place mild disincentives against "wrong faiths", such as not allowing tax exemption to "false" faiths or publicly encouraging citizens to enroll in one particular church.

The implication that a norm of absolute religious neutrality by states will place all religions on an equal footing is unavoidable. The legal community of Western society could easily rally to such a proposition, but it should not be too surprised to find itself relatively alone.

F. Recent Developments

Because of the fundamental problems outlined above facing the United Nations, activity concerning the area of religious freedom

138. McDougal, Lasswell & Chen, *supra* note 54, at 874-75.

139. For a penetrating analysis of the extent to which the notion of toleration of opposing points of view is a specifically Western, liberal, pluralist, and perhaps outdated point of view, see Wolff, ***Beyond Tolerance***, in A CRITIQUE OF PURE TOLERANCE (R. Wolff, B. Moore, & H. Marcuse eds. 1965). See also Marcuse, ***Repressive Tolerance***, in *id*. For a classic exposition of the thesis that all ideas should be allowed to compete against each other on an equal basis with no more than their own intrinsic merits supporting them, see J. MILL, ON LIBERTY (1859). For the expression of a similar philosophy of toleration, see Beach, ***Basis of Tolerance in a Democratic Society: True and Counterfeit Tolerance***, 57 ETHICS 157 (1947). For a defense of the Mill position and an attack on the critiques of Wolff and Marcuse, see Spitz, ***Pure Tolerance: A Critique of Criticism***, 21 DISSENT 259 (1974). There is an argument presented in J. RAWLS, A THEORY OF JUSTICE 206, 214-16 (1971) which purports not to be based on either skepticism or indifference towards religion. The argument presented, however, involves reasoning from an "original position" in which no one knows in advance what his own religious beliefs are to be. Therefore it appears to be a trifle artificial and is unlikely to appeal to a devout person. For a critique of the Rawls position, see Dworkin, ***Non-neutral Principles***, 71 J. PHIL. 491 (1974).

From a historical viewpoint, we may note that the original justifications which were posited for religious toleration are not appealing to secular thinkers today. The origin of the ideology of toleration was two-fold, with one basis in the mysticism of the German

ground to a halt in the late 1960s. The working group of the Commission never went beyond its revisions of the first six articles of the Sub-Commission's 1964 draft declaration nor of the Sub-Commission's 1965 draft convention. The idea of establishing an international legal norm of religious toleration began to look like one whose time would never come.

A fresh start on the project, however, was begun in the early 1970s. A movement was instigated to have a declaration passed by the General Assembly in time for the twenty-fifth anniversary of the Universal Declaration in 1973. Even though this goal proved to be too ambitious, the General Assembly did decide to give the matter priority in 1972.[140] Then in 1973, the General Assembly presented the problem once again to the Commission on Human Rights, directing it to submit a draft declaration to the Twenty-ninth Session of the General Assembly in 1974. The General Assembly also invited member states to comment on the work that had been done to date in the field.[141]

In 1974 the Commission on Human Rights established a new working group to carry out this new assignment. In its first session in 1974, the new group adopted a title for the draft declaration: Draft Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. The group also adopted the first paragraph of the preamble to the draft declaration.[142] By 1977 this draft preamble had been completed,[143] and the working group then began the preliminary discussion of the substantive portion of the declaration.

Although the working group is far from completing its appointed task, and because no standing United Nations body has passed on the work completed to date, any assessment of progress is necessarily tentative. Nevertheless, there are four points pertaining to the new draft preamble which are worthy of note.

Sebastien Franck and the other in the neo-Platonic-*cum*-humanist tradition which originated in the neo-Platonic academy of Renaissance Florence. *See* Sabine, ***The Colloquium Heptaplomeres of Jean Bodin***, in PERSECUTION AND LIBERTY: ESSAYS IN HONOR OF GEORGE LINCOLN BURR 271 (1931). Neither of these strains of thought find much favor among international lawyers today. Concerning the inadequacy of the later Lockean justification of toleration, see note 19 *supra*.

140. G.A. Res. 3027, 27 U.N. GAOR Supp. (No. 30) 72, U.N. Doc. 8730 (1972).

141. G.A. Res. 3069, 28 U.N. GAOR Supp. (No. 30) 77, U.N. Doc. A/9030 (1973).

142. COMMISSION ON HUMAN RIGHTS, REPORT ON THE THIRTIETH SESSION, 56 U.N. ESCOR, Supp. (No. 5) 18-22, U.N. Doc. E/5464 (1974).

143. *See* Appendix Three of this article *infra*. COMMISSION ON HUMAN RIGHTS, REPORT ON THE THIRTY-THIRD SESSION, 62 U.N. ESCOR, Supp. (No. 6) 47-48, U.N. Doc. E/5927 (1977).

The first is that, unlike the Sub-Commission draft of 1964,[144] this new draft recognizes that "religion or belief . . . is one of the fundamental elements . . . of life and . . . should be fully respected and guaranteed."[145] The 1964 draft differed in that it never spoke of a right of religious freedom as an autonomous right, but only as an integral part of the United Nations Charter and of the Universal Declaration of Human Rights. The difference may prove to be insignificant, but it may indicate a willingness on the working group's part to view religious freedom as the unique problem that it undoubtedly is.

The second point concerning the draft preamble is the position that it accords to the right to "manifest" one's beliefs. In 1975 the group was working with two rival drafts—one submitted by the Netherlands[146] and the other by Byelorussia.[147] The latter draft did not contain the word "manifest", while the former draft posited the existence of a "right to manifest one's religion or belief in worship, observance, practise [*sic*] and teaching." The working group made an uneasy compromise. In its final draft, the right to "manifest" one's belief was incorporated, but only in such a context that it carries much less force than it would have in the Netherlands draft:

> *Considering that* the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of nondiscrimination and equality before the law and the right to freedom of thought, conscience, religion and belief, including the right to choose, manifest and change one's religion or belief.[148]

The third point of interest concerns the final version of paragraph 5. Once again, there had been serious disagreement between the preliminary drafts of the Netherlands and Byelorussia. The latter stated that "[g]overnments, organizations and private persons should strive . . . to combat any exploitation or abuse of religion or belief for political or other ends inconsistent with the purpose and principles of the present Declaration."[149] The Netherlands draft, on the other hand, provided that "[g]overnments, organizations and private persons . . .

144. The draft completed by the working group which the commission had appointed in 1964 did not contain a preamble. *See* text accompanying note 93 *supra*. Therefore, that draft does not pertain to this discussion.

145. *See* Appendix Three, para. 4, of this article *infra*.

146. E/CN.4/L.1289/Add.1 (1975), *reprinted in* COMMISSION ON HUMAN RIGHTS, REPORT ON THE THIRTY-FIRST SESSION, 58 U.N. ESCOR, Supp. (No. 4) 38, U.N. Doc. E/5635(1975).

147. E/CN.4/5464 (1975), *reprinted in id.* at 37.

148. *See* Appendix Three, para. 2, of this article *infra*.

149. *See* note 147 *supra*.

should not engage in any activities or perform any acts aimed at the destruction of any of the purposes and principles set forth in the present Declaration."[150] Although this difference in wording may appear trivial, it signifies a profound difference in approach to the issue of religious toleration. In principle both drafts agree that the freedom of religion should not be misused. However, the Byelorussian draft betrays the fear that religion or belief *itself* might be misused, while the Netherlands text displays no similar concern. The Netherlands draft was primarily concerned with protecting religion from the State or any other potentially hostile group; while the Byelorussian draft was more concerned about protecting rival religions from each other, though it is difficult to avoid suspecting that the real concern was about protecting the *State's* interests from the activities of churches. In 1976 the working group, essentially adopted the Byelorussian version:

> *Considering* that . . . the use of religion or belief for ends inconsistent with the Charter of the United Nations . . . is inadmissible.[151]

The fourth point of interest concerning the draft preamble is the disagreement which surfaced within the working group in 1977. This disagreement centered around the text of a new paragraph 6 to the preamble, which was to be inserted before the previously agreed upon paragraph 6, but not to replace it. This proposed paragraph related freedom of religion or belief to "the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination."[152] There was little dispute that the preamble should posit a link between the two phenomena. The question was the form that this link should take. Various Western states, and this included the Holy See, believed that the paragraph should state that freedom of religion or belief *can* or *could* make a contribution to the attainment of the other goals mentioned, while various Soviet bloc texts held that freedom of religion or belief *should* make such a contribution.[153] Once again, the difference is subtle but significant. To one group, freedom of religion is a goal which, although possibly useful in the struggle to achieve other political, social, or economic ends, should be pursued for its own sake. To the other group, freedom of religion is seen as useful primari-

150. *See* note 146 *supra*.

151. *See* note 143 *supra*.

152. COMMISSION ON HUMAN RIGHTS, REPORT ON THE THIRTY-THIRD SESSION, 62 U.N. ESCOR, Supp. (No. 6) 48, U.N. Doc. E/5927 (1977).

153. *Id*. at 44-47.

ly in the pursuit of other, more urgent causes. The working group adopted the Soviet bloc position on this question as well.

At its 1977 session, the working group began consideration of the operative parts of the draft declaration. Scant progress was made, as was evident in the fact that the group only met for four out of its five scheduled meetings "owing to the heavy workload of the Commission."[154] The working group's only accomplishment in this area was to hold a preliminary discussion on two rival drafts of first articles, one submitted by Byelorussia and the other by Italy.[155] No decision was reached.

V. CONCLUSION

As of mid-1977 the outlook for the future was hardly promising. In three sessions the Commission on Human Rights has been able to agree upon only a draft preamble to a declaration. This slow progress indicates that we must expect a long wait until a convention containing enforcement machinery is drafted, adopted by the General Assembly, and ultimately ratified by enough states to take effect.

At first glance it appears difficult to explain how the United Nations' efforts against racial discrimination could work out so differently from its efforts against religious intolerance. The Declaration on the Elimination of All Forms of Racial Discrimination[156] passed the General Assembly as early as 1963. The Convention on Racial Discrimination[157] was opened for signature in 1965 and came into force in 1969. Yet, more than eight years later, there is less than a complete draft preamble prepared for a declaration on religious intolerance. The reason for this striking difference should be apparent. The right to religious freedom is a right that is unique in the international human rights field, for it is not merely a right to have one's personal integrity

154. *Id.* at 46.

155. The Byelorussian draft article 1 read as follows:

> Everyone has the right to freedom of thought, conscience and religion. This right shall include freedom of theistic, non-theistic and atheistic beliefs as far as their choice and change are concerned, freedom to exercise and express religious beliefs and freedom to express anti-religious views.

The Italian draft article 1 read as follows:

> Everyone has the right to freedom of thought, conscience and religion. This right shall include, *inter alia*, freedom to adhere or not to adhere to a religion or belief, to manifest and practise a religion or belief, or to change religion or belief, in accordance with the dictates of his conscience, without being subjected to any coercion likely to impair his freedom of choice or decision in the matter.

Id. at 45-46.

156. G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) 35, U.N. Doc. A/5515 (1963).

157. G.A. Res. 2106 (Annex), 20 U.N. GAOR Supp. (No. 14) 47, U.N. Doc. A/6014 (1965); 660 U.N.T.S. 195 (1965).

protected against the instrusion of governments; it is also a right to owe one's loyalty to a nongovernmental institution.

Therefore it is incorrect to take the position that "religious liberty is simply civil liberty exercised in the field of religion."[158] It is also inadequate to view the problem in terms of preventing discrimination against persons because of their religion.[159] States have little trouble conceding in principle that their citizens have the right to think and believe as they wish, so long as the state retains the right to control the *conduct* of nonbelievers. The wide array of sophisticated psychological weaponry that is available[160] to the modern totalitarian state makes it possible for states to negate, at least to some extent, any "right" which an individual may have to stand aloof.[161] Thus, to make a grant of liberty of conscience is a fairly safe thing for a state to do. However, it is not safe for a state to grant a charter of liberty to a corporation, such as a church, which ultimately may be hostile to it. The greater the

158. Garrison, *Democratic Rights in the Roman Catholic Tradition*, 15 CHURCH HISTORY 195, 200 (1946).

159. McDougal, Lasswell & Chen, *supra* note 54, at 898 appear to take essentially this position:

> The demand to conform typically goes beyond insistence on verbal conformity; the words must also be uttered in tones that are recognized modes of expressing conviction. "Tentativeness" arouses suspicions of disloyalty or treason and the range of tolerance afforded to variety and deviation is narrowed. . . .

The contention of this article is that it is not "tentativeness" towards the established creed that concerns governments so much as conviction in the cause of a rival faith.

160. *See, e.g.*, J. BROWN, TECHNIQUES OF PERSUASION (1963); J. MEERLOO, MENTAL SEDUCTION AND MENTICIDE: THE PSYCHOLOGY OF THOUGHT CONTROL AND BRAINWASHING (1956); C. MILOSZ, THE ACTIVE MIND (1955); R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF "BRAINWASHING" IN CHINA (1961); R. HUNTER, BRAINWASHING IN RED CHINA (1900); *and* T. BEISECKER, THE PROCESS OF SOCIAL INFLUENCE: READINGS IN PERSUASION.

The psychological theory of cognitive dissonance theorizes about the relationship between attitude and behavior; a change in the latter can work to effect a change in the former, as well as *vice versa*. *See* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1954); Festinger & Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL AND SOCIAL PSYCH. 203 (1959); J. BREHAM & A. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962); Brock, *Cognitive Restructuring and Attitude Change*, 64 J. ABNORMAL AND SOCIAL PSYCH. (1962); Blum & Wright, *Degree of Effort and Attitude Change Under Forced Compliance*, 1 PSYCHONOMIC SCIENCE 67 (1964); Gollob & Dittes, *Different Effects of Manipulated Self-Esteem on Persuasibility Depending on the Threat and Complexity of the Communication*, 2 J. PERSONALITY AND SOCIAL PSYCH. 195 (1965); Helmrich & Collins, *Studies in Forced Compliance: Commitment and Magnitude of Inducement to Comply As Determinants of Opinion Change*, 10 J. PERSONALITY AND SOCIAL PSYCH. 75 (1968); THEORIES OF COGNITIVE CONSISTENCY: A SOURCEBOOK (R. Abelson & Others Eds. 1968); *and* C. KIESLER, THE PSYCHOLOGY OF COMMITMENT: EXPERIMENTS LINKING BEHAVIOR TO BELIEF (1971). The dividing line between belief and behavior has been found to be not nearly so sharp as was once assumed.

161. For an exposition of the thesis that toleration is a non-neutral principle which, in fact, works in favor of the established order, see Marcuse, *supra* note 139.

wealth and influence of the corporation, and the more liberty it is granted in its operations, the more has a state to fear from it.

The Western states, in a sense, have been singularly favored by history to accept the principle of co-existence of Church and State. Out of the appalling religious wars of the Sixteenth and Seventeenth Centuries emerged an "historic compromise" to the effect that both Church and State were limited in power and that each should function unhindered by the other in its own respective sphere. This compromise, although tacit, was nevertheless effective. In this case, however, it was domestic experience and not international law which dictated how this division of jurisdiction was to take place.

Eastern European and Middle Eastern states experienced no such fortune. When the original *millet* system of dividing power between strong churches and a weak imperial government was suddenly shattered in the Nineteenth Century by the onset of Western-style nationalism, they did not have two centuries of experience, as did the West, in which to gradually settle upon a new, workable relationship between State and Church. The achievement of an instant solution in this area has been hopelessly complicated by the serious problems which nearly all of the new states experienced with minority groups, which were sometimes of minority faiths as well.

Under such circumstances, the imposition of legal obligations upon these new and largely socialist states to uphold "freedom of religion" had the major effect of discrediting altogether the notion of international guarantees of religious liberty. At the time when promises of religious freedom were being written assiduously into the constitutions of the various new states, the appalling spectacle of a resurgence of anti-Semitism already had achieved the upper hand in Eastern Europe. The new nation-states were indeed jealous gods.

The United Nations' attempts to formulate a universal norm of religious toleration to replace the old *ad hoc* system of minority guarantees is to be welcomed. However, much damage has already occurred. Even before the rise of the totalitarianism of the Twentieth Century, the experiences and interests of the East and West had become deeply divergent. The communist governments of Eastern Europe simply have continued the struggle for limited freedom for churches which had begun in the last century.

In early 1976 then Ambassador to the Commission on Human Rights, Leonard Garment, delivered a scathing public attack on the extent to which the Commission had allowed its work to be influenced by political factors. He made specific reference to the slowness of the

progress in the area of religious freedom, terming it "a scandal of neglect."[162] He was correct in the sense that the world is justified to consider the delay of approximately thirteen years in the formulation of a declaration on religious freedom as excessive.

Yet "neglect" is not precisely the appropriate word to use. Whatever the defects and faults of the Commission's proceedings, utter indifference to the problem is not one of them. The divisions and differences of opinion concerning the definition of religious freedom are genuine and unlikely to be resolved quickly.

In a strange sense, there may be room for some optimism in the slowness of the Commission's proceedings. Those states pressing so strenuously for a narrow reading of religious toleration must feel that the ultimate United Nations position on the subject will be more than a mere academic construction or philosophical debating point. The reason is that this particular human right is unique in that it will be backed up by something which many states genuinely fear—an organized constituency. It is doubtful that there exists any organization or group of organizations with so strong a hold on the hearts and minds of persons the world over as the churches. To give the churches a legal license to function autonomously in certain areas of life is among the most dangerous threats that repressive states face. Therefore, we should not anticipate speedy progress in this area, although progress there has been. If the battle shows no immediate sign of ending, perhaps we can take some comfort in that there are indications that it is a battle worth fighting.

162. N.Y. Times, Feb. 1, 1976, at 18, col. 3. On the other hand, in March 1977, President Carter did not refer to the problem of religious discrimination in his speech to the United Nations. 57 DEP'T STATE BULL. 229 (1977).

APPENDIX ONE

THE SUB-COMMISSION'S 1964 DRAFT DECLARATION ON THE ELIMINATION OF ALL FORMS OF RELIGIOUS INTOLERANCE

The General Assembly,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality of all human beings and seeks, among other basic objectives, to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, in particular as to race, colour, religion or national origin,

Considering that the Universal Declaration of Human Rights proclaims further that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination and against any incitement to such discrimination,

Considering further that the right of everyone to freedom of thought, conscience and religion has been proclaimed in the Universal Declaration of Human Rights, which right includes freedom to change one's religion or belief, and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief in teaching, practice, worship or observance.

Noting that the disregard of human rights and fundamental freedoms through discrimination because of religion and the denial of the right to freedom of thought, conscience and religion has brought in the past untold sorrow to mankind by inflicting grievous suffering on those who were its victims and in injuring those responsible for them,

Considering that in order to eliminate and prevent all such forms of religions intolerance it is vital for Governments to take legislative, educational and other measures to that end, and for organizations and private persons to lend their fullest support to the achievement of this objective,

Convinced that the building of a world society free from all forms of religious intolerance is one of the fundamental objectives of the United Nations,

Solemnly affirms the necessity of adopting national and international measures to that end and in order to secure the universal and effective recognition and observance of the principles set forth below,

Proclaims this declaration:

Article I

Discrimination between human beings on the grounds of religion or belief is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and as an obstacle to friendly and peaceful relations among nations.

Article II

No States, institution, group or individual shall make any discrimination in matters of human rights and fundamental freedoms in the treatment of persons on the grounds of their religion or their belief.

Article III

1. Particular efforts shall be made to prevent discrimination based on religion, especially in the fields of civil rights, access to citizenship and the enjoyment of political rights, such as the right to participate in elections, to hold public office, or in other ways to take part in the government of his country.

2. Everyone has the right to effective remedial relief by the competent national tribunals against any discrimination he may suffer on the grounds of religion or belief, through acts violating fundamental rights granted him by the constitution or by law.

Article IV

Everyone has the right to adhere, or not to adhere, to a religion or belief and to change in accordance with the dictates of his conscience—without being subjected to any pressure, inducement or undue influence likely to impair his freedom of choice or decision in this matter.

Article V

Parents or legal guardians have the right to decide upon the religion or belief in which a child should be brought up. In the case of a child who has been deprived of its parents, the best interests of the child being the guiding principle, their expressed or presumed wish shall be duly taken into account.

Article VI

Everyone has the right to comply with what is prescribed by his religion or belief and shall be free to worship, and profess, in public or in private, without suffering any discrimination on account of his religion or belief and specifically:

1. Every person and every group has the right to worship, either alone or together with others, in public or in private, and to maintain houses of worship in accordance with the prescription of their belief.

2. (i) Every individual has the right in association with others, without any limitation based on the number of members, to form and maintain religious communities and institutions.

(ii) Every religious community and institution has the right, in association with similar religious communities and institutions, to form territorial federations on a national, regional or local basis.

3. Everyone has the right to teach and to learn his religion or belief, his sacred language and religious traditions, either in public or in private. No one shall be compelled to receive instruction in a religion or belief contrary to his convictions or, in the case of children, contrary to the wishes of their parents, or legal guardians. All education shall be directed to promote understanding, tolerance and friendship among all religions and beliefs.

4. Every religious group or community has the right to write, to print and to publish religious books and texts and shall be permitted to train the personnel required for the performance of its practices or rites. No religious group or community shall be prevented from bringing teachers from abroad for this purpose. Every religious group or community shall be enabled to have contacts with communities and institutions belonging to the same religion abroad.

5. (i) Everyone has the right to observe the dietary practices prescribed by his religion or belief. Any individual or any religious community shall be permitted to acquire and produce all materials and objects necessary for the observance of prescribed ritual or practices, including dietary practices.

(ii) Where the State controls the means of production and distribution, it shall help to provide the above-mentioned materials, or the materials and means necessary for their production, to religious communities of the religions concerned and to its members, and if necessary allow them to be imported.

6. 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.

7. Equal legal protection shall be accorded to all forms of worship, places of worship and institutions. Similar guarantees shall be accorded to ritual objects, language of worship and sacred books.

8. Due account shall be taken of the prescriptions of each religion or belief relating to holy days and days of rest, and all discrimination in this regard between persons of different religions or beliefs shall be prohibited.

Article VII

Everyone shall have the right to have marriage rites performed in accordance with the prescriptions of his religion or belief, and no one shall be compelled to undergo a religious marriage ceremony not in conformity with his convictions. Nothing in this Article shall, however, dispense anyone from the obligations to observe other requirements and formalities laid down by the law regarding marriage.

Article VIII

The prescriptions of the religion of a deceased person shall be followed in all matters affecting burial customs, subject to the wishes, if any, expressed by the deceased during his lifetime, or failing that those of his family.

Article IX

Equal legal protection shall be afforded to all cemeteries or other burial place and also to the funeral or memorial rites of all religions or beliefs.

Article X

Religious communities shall have the right to receive the funds necessary for the carrying out of their functions.

Article XI

No one shall be compelled to take an oath of a religious nature contrary to his convictions.

Article XII

No State shall discriminate in the granting of subsidies, in taxation or in exemptions from taxation, between different religions or beliefs or their adherents. However, public authorities shall not be precluded from levying general taxes of from contributing funds for the preservation of religious structures recognized as monuments of historic or artistic value.

Article XIII

1. The freedoms and rights set out in Articles I, II, III, IV, V and XI shall not be subject to any restrictions.

2. The freedoms and rights set out elsewhere in this Declaration shall be subject only to the restrictions prescribed by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the legitimate requirements of morality, health, public order and the general welfare in a democratic society. Any restrictions which may be imposed shall be consistent with the purposes and principles of the United Nations and with the rights and freedoms stated in the Universal Declaration of Human Rights. These freedoms and rights may in no case be exercised contrary to the purposes and principles of the United Nations.

Article XIV

1. All acts directed or intended to prevent or to restrict the freedom of religion or cult shall be prohibited.

2. All incitements to hatred or acts of violence, whether by individuals or organizations against any religious group of persons belonging to a religious community, shall be considered an offense against society and punishable by law and all propaganda designed to foster or justify it, shall be condemned.

3. In order to put into effect the purposes and principles of the present declaration, all States shall take immediate and positive measures, including legislative and other measures, to prosecute and/or declare illegal organizations which promote and incite to religious discrimination or incite to, or use violence for purposes of discrimination based on religion.

4. The United Nations, the specialized agencies, Member States and non-governmental organizations shall do all in their power to promote energetic action, through research, education, information, and appropriate legislation with a view to hastening the elimination of all forms of religious discrimination and intolerance.

APPENDIX TWO

THE SUB-COMMISSION'S 1964 DRAFT DECLARATION AS MODIFIED BY THE WORKING GROUP OF THE FULL COMMISSION (1965)

Article I

Everyone has the right to freedom of thought, conscience and religion. This right shall include freedom to adhere or not to adhere to any religion or [to any religious or nonreligious] belief and to change his religion or belief in accordance with the dictates of his conscience, without being subjected to any coercion likely to impair his freedom of choice or decision in the matter.

Article II

Discrimination between human beings on the ground of religion or belief is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and as an obstacle to friendly and peaceful relations among nations.

Article III

1. No individual or group shall be subjected by any State, institution, group or individual on the ground of religion or belief to any discrimination in the recognition, exercise and enjoyment of human rights and fundamental freedoms.

2. Everyone has the right to effective remedial relief by the competent national tribunals against any acts violating the rights set forth in this Declaration or any acts of discrimination he may suffer on the grounds of religion or belief [with respect to his fundamental rights and freedoms as defined by the Constitution or by law].

Article IV

[1.] All States shall take effective measures to prevent and eliminate discrimination based on religion or belief, in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life. They should enact or rescind legislation where necessary to prohibit such discrimination and take all appropriate measures to combat those prejudices which lead to religious intolerance.

[2.] Particular efforts shall be made to prevent discrimination based on religion or belief, especially in the fields of civil rights,

[access to] citizenship and the enjoyment of political rights, such as the right to participate in elections, to hold public office, or in other ways to take part in the government of the country as well as in the field of labour and employment.

Article V

[1.] Parents or legal guardians have the right to decide upon the religion or belief in which a child should be brought up. In the case of a child who has been deprived of its parents, their expressed [or presumed] wish shall be duly taken into account, the best interests of the child being the guiding principle. [If the child has reached a sufficient degree of understanding, his wish shall be taken into account].

[2.] The decision concerning the religion or belief in which a child should be brought up must not be injurious to its interest or health, and must not do him physical or moral harm. The child must be guarded against practices which might inculcate in him any discrimination on account of religion or belief.

Article VI

Every person and every group or community has the right to manifest their religion or belief in public or in private, without being subjected to any discrimination on the grounds of religion or belief; this right includes in particular:

(*a*) freedom to worship, to assemble and to establish and maintain places of worship or assembly;

(*b*) freedom to teach, to disseminate [at home and abroad], and to learn their religion or belief, and also its sacred languages or traditions;

(*c*) freedom to practise [*sic*] their religion or belief by establishing and maintaining charitable and educational institutions and by expressing the implications of religion or belief in public life;

(*d*) freedom to observe the rites or customs of their religion or belief.

APPENDIX THREE

DRAFT DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF AS OF 1977

(1) *Considering* that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all States Members have pledged themselves to

take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

(2) *Considering* that the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief, including the right to choose, manifest and change one's religion or belief,

(3) *Considering* that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

(4) *Considering* that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

(5) *Considering* that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

(6) *Convinced* that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination,

(7) *Noting with satisfaction* the adoption of several and the coming into force of some conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various forms of discrimination,

(8) *Concerned* by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

(9) *Resolved* to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief.