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The Nature and Minimum Standards of Freedom of Religion or Belief

*Natan Lerner**

I. INTRODUCTION

This article provides an overview of the nature and scope of the minimum standards for freedom of religion or belief in the international community, as regulated by the principal international norms. Although the international community had already addressed racial discrimination, racial hatred, and other human rights issues, the United Nations did not address racial and *religious* discrimination and intolerance until the early sixties, following a series of anti-Semitic outbreaks. The United Nations separated the issues and promptly drafted a declaration and convention against racial discrimination. However, the United Nations did not draft a declaration regarding religion and belief until 1981. Moreover, it does not appear the United Nations will draft a convention regarding religion and belief any time soon, for reasons discussed hereafter.¹

International organizations have adopted measures intended to guarantee freedom of religion or belief at the global and regional levels. These measures have also had some influence on domestic leg-

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1. See *infra* Part IV.C.4. Scholarly literature regarding human rights was criticized for similarly failing to sufficiently address religion, belief, and related issues. This deficiency has been remedied in recent years. Today, there are a fair number of books and articles available that address religion and beliefs and the minimum standards and norms that prevail in the area. See, e.g., MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE (1997); NATAN LERNER, RELIGION, BELIEFS AND INTERNATIONAL HUMAN RIGHTS (2000); RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS (Ted Stahnke & J. Paul Martin eds., 1998); RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES (Johan D. van der Vyver & John Witte, Jr. eds., 1996) [hereinafter RELIGIOUS HUMAN RIGHTS]; BAHIIYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION (1996).

isolation. The measures address issues such as (1) the nature, scope, and other substantive aspects of freedom of religion or belief; inner- and outer-religious freedoms; the expression and manifestation of the freedom; permissible limitations and derogation of the freedom; and how the freedom clashes or interacts with other individual and collective rights, and (2) the procedural aspects available to protect individuals' fundamental rights of freedom of religion or belief, including freedom *from* religion. Some countries have unilaterally addressed the second issue, while other countries have entered into special arrangements with other countries, churches, religious communities, and congregations.

This article attempts to briefly inventory these measures, which govern the sensitive issue of freedom of religion or belief. Where appropriate, this article also refers to other international instruments that indirectly impact freedom of religion or belief and to the interaction between freedom of religion or belief and other rights, including the freedoms of expression, association, and communication; gender rights; the rights of indigenous people and other special populations, such as migrant workers; educational rights; and children's rights. This article also alludes to problems concerning the relationship between the religious group and its individual members and the religious group (be it a religious congregation or community) and the state. Other articles in this Symposium address several of these issues in more depth.

II. THE NEED FOR THE INTERNATIONAL COMMUNITY TO ADDRESS FREEDOM OF RELIGION OR BELIEF

With the beginning of a new millennium, the international community's continued efforts and interest in development, advancement, and technology present the ineluctable question of whether the international community is likewise ready to make additional advancements in the area of freedom of religion or belief by, perhaps, adopting a mandatory treaty based upon an existing draft or other instrument. Conversely, if the international community sees this next step as premature, undesirable, or risky, the question becomes whether it is possible to agree upon another way to place freedom of religion or belief on equal footing with other basic human rights.

None of the several suggestions and proposals to that effect adequately answer why this essential manifestation of human liberty has

received less attention than other fundamental rights. Indeed, religion profoundly impacts the state of the world. Tragic events that demonstrate the powerful influence of ethnicity and religion, and in some cases require the intervention of massive international force, are but additional proof that religion plays a weighty role in xenophobia, racism, group hatred, and even territorial changes. Furthermore, religious persecution and conflicts between believers and non-believers; between different churches in multireligious societies; between dominating, protected, or preferred religions and religious minorities; and between newly established religions are all common phenomena. Some even argue that a shift from violence between sovereign states to conflicts between ethnic and religious groups is taking place.² In fact, the problem is so pervasive that the United States, the major political force in the world, considered it necessary to go through the complicated legislative process (legally and otherwise) to enact domestic legislation to protect endangered religious groups abroad.³ These problems, and the United States' response, suggest the time is ripe for the international community to give equal attention to freedom of religion or belief.

III. "RELIGION" DEFINED

The notion of "religion" is difficult to define in legal terms. To avoid philosophical and ideological controversy, international and human rights law have prescribed a catalog of rights and the means of protecting those rights, under the agreed heading of "freedom of thought, conscience, and religion," rather than defining the freedoms themselves. All of the basic instruments refer to these three freedoms. Moreover, most of the developed international norms protect the *manifestations* or *expressions* of the freedom of religion or belief.⁴

2. See TRANSNATIONAL RELIGION AND FADING STATES 3-4 (Susanne Hober Rudolf & James Piscatori eds., 1997). See also SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996), which caused considerable controversy.

3. See U.S. DEPARTMENT OF STATE ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (1999); International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (codified at 22 U.S.C. § 6401 (1998)).

4. Problems exist with regard to new religious movements and sects, an issue that sparked emotional debates in many countries and led some to enact special provisions. The United Nations Rapporteur on Religious Freedom has dealt with this subject in his recent reports. See the reports submitted by Abdelfattah Amor to the Commission on Human Rights since his appointment in 1987, the last of which is, before this writing, U.N. Doc. E/CN.4/

A major politically-motivated confrontation between Western and Communist countries was avoided by inserting “belief” after “religion.” The terms are intended to refer to both theistic views of the universe, as well as atheistic, agnostic, rationalistic, and other views excluding religion and religious norms.⁵

IV. THE DEVELOPMENT OF RELIGIOUS RIGHTS

A. Early Protection of Religious Freedom

Historically, the protection of religious freedom preceded the protection of other rights.⁶ It commenced with provisions in bilateral treaties modifying the traditional rule, *cuius regio eius religio*, a weak, limited ad hoc system that only worked in favor of those religious minorities that a signatory state sought to protect, usually on the grounds of reciprocity.⁷ Other states unilaterally extended diplomatic protection to persecuted religious minorities. Still other states adopted the principle of religious tolerance and promulgated some rules on religious freedom in their legislation.⁸ The Augsburg (1555), Westphalia (1648), and Vienna (1815) treaties were important stages in this development, showing that the international community was relatively accepting of the principle of humanitarian

58 (1999). On June 22, 1999, the Council of Europe adopted the *Recommendation 1412, Illegal Activities of Sects*, EUR. PARL. ASS. DEB. 18TH Sess. (June 22, 1999). The Council considered it “undesirable” to enact major legislation on sects and reaffirmed its commitment to freedom of conscience and religion. *Id.*

5. I have listed judicial attempts to define religion and references from legal dictionaries in my book, LERNER, *supra* note 1, at 3-4. See also TAHZIB, *supra* note 1, at 1-3; RELIGIOUS HUMAN RIGHTS, *supra* note 1.

6. See John P. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 171, 176 (Theodor Meron ed., 1985); Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS 209 (Louis Henkin ed., 1981); PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS (1983).

7. At this stage (the 16th century) the abandonment of this traditional rule—that the sovereign’s religion should be the religion of everyone under his jurisdiction—did not imply the establishment of a general freedom of religion.

8. On these early developments, see ALESSANDRA LUINI DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1971). See also, EVANS, *supra* note 1, at 42. On religious rights and minorities, see generally Natan Lerner, *The Evolution of Minority Rights in International Law*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77-101 (Catherine Brolmann et al. eds., 1993), and PATRICK THORNBERRY, INTERNATIONAL LAW AND RIGHTS OF MINORITIES (1991).

intervention. Such intervention was on pragmatic grounds, however, without any philosophical or legal justification. This period culminated with the French and American revolutions.⁹

B. Post-World War I Protection of Religious Freedom

The next relevant step toward the protection of religious freedom was the unsuccessful, but interesting, regime that developed after World War I based upon Article 22 of the Covenant of the League of Nations, which guaranteed freedom of conscience and religion. Treaties and states' unilateral statements on religious freedom sought to ensure the protection of national, ethnic, religious, cultural, and linguistic minorities.¹⁰ This protection included individual and collective religious rights. This system failed, however, with the breakdown of the League of Nations, a consequence of the general political situation preceding World War II.

C. Post-World War II Protection of Religious Freedom

After the 1945 San Francisco Conference and the establishment of the United Nations, the international community, suspicious of the validity and genuineness of the assertion of collective and group (including religious group) rights, shifted its emphasis from protecting collective and group rights to affording protection to individual persons on the basis of individual rights and nondiscrimination. Persons whose rights were violated or jeopardized because of a group characteristic—be it race, color, religion, ethnic or national origin, culture, or language—would now be protected purely on an individual basis.¹¹ The issue of minority group rights, although not com-

9. On religious rights under national law, see ARCOT KRISHNASWAMI, *STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES*, U.N. Doc. E/CN.4/Sub.2, U.N. Sales No. 60.XIV.2 (1960).

10. The literature on the minority treaties is immense and cannot be listed here. Recent works include FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* (1991), especially Chapter IV; Felix Ermacora, *The Protection of Minorities Before the United Nations*, in *RECUEIL DES COURS* 182/IV 247, 347 (1983); NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (1991); THORNBERRY, *supra* note 8; and *THE PROTECTION OF MINORITIES AND HUMAN RIGHTS* (Yoram Dinstein & Mala Tabory eds., 1992). On the interwar experience, see JACOB ROBINSON ET AL., *WERE THE MINORITIES TREATIES A FAILURE?* (1943).

11. See Lerner, *supra* note 8; WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* (1983).

pletely ignored, was not addressed in the early United Nations texts mainly because several member states were dealing with minority problems and the discredit of the inter-war system.¹²

An important exception to the international community's failure to address group rights was the International Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), adopted on December 9, 1948, one day before the Universal Declaration of Human Rights.¹³ Article II of the Genocide Convention specifically includes in the notion of genocide the intent to destroy, in whole or in part, a "religious group."¹⁴ Although the victims of the crime will always be individuals, the target of the crime is the group, be it religious or otherwise. The Genocide Convention clearly addresses crimes such as those committed in the 1990s under the guise of "ethnic—meaning also religious—cleansing."¹⁵

1. *Universal Declaration of Human Rights*

Except for prohibiting the discrimination of persons on religious grounds, the United Nations Charter does not deal specifically with religious rights. The first United Nations instrument to address the subject was the 1948 Universal Declaration of Human Rights ("Universal Declaration").¹⁶ The seminal Article 18 greatly influenced the 1966 Covenant on Economic, Social and Cultural Rights,¹⁷ the 1966 Covenant on Civil and Political Rights,¹⁸ the re-

12. See Lerner, *supra* note 8; THORNBERRY, *supra* note 8; Lerner, *Religious Human Rights under the United Nations*, in RELIGIOUS HUMAN RIGHTS, *supra* note 1, at 79, 85-86.

13. For the text of the Genocide Convention, see INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 130.1 (Richard B. Lillich ed., 2d ed. 1990) [hereinafter INTERNATIONAL INSTRUMENTS]. On the subject generally, see NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY (1960).

14. INTERNATIONAL INSTRUMENTS, *supra* note 13, at 130.1. Article II refers to "national, ethnical, racial or religious groups, as such." *Id.*

15. On the international community's response to ethnic cleansing in the 1990s, see *infra* Part IV.D.

16. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 440.1. On the Universal Declaration, see generally John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS, THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21 (1979); NEHEMIAH ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION (1958); and THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Asbjørn Eide and Gudmundur Alfredsson eds., 1992), particularly Martin Scheinin's article, *Article 18*, contained therein at 263.

17. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 180.1.

gional treaties, and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (“1981 Declaration”).¹⁹ It reads:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.²⁰

Article 18 consists of three parts. First, it guarantees the right to freedom of thought, conscience, and religion, generally described as the *forum internum*.²¹ This is a broad category, which includes the right to profess a religion or to profess none, *i.e.*, to believe or not believe. The term “belief” twice follows the term “religion.”²² “Belief” should be interpreted strictly in connection with the word “religion.” It does not refer to political, economic, scientific, or other beliefs. The term “belief” was incorporated into the Universal Declaration to protect the right to profess nonreligious or atheistic convictions.

It may be legitimate to consider the freedoms of conscience and religion as included in the freedom of thought. However, freedom of conscience was not universally considered a consolidated legal concept at the time of the drafting of Article 18. This freedom is frequently discussed under the heading of “conscientious objection,” not an exclusively religion-related issue. The reference to “freedom of conscience” was incorporated despite some opposition. The phrase refers to pacifism, obedience to superior orders, the power of the state to impose obligations in areas such as taxation, and other controversial problems regarding matters of principle for the individual.

Second, Article 18 addresses conversion and religious proselyting,²³ issues that became more difficult when the 1966 Covenants and the 1981 Declaration were drafted.²⁴ By the time those docu-

18. *See id.* at 170.1.

19. *See id.* at 490.1.

20. *Id.* at 490.2.

21. *See id.* at 440.4.

22. *See id.*

23. *See id.*

24. For a discussion of the 1966 Covenants and the 1981 Declaration, see *infra* Part IV.C.3 and Part IV.C.4, respectively.

ments were drafted, the right to teach and disseminate one's religion and to conduct proselyting activities became controversial matters. Those matters are beyond the scope of this article. They may sometimes involve a clash with rights such as privacy, interference with the integrity of some group identities—as when ethnicity and religion are closely related—and even illegal acts. Such illegal acts may include the abuse of conversion and proselyting rights, coercion of “captive audiences,” and the use of improper enticements.

Third, Article 18 addresses the external forum or, put another way, the manifestations of religious freedom.²⁵ Unlike freedom of thought and conscience, which can only be limited by complicated psychological techniques that influence the human mind, problems arise regarding manifestations of religious rights because those rights are more likely to be derogated. Given these problems, this aspect of religious freedom deserves special scrutiny.

2. *The Krishnaswami study*

Arcot Krishnaswami's study,²⁶ submitted in 1959, was an important step in the United Nations' identification and protection of religious freedoms.²⁷ The study was based on information contained in 82 country monographs and established principles that the Sub-Commission later adopted, and which had considerable influence on future documents. The 1981 Declaration²⁸ and pending Draft Convention²⁹ incorporate many of its principles. The study did not define the term “religion” but did clarify that the term “beliefs” included attitudes concerning religion such as agnosticism, atheism, and rationalism, in addition to theistic creeds. However, these terms are not defined either.

Krishnaswami analyzed the notions of freedom of thought, conscience, and religion as legal rights.³⁰ He referred to the prohibition of discrimination, dealt with the crucial issue of proselyting and conversion, and detailed the contents of the right to manifest religion, as

25. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 440.4.

26. Krishnaswami was appointed as Special Rapporteur by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

27. See KRISHNASWAMI, *supra* note 9.

28. For a discussion of the 1981 Declaration, see *infra* Part IV.C.4.

29. For a discussion of the Draft Convention, see *infra* Part IV.C.4.

30. See KRISHNASWAMI, *supra* note 9, at 13-14.

well as permissible limitations on it.³¹ He also dealt with the nature and rights of religious organizations; the relationship between those organizations and their members; and the scope of the concepts of teaching, practice, worship, and observance, embracing all possible manifestations of religion.³² Krishnaswami stressed the collective aspects of religious rights: assembly, association, organization, and international ties and contacts.³³

Krishnaswami's catalog of religious rights embraces worship, processions, pilgrimages, symbols, funeral practices, marriage and divorce, teaching, and appointment of personnel.³⁴ He also lists permissible limitations on religious rights and discusses oaths, objection to military service and other conscientious objections, compulsory medical treatment, and other particularly difficult issues.³⁵ Further, he discusses different approaches to the state-religion and state-religious community relationship.³⁶

3. *The 1966 Covenants*

The United Nations took the next step in identifying and protecting religious rights when it promulgated the 1966 International Covenant on Economic, Social and Cultural Rights³⁷ and the 1966 International Covenant on Civil and Political Rights.³⁸ Eighteen years had elapsed since the adoption of the Universal Declaration. Despite the evolution of legal thought during that time, which influenced instruments such as the 1965 Convention on Racial Discrimination ("1965 Convention"),³⁹ the text of the 1966 Covenants re-

31. *See id.* at 16-18.

32. *See id.* at 15, 18-19.

33. *See id.* at 18-19.

34. *See id.* at 26-36.

35. *See id.* at 36-39.

36. *See id.* at 39-46.

37. *See* INTERNATIONAL INSTRUMENTS, *supra* note 13, at 180.1.

38. *See* INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.1. Some of the many works on the 1966 Covenants are Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS* 126 (Philip Alston ed., 1992); DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1991); *HUMAN RIGHTS IN INTERNATIONAL LAW* (Theodor Meron ed., 1991); and MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS* (1993); Partsch, *supra* note 6, at 209.

39. *See* INTERNATIONAL INSTRUMENTS, *supra* note 13, at 160.1.

flects the Universal Declaration's general orientation and trends.⁴⁰ This can be attributed to the slow drafting process and the impact of weighty philosophical and political issues on the process, including conversion, proselyting, and the conflict between universal human rights and cultural relativism. Although several other internationally binding instruments, some of which were widely ratified, contain provisions related to religious rights,⁴¹ the 1966 Covenant on Civil and Political Rights is presently the only binding treaty specifically containing a coherent articulation of such rights.⁴² The Human Rights Committee, which implements the 1966 Covenant on Civil and Political Rights, also gave considerable attention to the subject, as evidenced by its issuance of a specific General Comment in 1993.⁴³ This Comment is of great value in interpreting religious norms.

Articles 18, 19, 20, and 27 of the 1966 Covenant on Civil and Political Rights are relevant to religious rights.⁴⁴ Article 18 is seminal. The first paragraph generally tracks the language in Article 18 of the Universal Declaration, with minor changes.⁴⁵ The Covenant's Article 18 does not, however, explicitly refer to the right to change one's religion.⁴⁶ In an effort to compromise, it reads: "The right to freedom of thought, conscience and religion [the inner forum] . . . shall include freedom to have or to adopt a religion or belief of his choice."⁴⁷ Most specialists interpret the Covenant's Article 18 as fully recognizing the right to change religion, as proclaimed by the Universal Declaration.⁴⁸ But its failure to explicitly protect the right to change religion began a downward trend, which became more

40. See *supra* Part IV.C.1.

41. See Lerner, *supra* note 12, at 79.

42. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.1.

43. For its text, see *Human Rights Committee, General Comment No. 22, Article 18*, 48th Sess., U.N. Doc. HRI/GEN/I/Rev.1, at 35 (1994) [hereinafter *General Comment No. 22*].

44. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.7-170.8, 170.10.

45. See *id.* at 170.7.

46. See *id.*

47. *Id.*

48. See, e.g., Partsch, *supra* note 6, at 210-11; Martin Scheinin, *Article 18, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY*, *supra* note 16, at 263; J.A. Walkate, *The Right of Everyone to Change His Religion or Belief*, 30 NETH. INT'L L. REV. 146, 153 (1983).

pronounced and very problematic during the preparation and adoption of the 1981 Declaration.

Article 18(2) prohibits “coercion” that would impair a person’s freedom to have or to adopt a religion or belief.⁴⁹ The text does not define “coercion,” but it should be read as meaning not only the use of force or threats but also more subtle forms of illegitimate influence, such as family considerations, public standing, and social relations. Use of such tactics is less than illegal, but so are some material enticements.

Article 18(3) deals with limitations⁵⁰ on the freedom to manifest one’s religion or belief “as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁵¹ Article 4 of the Covenant on Civil and Political Rights incorporates the whole of Article 18 as an article that cannot be derogated even in times of public emergency.⁵²

Significantly, Article 18 does not mention national security as an appropriate justification for religious discrimination by a state. In a delicate area such as religious rights, limitations must be interpreted narrowly. Article 18 only permits limitations upon manifestations or the practice of religion, namely the external forum, if such limitations are prescribed by law.⁵³ The internal forum cannot be restricted or limited. This distinction is, of course, of the greatest importance. Judicial bodies in several countries have, out of necessity, intervened in religious practices such as the slaughtering of animals, the wearing of turbans, skullcaps, veils and head-coverings, the growing of beards, and work on specific days. Moreover, some religious groups’ rites, customs, and rules of behavior clash with public order and morality norms of the general population in areas such as education, health, gender, and family law. This is a delicate issue, in which there may be frequent clashes between what a society may consider its minimum

49. INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.8.

50. On limitations in the 1966 Covenant on Civil and Political Rights, see Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 6, at 72, 78-91, and Alexandre Charles Kiss, *Permissible Limitations on Rights*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 6, at 290, 295-310.

51. INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.8.

52. *See id.* at 170.2. Articles 29(2) and 29(3) of the Universal Declaration on Human Rights are also relevant.

53. INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.8.

legal standard and minority religions' religious attitudes grounded in history and culture.⁵⁴

The last paragraph of Article 18 deals with parental rights in the field of education, a highly sensitive area.⁵⁵ The UNESCO Convention Against Discrimination in Education,⁵⁶ the 1981 Declaration,⁵⁷ the Convention on the Rights of the Child,⁵⁸ and other global and regional texts address this subject. International judicial or quasi-judicial decisions on the topic have also been numerous.

Article 19 deals generally with freedom of expression.⁵⁹ Article 20(2) imposes upon states that are parties to the 1966 Covenant on Civil and Political Rights the duty to prohibit by law the advocacy of religious hatred that incites to discrimination, hostility, or violence.⁶⁰ Several states objected and entered reservations to Article 20(2), seeing in it a limitation on freedom of expression.⁶¹ Article 20(2) should be compared with Article 4 of the 1965 Convention.⁶² The Human Rights Committee, in its General Comment on Article 20, stressed Article 20(2)'s mandatory character and full compatibility with freedom of expression.⁶³

Article 27 deals with minorities, including religious minorities.⁶⁴ Scholars are divided on the merits of Article 27 and the scope of its protection.⁶⁵ Moreover, Article 27 has, to some extent, been superseded by the 1992 United Nations Declaration on the Rights of Per-

54. For an examination of these issues, see Leon Sheff, *Tribal Rites and Legal Rights*, 18 ISRAEL YEARBOOK ON HUMAN RIGHTS 153 (1988); Aviam Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350 (1989); and Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795 (1992).

55. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.8.

56. See *id.* at 330.1.

57. See *id.* at 490.1.

58. See *id.* at 423.1.

59. See *id.* at 170.8.

60. See *id.*

61. See SIEGHART, *supra* note 6, at 450, for details of reservations and interpretations entered to article 20.

62. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 160.3-160.4.

63. See *Human Rights Committee General Comment No. 11, Article 20*, 19th Sess., U.N. Doc. HRI/GEN/1/Rev.1, at 12 (1994) [hereinafter *General Comment No. 11*].

64. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 170.10.

65. The controversy primarily concerns whether Article 27 protects only individuals or minority groups as well. Tomuschat takes the first view, while Ermacora, Dinstein, and Capotorti are in favor of a more group-oriented interpretation. See LERNER, *supra* note 10, at 15.

sons Belonging to National, Ethnic, Religious and Linguistic Minorities.⁶⁶ It can also be argued that the 1992 Declaration is a rather timid approach to the issue of minorities' rights.⁶⁷

The Human Rights Committee's General Comment No. 22(48) on Article 18 stresses that the right to freedom of thought, conscience, and religion is "far-reaching and profound."⁶⁸ Article 18 protects theistic and atheistic beliefs, as well as the right not to profess any religion.⁶⁹ It is not limited to traditional religions.⁷⁰ It distinguishes between freedom of thought, conscience, religion, or belief—protected unconditionally—from the freedom to manifest religion or belief.⁷¹ Paragraph 4 lists a broad range of acts encompassed in the freedom to manifest religion or belief, to be exercised individually or in community with others.⁷² The freedom to "have or to adopt" a religion or belief includes the right to replace one's religion with another or to adopt atheistic views.⁷³ Coercion in this respect is barred.⁷⁴ Paragraph 6 regards religious education and parental rights.⁷⁵ Paragraph 7 reiterates the obligatory character of Article 20 of the Covenant, which prohibits advocacy of religious hatred. Paragraph 8 permits limitations only if they are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights of others.⁷⁶ Article 18(3), on limitations, should be strictly interpreted.⁷⁷ Paragraphs 9 and 10 address discrimination when there is a state religion or if a set of beliefs is treated as official ideology.⁷⁸ Conscientious objection is the subject of Paragraph 11.⁷⁹

The General Comment on Article 18 should be viewed as an authoritative interpretation of the scope of Article 18 by the body in

66. See 1 UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 140 (1994) [hereinafter HUMAN RIGHTS].

67. See LERNER, *supra* note 1, at 15.

68. See *General Comment No. 22*, *supra* note 43.

69. *Id.*

70. See *id.*

71. See *id.*

72. See *id.*

73. *Id.*

74. See *id.*

75. See *id.*

76. *Id.*

77. *Id.*

78. See *id.*

79. See *id.*

charge of implementation of the Covenant on Civil and Political Rights. It is also relevant to the interpretation of the 1981 Declaration, to be discussed below.

4. *The 1981 Declaration*⁸⁰

Proclaimed by the General Assembly of the United Nations on November 25, 1981, the 1981 Declaration is presently the most important global instrument regarding religious rights. Although not binding, the 1981 Declaration, like all solemn declarations of the United Nations General Assembly, implies an expectation of observance. It has its origin, together with the draft convention still pending ("Draft Convention"), in the anti-Semitic events of 1959 and 1960 ("swastika epidemics") that prompted the United Nations to start its unfinished legislative process regarding manifestations of racial and religious discrimination and intolerance.⁸¹ The reasons for the United Nations' delayed action regarding religious freedoms have been recounted repeatedly, and the reasons for the interruption of the drafting of a convention in the areas of religion or belief are well known.⁸² International politics have undoubtedly played a major role. In light of this, the 1981 Declaration is clearly the United Nations' most ambitious achievement in this sphere to date, despite the fact that most of its provisions already exist in other binding instruments. The 1981 Declaration permits measures of implementation. Various Special Rapporteurs have already been appointed, and those Special Rapporteurs have produced an extremely valuable body of information. The system requires improvement, but its usefulness is obvious.

The 1981 Declaration took a clear stand with regard to the scope of the term "religion." The 1981 Declaration defines "religion" to

80. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 490.1.

81. General Assembly Resolution 1510 (XV), dated Dec. 12, 1960. For the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities after the incidents, see U.N. Doc. No. E/CN.4/800, para. 163 (1960); and Resolutions 3(XII) and 6(XVI) on the Commission of Human Rights (1960). For an analysis of the 1981 Declaration, see LERNER, *supra* note 10, at 75-96; and Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

82. See LERNER, *supra* note 10, at 46. For the reasons why the United Nations treated religious issues differently than other human rights issues, see also Antonio Cassese, *The General Assembly: Historical Perspective 1945-1989*, in THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 38, at 37.

include “beliefs,” namely nontheistic convictions related to religion, such as atheism, rationalism, agnosticism, and other “beliefs,” provided those convictions are related to religion.⁸³ Beliefs related to politics, social, or economic issues are not included. The controversy regarding issues of conversion and proselyting, present at all stages in the 1981 Declaration’s preparation, threatened to prevent the General Assembly from adopting the Declaration. The controversy, however, was remedied by a compromise incorporated into Article 8 of the 1981 Declaration, which preserves the applicability of the norms of the Universal Declaration and the 1966 Covenants.⁸⁴ This controversy nevertheless weakened the text of the 1981 Declaration. Two decades of protracted and difficult negotiations were required to reach a compromise. Even if one accepts the view of commentators who consider the differences in wording between the Universal Declaration and the 1981 Declaration to be insubstantial, one cannot ignore the argument that the differences may prevent the Declaration from being viewed as part of customary law applicable to some societies.

One of the deficiencies of the 1981 Declaration is the imprecise use of the terms “discrimination,” clearly a legal concept, and “intolerance,” a rather vague concept referring essentially to emotional, psychological, philosophical, and other attitudes likely to generate discrimination, hatred, or persecution.⁸⁵ In fact, the 1981 Declaration gives both words equivalent meaning.⁸⁶ Moreover, the 1981 Declaration, unlike the Draft Convention, does not incorporate provisions on incitement to intolerance or discrimination on religious grounds. The need and desire to compromise in drafting the 1981 Declaration are reflected in the references to conversion, missionary activities and the right to teach and propagate a religion, and the right to leave a religion. They continue the descent already mentioned in the above discussion on the respective provisions in the

83. See LERNER, *supra* note 10, at 80-81.

84. See *id.*

85. WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, (1971), defines “intolerant” as “refusing to allow others the free enjoyment of their opinions or worship.” Elizabeth Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and Discrimination Based on Religion or Belief*, U.N. Doc. E/CN.4/Sub.2/26, at 3 (1987), states that manifestations of intolerance, often extending far beyond discrimination, include stirring up hatred against or even persecuting individuals or groups of a different religion or belief.

86. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 490.2.

1966 Covenant on Civil and Political Rights. The prohibition of discrimination is vague and requires further elaboration. Not every preference based on religion or belief is discriminatory. For example, comparative legislation on religious rights sometimes prefers religions, treats religions differently, and draws distinctions between religions that respond to social and historic realities. In some cases, legislation may be discriminatory; in other cases, it may not. Common sense is the key, particularly since the 1981 Declaration prohibits discrimination, not only by the state, but also by institutions, groups, and persons.⁸⁷

Despite these shortcomings, the 1981 Declaration text constitutes a far-reaching catalog of generally recognized human rights related to religion or belief. Where the 1981 Declaration is unclear, authoritative interpretations of the 1966 Covenant on Civil and Political Rights are helpful.⁸⁸ The 1981 Declaration follows the pattern of the Covenant in drawing the distinction between basic rights in the inner forum—thought, conscience, and religion—and the external manifestations of religion—worship, observance, practice, and teaching.⁸⁹ Only external manifestations, which are in some cases listed, may be limited if such limitations are prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights of others.⁹⁰ The 1981 Declaration does not distinguish the rights of nationals and the rights of aliens.

The catalog of religious rights is listed in the comprehensive, but not exhaustive, text of Article 6.⁹¹ It includes the right to worship and assemble and to maintain places for this purpose; to establish institutions; to make, acquire, and use materials necessary to the religion; to produce relevant publications; to teach the religion in suitable places; to receive financial contributions; to train and appoint appropriate leaders; to observe days of rest and to celebrate holidays and ceremonies; and to communicate with individuals and communities

87. *See id.*

88. *See, e.g.,* Partsch, *supra* note 6; *General Comment No. 22, supra* note 43.

89. *See* INTERNATIONAL INSTRUMENTS, *supra* note 13, at 490.3-490.4.

90. *See id.* at 490.2. On several occasions, the Human Rights Committee and the European Court on Human Rights dealt with the scope of permissible limitations. The European Court clarified the meaning of “morals” in *Handyside v. UK*, 24 Eur. Ct. H.R. (ser. A) (1976).

91. *See* INTERNATIONAL INSTRUMENTS, *supra* note 13, at 490.3-.4.

on religious matters at the national and international levels.⁹² Some of these same rights appear in Articles 16 and 17 of the Conference on Security and Co-operation in Europe's ("CSCE") 1989 Concluding Document of the Vienna meeting.⁹³

On the whole, the 1981 Declaration is a reasonably good text, which, more or less, reflects the international community's present understanding of the minimum standard for matters of religious rights. It is to be noted that the Special Rapporteurs appointed since 1986 have been performing the role usually assigned to formal mechanisms incorporated into mandatory treaties.⁹⁴ There is certainly room for improvement, and some recommendations have been advanced to that effect. But this does not detract from the positive aspects of the document, which enlarges the scope of specific articles in the obligatory 1966 Covenants. So long as no progress is made on the Draft Convention, and there are no signs of such progress, the 1981 Declaration is a very positive step in the international effort to ensure human religious rights.

5. Other global provisions

International human rights should be viewed as a universal, all-embracing system of rights. The specific provisions on religion and belief must be considered in connection with other norms adopted by the international community and with regional instruments regulating religion or belief in some parts of the world. Religion is a wide-reaching spiritual, social, and political phenomenon. Many facets of life are covered by rules dealing with religion or belief.

For these reasons, after the adoption of the United Nations Charter and the early instruments directly concerned with issues involving religion or belief, such as the Genocide Convention and the Universal Declaration, many international law documents, although mainly directed toward the protection of other specific rights, also

92. *See id.* However, rights considered but omitted include the rights to observe dietary practices, to make pilgrimages, and not to be coerced to take an oath of a religious nature.

93. *See* COUNCIL OF EUROPE, HUMAN RIGHTS IN INTERNATIONAL LAW 403 (1995) (emphasizing the rights of religious communities in Principle 16.4); *see also* W. COLE DURHAM, JR., FREEDOM OF RELIGION OR BELIEF: LAWS AFFECTING THE STRUCTURING OF RELIGIOUS COMMUNITIES (1999).

94. Not being a treaty, the 1981 Declaration did not establish such a mechanism. The Reports submitted by the Special Rapporteurs do not differ, however, from similar documents to be submitted under treaty obligations.

address religious rights. Among those international law documents, the following deserve mentioning:

- The Genocide Convention.⁹⁵
- Humanitarian law, consolidated in the 1949 Geneva Conventions and 1977 Protocols.⁹⁶
- The Declaration and Convention on the Elimination of All Forms of Racial Discrimination.⁹⁷ This is an appropriate guideline for state action in the field of religious prejudice, intolerance, and discrimination, which includes the difficult subject of prohibiting and incriminating group discrimination, incitement, and hatred in general.
- The 1979 Convention on the Elimination of All Forms of Discrimination Against Women.⁹⁸ It is impossible to ignore the clash between gender equality and religious practices difficult to eliminate from some traditions, particularly where the personal status law is part of the law of the state.⁹⁹
- The 1960 UNESCO Convention Against Discrimination in Education.¹⁰⁰ This contains norms on the establishment of separate educational systems for religious reasons and on parental rights.¹⁰¹ These norms should be compared to those included in the Convention on the Rights of the Child¹⁰² and have been the subject of frequent judicial or quasi-judicial adjudication.¹⁰³
- The 1958 International Labor Organization Convention (No. 111) Concerning Discrimination in Respect of Em-

95. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 130.1. See *supra* Part IV.C and *infra* Part IV.E for discussions of the Genocide Convention.

96. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 70.1, 80.1, 90.1, 100.1, 200.1, 210.1.

97. See *id.* at 160.1.

98. See *id.* at 220.1. On the Convention generally, see THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 53 (1986).

99. See Sullivan, *supra* note 54, at 795. This article contains an extensive bibliography on women's rights. See also HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 71-117 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

100. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 330.1.

101. See *id.* at 330.2.

102. See *id.* at 423.3.

103. See, e.g., *Belgian Linguistic Case*, 6 Eur. Ct. H.R. (ser. A) at 35 (1968); *Kjeldsen et al.*, 23 Eur. Ct. H.R. (ser. A) at 26 (1976); *Angelini v. Sweden*, 10 Eur. Ct. H.R. (ser. A) at 123 (1988).

ployment and Occupation.¹⁰⁴ The quasi-judicial supervisory bodies of the International Labor Organization (“ILO”) had to deal, on many occasions, with issues regarding religious rights of employees, frequently in connection with holy days and days of rest.¹⁰⁵ Another interesting ILO treaty in this context is the 1989 Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries,¹⁰⁶ a partial revision of the 1957 Convention. The new instrument, strongly group-oriented, protects the identities (including religious) of indigenous populations with a view toward ensuring respect for the religious and spiritual values and practices of the interested populations as groups and as individuals.¹⁰⁷

- The 1990 U.N. International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families.¹⁰⁸ This convention contains provisions for the satisfaction of the cultural and religious needs of such migrants and contains an article inspired by Article 18 of the 1966 Covenant on Civil and Political Rights.¹⁰⁹
- The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹¹⁰ This declaration implies some progress as compared to Article 27 of the Covenant on Civil and Political Rights. Its relationship to religious rights is limited.

While many of the listed provisions are consistent with the minimum standard¹¹¹ for religious rights, contradictory rules (and in

104. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 320.1.

105. For the work of the ILO and its struggle against discrimination, see generally N. Valticos, *The International Labor Organization*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 363 (Karel Vasak ed., 1979).

106. See HUMAN RIGHTS, *supra* note 66, at 475. For an analysis of the 1989 Convention (No. 169) concerning Indigenous and Tribal Populations or Peoples, see LERNER, *supra* note 10, at 99-114.

107. See HUMAN RIGHTS, *supra* note 66, at 475.

108. See HUMAN RIGHTS, *supra* note 66, at 554.

109. See *id.* For a critical analysis, see Ved P. Nanda, *The Protection of the Rights of Migrant Workers*, 2 ASIAN AND PAC. MIGRATION J. 161 (1993).

110. See HUMAN RIGHTS, *supra* note 66, at 140. For a comparison with other provisions on minorities, see LERNER, *supra* note 1, at 33-35.

111. See HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 6 (Abdullah Ahmed An-Naim ed., 1992); Fernando R. Teson, *International*

some cases even divergent principles) have developed in areas such as gender and minority rights. This, again, raises the issue of universalism versus cultural relativism with respect to some major religions, new religions, and sects in particular.

*6. Regional norms and special agreements*¹¹²

A study of religious rights cannot ignore the following: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms;¹¹³ the 1969 American Convention on Human Rights;¹¹⁴ the documents adopted by the Organization (formerly Conference) on Security and Co-operation in Europe;¹¹⁵ and the African Charter on Human and Peoples' Rights.¹¹⁶ These instruments should be compared to the global rules.

At the European level particularly, a comprehensive and important jurisprudence has developed as a consequence of the work of the European Court and former European Commission on Human Rights. These European bodies adjudicated issues such as the mandatory use of crash helmets, compulsory membership in health services, compulsory insurance, religious needs of prisoners, the status of religious congregations, the rights of the clergy, parental rights, conscientious objection, taxation, blasphemy, the status of minor and new religious groups, and the relationship between churches and their members.¹¹⁷ This created an interesting body of jurisprudence

Human Rights and Cultural Relativism, in HUMAN RIGHTS IN THE WORLD COMMUNITY 42-51 (Richard Claude & Burns H. Weston eds., 2d ed. 1992); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984). Volume 16(2) of the Human Rights Quarterly carries several articles on the subject. See 16 HUM. RTS. QT. 235 (1994).

112. An in-depth discussion of the protection of religious rights by regional instruments is beyond the scope of this Article.

113. See 213 U.N.T.S. 211 (1993). There is vast literature on the protection of human rights in Europe. For a recent comprehensive book, see EVANS, *supra* note 1.

114. See 9 I.L.M. 673 (1970). On the American system generally, see THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS (1995); SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (1997).

115. For the Organization on Security and Co-operation in Europe ("OSCE") documents, see COUNCIL OF EUROPE, *supra* note 93. For a discussion of the OSCE's work in general, see THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE (Arie Bloed ed., 1993). See also DURHAM, *supra* note 93.

116. For the African Charter on Human and Peoples' Rights, see 21 I.L.M. 58 (1982). See also U. OJI UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (1997).

117. See generally, EVANS, *supra* note 1.

and contributed to the interpretation of the basic rules concerning religious rights. The issue of new religions and sects has recently become very controversial in Europe, and a recent Council of Europe statement regarding this issue has drawn attention.¹¹⁸ Principles 16 and 17 of the 1989 Concluding Document of the Vienna Meeting of the CSCE deserve special mention also because of their detailed coverage of religious rights.¹¹⁹ These principles should be compared with those religious rights listed in the 1981 Declaration.

Although not precisely regional arrangements, some states have entered into bilateral agreements with churches and religious communities, providing a framework for the solution and clarification of different problems in this area. Spain, for instance, has entered into such agreements with different religious communities.¹²⁰ Also noteworthy is the 1993 agreement between the State of Israel and the Holy See preceding the establishment of diplomatic relations between them.¹²¹ This agreement refers to the protection of Catholic interests in Israel and to the Catholic Church's condemnation of anti-Semitism.¹²² The agreement has been described as the first agreement between the Holy See and a non-Christian state.¹²³

D. Protection from Persecution

Although international law adequately addressed racial discrimination (though the issue of implementation is not always resolved satisfactorily), there remains a strongly felt need to protect religious groups from discrimination, persecution, and incitement.¹²⁴ Interna-

118. See Official Press Release of the Council of Europe, OFFICIAL GAZETTE OF THE COUNCIL (June 1999).

119. See COUNCIL OF EUROPE, *supra* note 93.

120. See SPANISH LEGISLATION ON RELIGIOUS AFFAIRS (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

121. See *Holy See-Israel: Fundamental Agreement*, 33 I.L.M. 153 (1994).

122. See *id.*

123. See Silvio Ferrari, *Concordats were Born in the West*, 12/13 LA PORTA D'ORIENTE 37-44 (1998); Natan Lerner, *Protecting Religious Human Rights by Bilateral Arrangements*, 12/13 LA PORTA D'ORIENTE 45-55 (1998).

124. The controversial International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (codified at 22 U.S.C. § 6401 (1998)), calls upon the President of the United States to take a range of diplomatic and other actions against any country that engages in or tolerates violations of religious freedom. See *id.* at § 6441. See also the detailed list of violations of religious rights in many countries included in the reports of Special Rapporteur, Abdelfattah Amor, *supra* note 4. See also FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT (Kevin Boyle & Juliet Sheen eds., 1997), which covers persecution against various

tional and domestic law must also address the defamation and libel of groups or of persons belonging to a group for their membership in the group, even though such defamation and libel is less dramatic than physical persecution.¹²⁵

The developing trend is to make the prohibition of religious discrimination, like the prohibition of racial discrimination, a peremptory norm of international law or, in other words, *jus cogens*.¹²⁶ Hatred and intolerance, admittedly less precise terms, are mentioned in some provisions addressing incitement to hatred, intolerance, and other related evils. But it is still necessary to harmonize basic rights, such as freedom of speech or of association on the one hand, and, on the other hand, the right of collective entities and their members not to be subjected to libel, defamation, hostility, intolerance, or incitement to hatred. The highly relevant issue of whether punishment should be enhanced for crimes committed on religious or racial grounds must also be resolved.

The various instruments referenced above contain provisions to protect religious and other groups. The Genocide Convention, for example, protects religious groups' right to exist.¹²⁷ Similarly, Article 19 of the 1966 Covenant on Civil and Political Rights authorizes limitations upon the freedom of expression to protect "the rights and reputations of others."¹²⁸ Article 20 prohibits the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.¹²⁹ The Human Rights Committee, in its General Comment on Article 20, affirms that the prohibition is fully compatible with other freedoms.¹³⁰ Likewise, Articles 10(2) and 11(2) of the European Convention on Human Rights restrict the freedom of expression, assembly, and association when necessary in a

religious groups in different countries.

125. On this controversial issue, see, for example, Raphael Cohen-Almagor, *Harm Principle, Offence Principle, and the Skokie Affair*, 41 POL. STUD. 453 (1993); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); and Natan Lerner, *Group Libel Revisited*, 17 ISRAEL YEARBOOK ON HUMAN RIGHTS 184 (1987).

126. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 n.29 (4th ed. 1990).

127. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 130.1.

128. *Id.* at 170.8

129. See *id.*

130. *General Comment No. 11, supra* note 63.

democratic society to “protect[] . . . the reputation . . . of others.”¹³¹ The American Convention on Human Rights refers to the right of “everyone” to have his honor and dignity respected, liability to protect the “reputations of others,” and penalties for “advocat[ing] . . . national, racial, or religious hatred that constitute[s] incitement[] to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin.”¹³² The 1981 Declaration calls upon states to take “all necessary measures . . . to . . . combat discrimination on the ground of religion or belief.”¹³³ The 1978 UNESCO Declaration on Race and Racial Prejudice urges the mass media and all organized groups to refrain from presenting “a stereotyped, partial, unilateral or tendentious picture of individuals and of various human groups.”¹³⁴ The 1990 Charter of Paris for a New Europe states the determination of its signatories “to combat all forms of racial and ethnic hatred, anti-Semitism, xenophobia, and discrimination against anyone, as well as persecution on religious and ideological grounds.”¹³⁵

The main provisions prohibiting incitement against groups, communities, and collective entities are contained in the United Nations Convention on the Elimination of All Forms of Racial Discrimination (“1965 Convention”), ratified by 155 states as of August 1999.¹³⁶ Article 4 of the 1965 Convention contains provisions concerning incitement, hatred, and hostility against persons and groups.¹³⁷ It is a controversial article and was subject to criticism and formal reservations. Article 4 has, however, become an important guideline for states, and several have enacted domestic legislation in

131. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 10(2), 213 U.N.T.S. 222.

132. American Convention on Human Rights, July 18, 1978, 9 I.L.M. 673.

133. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 490.3.

134. See HUMAN RIGHTS, *supra* note 66, at 132.

135. See 2 UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 406 (1994).

136. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 160.1; see generally NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY (1970); G. Tenekides, *L'Action des Nations Unies Contre la Discrimination Raciale*, RECUEIL DES COURS III 269 (1980). See also the Reports of the Committee on the Elimination of Racial Discrimination (“CERD”), the most recent of which (at the time of publication of this Article) is indexed as U.N. Doc. A/54/18 (1999).

137. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 160.3-160.4.

the spirit of its provisions.¹³⁸ Article 4 is undoubtedly relevant to religious rights. Its text was a compromise between, on the one hand, those who sought primarily to penalize not only “incitement to discrimination” but also the “dissemination of ideas based on racial superiority or hatred,” and, on the other hand, those who considered such penalties a threat to the basic freedoms of speech and association.¹³⁹ As is frequently the case with such compromise, the text adopted is not entirely satisfactory and contains shortcomings.

Nevertheless, the obligations that Article 4 imposes are considered mandatory. State parties are bound to enact implementation legislation in accordance with it, even if they allege that racial discrimination or racist organizations do not exist in their jurisdiction.¹⁴⁰ However, in order to avoid interpretations that states might consider incompatible with their constitutional systems, the opening paragraph of Article 4 contains a sentence clarifying that measures to be adopted shall be “with due regard to the principles embodied in the Universal Declaration of Human Rights.”¹⁴¹ Nevertheless, where rights clash, the orientation of Article 4 is that freedom of speech or association cannot be invoked to prevent a state from taking legal measures, including penal action, against violations of the 1965 Convention.

Article 4 is presently one of the most ambitious provisions in international law intended to fight not only racial discrimination but all related evils, such as racial hatred, racial propaganda, and associations with a racist purpose.¹⁴² Even though there are few references to religion in the text of the 1965 Convention (because of the decision to separate the instruments on race from those on religion), it seems beyond any doubt that Article 4 acts as a guideline to interpret the provisions of the 1981 Declaration.

E. International Criminal Law

Post-war international law had to respond to the lessons of the most costly conflict in history, in terms of human lives. Those con-

138. See JOSE D. INGLES, STUDY ON THE IMPLEMENTATION OF ARTICLE 4 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, U.N. Sales No. E.85.XIV.2 (1986).

139. LERNER, *supra* note 1, at 53.

140. See INTERNATIONAL INSTRUMENTS, *supra* note 13, at 160.3-160.4.

141. *Id.*

142. *See id.*

structing an international order to preserve peace and prevent horrendous crimes, like those committed before and during World War II, were conscious of the need to avoid the recurrence of criminal policies directed against specific groups, religious or otherwise. One of the first human rights treaties adopted by the United Nations was the Genocide Convention,¹⁴³ discussed above. The Nuremberg trials influenced the Genocide Convention. As stated by the International Court of Justice, it “was manifestly adopted for a purely humanitarian and civilizing purpose” with the intention “to condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity.”¹⁴⁴

Today, the prohibition of genocide is part of *jus cogens*. The Genocide Convention does not contain measures of implementation. Moreover, it has exercised little influence in preventing clear-cut genocidal situations affecting religious and other groups in various parts of the world over the past few decades. The Genocide Convention needs updating, but, on the whole, it is one of the basic instruments protecting ethnic and religious groups and addressing those groups’ fundamental right to preserve their existence.

In the 1990s, the international community had to confront the tragic events in former Yugoslavia known as “ethnic cleansing.” A large body of documents, literature, and decisions dealing with the events in this context, including those of the International Court of Justice, already exists.¹⁴⁵ It should be emphasized that the issue is wider than pure “ethnicity” in its strictest sense. United Nations Rapporteurs pointed out the severe damage suffered by religious and cultural monuments and sites of the different religions. “Such wanton destruction,” wrote Angelo Vidal d’Almeida Ribeiro, “appears to be part of the policy of certain groups aimed at eradicating the religious and cultural base of ethnic communities living in a given area

143. *See id.* at 130.1.

144. *Reservations to the Convention on Genocide Case*, 1970 I.C.J. 15, 23.

145. The United Nations General Assembly and Security Council, as well as other United Nations organs and treaty bodies, adopted numerous resolutions on ethnic cleansing. *See, e.g.*, Natan Lerner, *Ethnic Cleansing*, 24 ISRAEL YEARBOOK ON HUMAN RIGHTS 103 (1994); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFFAIRS 122 (1993); James C. O’Brien, *The International Tribunal for Violation of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT’L L. 639 (1993).

in order to encourage their departure and prevent their eventual return.”¹⁴⁶

As a result of these events, the Security Council established an international tribunal under Security Resolution 808 on February 22, 1993 “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”¹⁴⁷ The Security Council, invoking Chapter VII of the Charter, established the international tribunal because of the threat to peace, the need for expedience, and the need to create an effective and binding obligation to take action as required.¹⁴⁸ The Security Council also adopted the international tribunal’s statute. The Security Council followed the same procedure in establishing an international tribunal for similar crimes committed in Rwanda.¹⁴⁹

Both international tribunals are *ad hoc* institutions. They are the first international courts dealing with war crimes and crimes against humanity since the Nuremberg and Tokyo trials. In 1998, an international conference convened by the United Nations in Rome decided by a large majority to create a permanent international criminal court to deal with war crimes and crimes against humanity.¹⁵⁰ Such crimes are frequently committed for religious or ethno-religious reasons.

V. CONCLUSION

This article has attempted to summarize the steps taken in international law to guarantee freedom of religion or belief. There is no generally agreed-upon definition of “religion,” mainly because of the desire to avoid ideological confrontations. There is, however, agreement that in modern human rights law the word “religion,” usually followed by the word “belief” refers to theistic convictions involving

146. U.N. Doc. E/CN.4/1993/62, at 119. A spokesman for the U.N. High Commissioner for Refugees accused Serbians of “erasing all traces of a Muslim religious and cultural presence.” Chuck Sudetic, *U.N. Says ‘Ethnic Cleansing’ by Serbs Intensifies*, N.Y. TIMES, Jan. 30, 1994, at A13.

147. See 32 I.L.M. 1159-1205 (1993), containing the Secretary General’s Report and Security Council resolutions.

148. See *id.*

149. Security Council Resolution 955 (1994), 33 I.L.M. 1598 (1994).

150. See U.N. Doc. A/CONF. 183/9 (as corrected by the procès-verbaux of Nov. 10, 1998 and July 12, 1999).

a transcendental view of the universe and a normative code of behavior as well as atheistic, agnostic, rationalistic, and other views in which such elements are absent. "Beliefs," in this context, always relate to religion and exclude beliefs of a different character in the political or social fields.

The international community has not adopted a specific mandatory treaty regarding religion. There is a draft that was under negotiation for several years, but it is doubtful that work on the draft will resume in the near future. The discussion about its need has been inconclusive. Different alternatives to the treaty have been submitted, anticipating that such a treaty may encounter objections from states and major religious communities. On the one hand, some fear that pushing for a convention may result in a low common denominator and a limited number of ratifications. On the other hand, some argue that there is obvious value in a treaty that goes beyond the articles on religious rights in the 1966 Covenant on Political and Civil Rights and incorporates most of the principles of the 1981 Declaration. The idea of the 1965 Convention as a model is stimulating, although the situations and factors influencing both areas are undoubtedly quite different.

Article 18 of the Universal Declaration and Article 18 of the 1966 Covenant on Political and Civil Rights are the basic provisions in the global instruments addressing religious freedom. The 1981 Declaration, although not obligatory, contains widely accepted international standards. Some of those provisions are customary international law, and a few should be seen as *jus cogens*, namely a rule which cannot be altered except by the will of the international community as a whole.

There is also a monitoring system. The General Comments of the Human Rights Committee, the reports and studies submitted by U.N. Special Rapporteurs, the development of a reporting system, the judicial and quasi-judicial decisions addressing some very significant issues in the area of religion, the special arrangements between some states and religious communities or religiously-originated or oriented communities together provide a reasonable degree of protection and provide guarantees in the tense, delicate, and explosive area of basic religious rights.

Pending problems are numerous. They include the issue of conversion and proselyting, opting-out of religious communities, conscientious objection (not necessarily a religious issue), and the clash

between rights in the field of religion or belief and those in other spheres. Evidence of the tension, delicacy, and explosiveness of these issues abounds. It can be seen in the struggle of the universal acceptance and understanding of human rights and what is loosely called cultural particularism or relativism against the dangers of wars, genocide, and persecution stemming from religious sentiments or hatred, of which the horrible practices of "ethnic cleansing" have been a very recent and tragic example. Some steps in the field of international criminal law directly relate to these excesses in matters of religious rights. Indeed, the most powerful state in today's world has felt the need to enact unilateral protective measures against religious persecution abroad.

The renewed interest in the field of religious rights is a positive development that requires an adequate, practical legislative response. It presents a fascinating challenge for lawyers, political scientists, and theologians. The international community must strive to reach a consensus to incorporate rights related to religion into the widely developed system of international human rights. Such consensus was attained in other delicate areas affecting the sensibilities of large groups. The new millennium is a propitious moment to review this issue and renew work on it. No group is expected to renounce its principles and basic ideology. However, because they are so important, religion or belief deserve an intelligent, careful, and balanced accommodation in fundamental legal norms that provide a minimum standard acceptable to a large majority of mankind. The instruments discussed in this article contain many ingredients of such a standard.