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Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination

*Carolyn Evans**

I. INTRODUCTION

We the peoples of the United Nations determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

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to employ international machinery for the promotion of the economic and social advancement of all peoples,

have resolved to combine our efforts to accomplish these aims.¹

The first lines of the Charter of the United Nations ring out with these words. Yet today, it is hard to hear such words without feeling a sense of doomed idealism. Despite the good intentions of the drafters of the Charter, we, the succeeding generations, have not been saved from the scourge of war; the front pages of the papers remind us of this daily. The dignity and worth of the human person continue to be attacked in the most fundamental ways in torture cells and secret prisons around the world,² and justice and respect for international law are now argued to be unacceptable luxuries in the war on terrorism by those States who once stood as their strongest supporters.³

Yet this Charter, and the Universal Declaration of Human Rights that rapidly followed it, were not the creation of dewy-eyed idealists or ivory tower academics. They were created by men—and a few notable women—who had experienced the worst of human behavior during war, occupation, and the Holocaust.⁴ These individuals were not blindly optimistic regarding the capacity of international organizations to bring about instant and significant changes to the way States conducted their business. The failure of the League of Nations during the interwar years was still very recent history at the time the Charter was drafted.⁵ Yet the drafters of the United Nations Charter still believed that it was important to persist with the difficult, messy, and time-consuming business of creating an international forum where disputes might be resolved peacefully and where human rights standards could be set, even if complete acceptance and implementation of those standards would still take generations.⁶

1. U.N. Charter pmbl.

2. See, e.g., Dana Priest, *CLA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Kirk Semple, *Basra Raid Finds Dozens Detained by Iraq Spy Unit*, N.Y. TIMES, Mar. 5, 2007, at A1.

3. CHRISTIAN WALKER ET AL., *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY* 126–39 (2004).

4. See Timothy Kearly, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 673–719 (2003).

5. See *id.*

6. See *id.*

Religious freedom is one element of human rights that has received considerable attention in this international forum. Although the Charter only briefly mentions human rights⁷ and does not explicitly deal with religious freedom,⁸ multiple resolutions and treaties have addressed this issue since the inception of the United Nations.⁹ Despite these efforts, the debate continues as to whether the resolutions and provisions dealing with religious freedom can bind member States of the United Nations without further agreement between these nations in the form of a treaty. Some scholars and diplomats believe that the current resolutions have legal sufficiency to protect religious freedoms. An analysis of the resolutions already in force, and in particular, of The Declaration on the Elimination of All Forms of Intolerance and Discrimination, reveals that the 1981 Declaration may already have some legal effect to require member nations to protect religious freedoms.¹⁰ However, even in the event that the 1981 Declaration does not have legal sufficiency, the interests of protecting religious freedom would best be served, not by creating a new treaty, but rather by strengthening the existing mechanisms established to protect and preserve religious freedom.

This paper argues that a new treaty is not warranted at this time and that it would be more fruitful to strengthen current mechanisms in order to protect religious freedom. Part II of the paper provides an overview of the key instruments designed to protect religious freedom in the international system. It briefly outlines the most prominent human rights treaties and declarations with respect to religious freedom and provides a more detailed analysis of the 1981 Declaration and its provisions dealing with religious freedom. Part

7. U.N. Charter pmbl., arts. 1, 13, 55, 62, 68, 73-74, 76.

8. Article 1 of the Charter indicates that one of the purposes of the United Nations is to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to . . . religion," and Articles 13, 55, and 76 echo this language. *Id.* arts. 1, 13, 55, 76. This language does not, however, seem to amount to a protection of religious freedom as such, and no other provisions of the Charter mention religion explicitly.

9. *E.g.*, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter 1981 Declaration]; International Covenant on Civil and Political Rights, art. 18, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

10. *See infra* Part III.

III explores the extent to which the 1981 Declaration could be considered to have legal effect in international law and the ramifications on the religious freedoms provided by member nations for their citizens. Finally, Part IV examines whether a treaty is needed to protect religious freedom and concludes that now is not the appropriate time to develop a treaty; rather, focusing on strengthening the existing mechanisms in place to protect religious freedoms would best further the cause of securing and protecting these rights for the citizens of all nations.

II. OVERVIEW OF THE LEGAL PROTECTION OF RELIGIOUS FREEDOM IN INTERNATIONAL LAW

Since the inception of the United Nations, proponents of human rights have made several efforts to secure religious freedom through international law. These attempts have been carried out through various mediums and at various times. Each attempt has contributed to the international conception regarding the protection of religious liberties. This section identifies provisions from prominent declarations and treaties aimed at protecting religious rights. It also provides a brief history of each document and analyzes the contribution that each has made to the legal doctrine currently underlying the protection of religious freedom in international law.

A. Early Attempts to Protect Religious Freedom

1. The Charter of the United Nations

The Charter of the United Nations makes only brief reference to the protection of rights. The most important provisions are Article I(3), which makes international co-operation in promoting respect for human rights one of the purposes of the United Nations,¹¹ and Article 55(c), which commits the United Nations to the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹² Article 56 pledges all Members of the

11. U.N. Charter art. 1, para. 3.

12. *Id.* art. 55, para. 1(c).

United Nations to “take joint and separate action” to assist the United Nations in achieving “the purposes set forth in Article 55.”¹³

Thus, the Charter envisioned that the United Nations would play a significant role in the international promotion of human rights. The Economic and Social Council was established under the Charter, in part to make recommendations about how to successfully promote human rights.¹⁴ At the time of the drafting and adoption of the Charter, however, precisely what constituted human rights or how they were to be protected was addressed at a very general level. The only specific reference to human rights, and more specifically religious freedom, came in the form of the non-discrimination norm: even at this early stage, non-discrimination on the basis of religion was recognized as important by the international community.

Because the Charter did not specify the contours of human rights and religious freedom, proponents of these rights attempted to more clearly define them. This desire led to the drafting of the Universal Declaration of Human Rights in 1948, which more clearly defined human rights and religious freedoms.

2. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights was the first United Nations instrument to set out a more comprehensive list of fundamental human rights and freedoms—including religious freedom.¹⁵ Religious freedom was explicitly recognized in the Universal Declaration in Article 18, which stated that:

Everyone has the right to freedom of thought, conscience and religion: this right includes the freedom to change his religion or belief, and the freedom, either alone or in community with others and in public or in private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁶

Although the Universal Declaration marked a significant milestone in the history of the protection of human rights, it was only a resolution of the General Assembly. Under the U.N. Charter,

13. *Id.* art. 56, para. 1.

14. *Id.* art. 7, para. 1, art. 62, para. 3.

15. Universal Declaration, *supra* note 9.

16. *Id.* art. 18. For a legislative history of Article 18, see LEONARD HAMMER, *THE INTERNATIONAL HUMAN RIGHT TO FREEDOM OF CONSCIENCE* 30-35 (2001).

such declarations have no binding legal force.¹⁷ Additionally, in order to achieve agreement on its provisions, the chair of the drafting committee, Mrs. Roosevelt, emphasized to participating States that the Universal Declaration was not a legally binding document.

The Universal Declaration is a significant document because it delineated the rights afforded to citizens of member States; nonetheless, it did little to ensure that these rights would be protected.¹⁸ The Universal Declaration was merely a declaration—its legal form that of a General Assembly resolution—and, as a result, it could not bind the members of the United Nations. This lack of enforcement led proponents of human rights to make a more ambitious attempt to secure the right of religious freedoms by proposing a treaty.

3. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Culture Rights

As work began on developing a binding treaty that reflected the provisions promulgated in the Universal Declaration, Cold War politics intervened and hampered the process.¹⁹ Unfortunately, this intervention resulted in the creation of two separate treaties—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Culture Rights (ICESCR)—instead of one comprehensive treaty.²⁰ Patterned after the Universal Declaration, the ICCPR also protected religious freedom. Article 18 reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or

17. U.N. Charter art. 13, para. 1(b).

18. See Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 217, 225 (“Whereas the Universal Declaration imposed a moral obligation upon all signatory nations, later documents went further in creating a legal obligation to comply with their broad principles.”).

19. ROBERT F. DRINAN, CAN GOD & CAESAR COEXIST?: BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW 33–34 (2004) (explaining that a major covenant on both political and economic rights was drawn up, but when the Cold War started the Soviets refused to grant political rights and the U.S. was hesitant to guarantee economic rights and that the compromise finally reached in 1966 created the ICCPR and ICESCR).

20. *Id.*

in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

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

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

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.²¹

Article 18 of the ICCPR largely reflects the provisions in the Universal Declaration, with one important exception that will be explored in Part IV, and provides more detail about certain elements of human rights. For example, it more explicitly protects the rights of parents to control the religious and moral education of their children.²²

Although the Universal Declaration was divided into two treaties, which further developed some of the rights in the 1981 Declaration, the International Covenants did not make any substantial contribution to the detailed meaning of the rights in question. The most significant contribution of the International Covenants is that they created mechanisms for monitoring human rights compliance by State parties—mechanisms that the non-binding Universal Declaration lacked. In particular, the ICCPR required all State parties to the covenant to make periodic reports to the United Nations Human Rights Committee²³ and gave the Committee the power to question State parties with respect to possible human rights violations.²⁴ Further, under the Optional Protocol, many States have also created the opportunity for

21. ICCPR, *supra* note 9, art. 18.

22. *Id.* art. 18, ¶ 3. For a discussion of the Universal Declaration's guarantee to parents of the right to choose the kind of education given to their children, see DRINAN, *supra* note 19, at 32-33.

23. ICCPR, *supra* note 9, art. 40.

24. *Id.* art. 41.

individuals within their jurisdiction to bring a complaint relating to breaches of the ICCPR before the Human Rights Committee.²⁵ Decisions relating to such complaints by the Committee are not binding court decisions, but they do put considerable moral and political pressure on States to comply with them.

Following the development of the International Covenants, a series of more specific treaties fleshing out the details of certain rights were developed, including conventions on torture, women's rights, children's rights, and freedom from racial discrimination.²⁶ Religious freedom was also to be protected in a treaty, yet no draft ever received the consensus necessary to lead to its acceptance. Instead, after protracted and extensive disagreement and debate, the United Nations General Assembly passed a resolution entitled, "The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief" in November of 1981.²⁷ Legally speaking, there have been no further developments since.

B. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

Since the inception of the 1981 Declaration, various treaties aiming to protect religious freedom have come into force; for example, the International Criminal Court now has jurisdiction to punish genocide committed against a religious group.²⁸ Regional treaties that largely replicate the religious freedom protections instituted by the United Nations have also been created.²⁹ But no

25. Optional Protocol to the International Covenant on Civil and Political Rights, pmb., *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302. There are now at least ninety-nine States with a combined population of over 1 billion people participating in the optional protocol. DRINAN, *supra* note 19, at 37. While opinions of the committee are not binding, its views are respected as objective and authoritative.

26. For a brief history of the development and implementation of these instruments, see BAHYYIH G. TAHZIB, *FREEDOM OF RELIGION: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* 94-107 (1996).

27. 1981 Declaration, *supra* note 9. For an interesting look at the twenty-year process that led to the creation of the 1981 Declaration, see TAHZIB, *supra* note 26, at 122-65. See also DRINAN, *supra* note 19, at 37-38; MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 227-301 (1997); JOHN NURSER, *FOR ALL PEOPLES AND ALL NATIONS: THE ECUMENICAL CHURCH AND HUMAN RIGHTS* (2005).

28. Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90.

29. Most notable among these treaties is Article 9 of the European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 230. It reads,

legal instrument has been created to specifically deal with freedom or discrimination solely on the basis of religion. For now, the 1981 Declaration presents the most detailed expression of international legal protection for religious freedom and for this reason, it deserves additional analysis. The 1981 Declaration broadly deals with two themes: religious freedom and protection from discrimination and intolerance.

I. Religious freedom

Three articles from the 1981 Declaration deal primarily with religious freedom. Article 1 establishes the basic protection for religious liberties and also notes its limitations.³⁰ The drafters based this section on previous international treaties, particularly, the Universal Declaration and the ICCPR.³¹ It reads in part:

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.³²

Article 1 also prohibits coercion that would impair the freedom of an individual to have a certain religion or belief, and limits the “[f]reedom to manifest one’s religion or belief” only when “necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”³³

Article 5 extends religious freedom by giving parents and guardians the right to bring up and educate their children in accordance with their religion or belief so long as it is not injurious

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

(2) Freedom to manifest one’s religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Id.

30. 1981 Declaration, *supra* note 9, art. 1.

31. DRINAN, *supra* note 19, at 19–21.

32. 1981 Declaration, *supra* note 9, art. 1.

33. *Id.*

to their physical or mental health.³⁴ Article 5 also has a counterpart in Article 18(4) of the ICCPR.³⁵

Finally, Article 6 establishes a non-exhaustive list of protected manifestations of religion and belief.³⁶ This new development in the effort to protect the freedom of religion does not have a clear counterpart in the earlier treaties and instruments. Article 6 provides strong support for the institutional elements of religious freedom, such as the capacity to establish and maintain places of worship, establish charitable institutions, receive financial contributions, and control religious leadership appointments.³⁷ However, when compared with some of the earlier drafts, it does not provide as much detail regarding individual manifestations of religious belief.³⁸ This element of the 1981 Declaration is disappointing. For strong protection of religious freedom to survive, the 1981 Declaration must maintain both collective and individual elements of religious freedom, yet the 1981 Declaration is somewhat unbalanced in favor of institutional religious rights.

2. Protection from discrimination and intolerance

The remaining articles in the 1981 Declaration deal primarily with religious discrimination and intolerance. Article 2 of the 1981 Declaration sets out the basic rule: "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief."³⁹ This article has a very broad application. In international law, obligations imposed by treaties and resolutions generally bind the State, but Article 2 binds all people, groups and institutions—including religious groups and institutions.⁴⁰ It is at least worth noting that there is potential for conflict between this prohibition on religious discrimination, even by

34. *Id.* art. 5.

35. ICCPR, *supra* note 9, art. 18, ¶ 4. Note, however, that Article 18(4) only requires States to respect the liberty of parents to "ensure the religious and moral education of their children in conformity with their own convictions." It does not add the qualification that this requirement does not apply if it would be injurious to the health of the child. *Id.*

36. 1981 Declaration, *supra* note 9, art. 6.

37. *Id.*

38. *See, e.g.*, Sub-Commission's Preliminary Draft of a United Nations Declaration on the Elimination of All Forms of Religious Intolerance, *reprinted in* TAHZIB, *supra* note 26, at 553-61.

39. 1981 Declaration, *supra* note 9, art. 2.

40. *Id.*

religious groups, and the requirements of institutional autonomy outlined in Article 6. If religious organizations are to be free to choose their own leaders, for example, they will normally do so in a manner that discriminates on the basis of religion. The drafters of the 1981 Declaration likely did not intend Article 2 to prohibit this type of discrimination, but such tensions within the 1981 Declaration demonstrate that it is a document of political compromise and broad principle rather than detailed, coherent legislation.

Article 4 places a positive obligation on States to “take effective measures to prevent and eliminate discrimination . . . in all fields of civil, economic, political, social, and cultural life” and “to take all appropriate measures to combat intolerance on the grounds of religion.”⁴¹ This obligation may prove very important to States with a long history of religious intolerance or discrimination. Even if a State does not discriminate in such a society, private groups are unlikely to respect religious equality unless the State takes positive measures to ensure compliance.

There are two additional provisions of the 1981 Declaration that do not fit neatly into either the discrimination or tolerance category. First, Article 7 requires that the “rights and freedoms set forth in the . . . Declaration be accorded in national legislations in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.”⁴² Second, and interestingly, Article 8 provides that “[n]othing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.”⁴³ This final and seemingly innocuous provision reflects growing attacks on the idea that religious freedom includes the freedom to change religion, and it will be discussed in more detail below.

III. THE LEGAL STATUS OF THE DECLARATION

This part explores the extent to which the 1981 Declaration could be considered to have created a legally binding obligation on States to adhere to its provisions. In international law there are two primary relevant sources of obligations on States—treaties and

41. *Id.* art. 4.

42. *Id.* art. 7.

43. *Id.* art. 8.

customary international law.⁴⁴ While treaty obligations fall only on ratifying States,⁴⁵ customary law obligations fall on all States, with very limited exceptions.⁴⁶ As a General Assembly Resolution, the 1981 Declaration clearly does not impose treaty-like obligations; however, usage of the Declaration suggests that its precepts may eventually acquire legal effect as customary international law.⁴⁷

A. Effects of the 1981 Declaration as a General Assembly Resolution

Though the Declaration is a General Assembly Resolution and therefore not legally binding, it may have significant effect if understood as an authoritative source for clarifying States' obligations as described in treaties such as the ICCPR.⁴⁸ Because there is extensive overlap between the rights provided in the ICCPR and the principles described in the 1981 Declaration, the 1981 Declaration may rightly be seen as flowing from the ICCPR.⁴⁹ However, the 1981 Declaration does not simply parrot the ICCPR; it provides much more robust and detailed descriptions of the rights outlined in the ICCPR.⁵⁰ For example, the 1981 Declaration fleshes out the meaning of manifestations of religion⁵¹ and establishes not only that States may not discriminate on the basis of religion, but also that they must actively prevent discrimination and religious intolerance.⁵²

44. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); see also SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 65-88 (2006) (discussing the various sources of international law and their relationships).

45. Vienna Convention on the Law of Treaties, arts. 2(g), 9, 26, 34, May 23, 1969, 1155 U.N.T.S. 331.

46. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7-11 (5th ed. 1998); MURPHY, *supra* note 44, at 78-86.

47. MURPHY, *supra* note 44, at 4-15 (explaining that while U.N. Resolutions are generally not binding, Resolutions accepted by a majority vote are evidence of a custom).

48. *Id.* at 15 ("[A] resolution may be an authoritative interpretation and application of the principles of the Charter.").

49. DRINAN, *supra* note 19, at 20 ("[The 1981 Declaration] is intended to clarify Article 18 of the ICCPR.").

50. Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT'L & COMP. L.Q. 327, 344-45 (explaining how the 1981 Declaration expands on the ICCPR, including the fact that the 1981 Declaration requires states to outlaw private religious discrimination).

51. 1981 Declaration, *supra* note 9, art. 6; see *supra* notes 36-38 and accompanying text.

52. 1981 Declaration, *supra* note 9, art. 4; see *supra* note 41 and accompanying text.

Understood as flowing from the ICCPR, the Declaration may be used as a supplement to the legally binding ICCPR, clarifying the treaty obligations taken on by its signatories. As a supplement, the Declaration would be a useful and authoritative tool for resolving controversy or doubt regarding the meaning of terms in the ICCPR. Thus, the Declaration would have legal *effect* without carrying legal *force*.⁵³ Though using the Declaration in this manner could help ensure appropriate protection of religious freedoms, it only affects those States that are parties to the Covenant on Civil and Political Rights. While there are now 157 parties to the Covenant, there are still some significant exceptions, including States where there are serious problems with religious freedom, such as Saudi Arabia, China, and Burma.⁵⁴

B. Potential Legal Effect of the 1981 Declaration as Customary International Law

Although the 1981 Declaration may inform interpretations of the ICCPR, such an augmented reading still applies only to those States that are parties to the treaty. Thus, in the absence of a new treaty signed by every State, any *comprehensive* legal protection for religious freedom will need to rely upon customary international law. Customary law is binding on all States and does not rely on ratification of particular treaties. To the extent that the principles outlined in the 1981 Declaration can be adjudged to be customary law, they may acquire international legal force.⁵⁵

In determining if a principle is customary international law, the test, used by the International Court of Justice and the broader legal

53. Davis, *supra* note 18, at 231–32 (stating that the 1981 Declaration is a valuable tool for interpreting other documents such as the ICCPR); Dickson, *supra* note 50, at 345 (stating that the U.N. Human Rights Committee treats the 1981 Declaration as an exposition of the ICCPR).

54. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2006) [hereinafter RELIGIOUS FREEDOM REPORT], <http://www.state.gov/g/drl/rls/irf/2006>. The report demonstrates that many States (such as the People's Republic of China, Burma, and Cuba) pursue an anti-religion policy that may be very problematic when it comes to religious freedom. However, the report also highlights the abuses in countries such as Iran, Saudi Arabia, and Sudan, where the dominant religion has political and legal authority. *Id.*

55. NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS 121–22 (2000) (asserting that many of the religious rights provisions in various international conventions are regarded as either customary international law or, in some cases, as the more binding *jus cogens*).

community, requires two elements.⁵⁶ The first requirement is that States must generally act in compliance with the purported rule.⁵⁷ The second requirement is *opinio juris*, that is, States must so act because they believe that they are *obliged* to do so; they cannot merely comply out of habit, courtesy, or convenience.⁵⁸ There are two ways in which the 1981 Declaration can help establish religious freedom as customary international law. First, the 1981 Declaration can assist in clarifying the meaning of the norm. In order to reach the level of customary international law, a norm needs to have a sufficient degree of specificity and clarity.⁵⁹ The 1981 Declaration, by outlining clear and specific standards for religious freedom, helps to further this purpose.⁶⁰

The other way in which the 1981 Declaration can contribute to customary international law is as a concrete manifestation of *opinio juris*. Though General Assembly declarations do not have automatic legal effect, they can be evidence of customary international law if they comply with certain criteria. In order to serve as evidence of customary international law, General Assembly Declarations must (1) be sufficiently clear; (2) use language that indicates legal obligation rather than simple aspiration; and (3) have been passed with the support of the countries representing a diverse range of regions, political systems, and legal systems.⁶¹ The first requirement is satisfied by the clear language of the 1981 Declaration. The second requirement is likewise fulfilled in the 1981 Declaration through use of phrases such as “everyone shall have the right,” “no one shall be

56. See Statute of the International Court of Justice, *supra* note 44 (stating that the Court in deciding questions of international law shall apply, among other things, “international custom”); see also, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

57. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (1987).

58. *Id.* at cmt. c; see also, e.g., Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L. L. 757, 757 (2001).

59. 48 C.J.S. *International Law* § 2 (2007) (explaining that customary international law consists of “clear and unambiguous rules”).

60. Davis, *supra* note 18, at 231–32 (discussing ways in which the 1981 Declaration helps to set and clarify norms).

61. For a discussion of the legal status of resolutions of the United Nations General Assembly, see BROWNIE, *supra* note 46, at 14. For a discussion of the requirements for customary international law, see generally *id.* at 4–11; 48 C.J.S. *International Law* § 2 (2007).

subject to discrimination,” and “all States shall take effective measures.” Finally, because the 1981 Declaration was adopted by the General Assembly, it fulfills the requirement that the declaration be passed with broad, diverse support.

Though the 1981 Declaration may be used as evidence that the principles therein are a manifestation of *opinio juris*, a question remains as to whether the degree of international consensus is sufficient to give rise to a customary law. Some argue that the principles embodied in the 1981 Declaration ought to be treated as customary law.⁶² As they do with many human rights issues, however, States are often prepared to make forceful statements in international forums that illustrate their sense of obligation in relation to religious freedom, yet State practice is much less likely to follow its publicly voiced principles. There are many countries today where religious freedom and non-discrimination on the basis of religion are incorporated into national constitutions and basic documents or bills of rights. In other countries, however, these principles continue to be flagrantly violated. In some States, the law itself institutionalizes religious discrimination or mandates breaches of religious freedom.⁶³ International lawyers continually debate what degree of State compliance is acceptable and whether paper rather than practical compliance is sufficient evidence of State practice. Positivists tend to emphasize the need for State practice because of the exclusive role that they ascribe to the State in the creation of international law.⁶⁴ Others, at least in the realm of human rights, argue that State practice should not be so definitive and that one should place greater emphasis on evidence of customary law,

62. See TAHZIB, *supra* note 26, at 187 (“States regard the 1981 Declaration, or at least some of its provisions, as normative in nature and part of customary international law.”); Dickson, *supra* note 50, at 345 (stating that the U.N. Human Rights Committee treats the 1981 Declaration as declarative of existing law and that no State has ever complained about this interpretation, implying that that view is widely held).

63. RELIGIOUS FREEDOM REPORT, *supra* note 54. The report details the status of religious freedom in each nation and shows that religious freedom is protected in most African and European nations as well as Australia. Religious freedom is not protected in a variety of states including Somalia, India, Indonesia, and Libya. Examples of states that actively discriminate against religion include Algeria, Iran, North Korea, and Saudi Arabia.

64. See, e.g., Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 102 (1987) (criticizing the World Court for failing to focus sufficiently on state practice when determining what is customary law and remarking that “a customary rule arises out of state practice”).

including so-called “soft law” sources, such as General Assembly resolutions.⁶⁵

Although this debate is unlikely to be resolved within the foreseeable future, it ought to be understood that the 1981 Declaration is part of a long, slow, and on-going process of generating consensus around the fundamental need to protect religious freedom. These principles are strengthening, but have generally not achieved the status of customary law, although some commentators have argued to the contrary.⁶⁶ Nevertheless, any serious observer of religious freedom in the world would recognize that, whether the religious freedom provisions in the 1981 Declaration are to be considered law or not, these rights are not yet fully protected in *practice* and breaches of religious freedom are not *effectively sanctioned* by the international community.⁶⁷

IV. A TREATY FOR THE PROTECTION OF RELIGIOUS FREEDOM

Because existing mechanisms, including treaties and customary international law, have failed to ensure protection of religious freedom, some have called for a new treaty designed to more effectively protect freedom of religion and promote non-discrimination.⁶⁸ While protecting these rights is an important goal, it is unlikely that a new treaty is the best means by which to achieve it.⁶⁹ The balance of this section argues that, for now, the limited

65. Roberts, *supra* note 58, at 757 (explaining that the traditional approach to customary international law tends to focus on state practice while the modern approach focuses more on *opinio juris*, and arguing that relatively more weight should be put on expressions of *opinio juris* when determining custom for human rights issues).

66. See *supra* note 50.

67. See, e.g., Davis, *supra* note 18, at 217–19 (detailing various religious rights abuses across the globe); Dickson, *supra* note 50, at 347–54 (discussing various violations of religious freedom); Carolyn Evans, *Strengthening the Role of the Special Rapporteur on Freedom of Religion or Belief*, 1 RELIGION AND HUMAN RIGHTS: AM INT’L J. 75, 94–95 (2006) (explaining that the Special Rapporteur must rely on voluntary compliance by States). Additionally, the annual reports of the Special Rapporteur, available at <http://www.ohchr.org/english/issues/religion/annual.htm>, each discuss various ongoing violations of religious freedom.

68. See, e.g., DRINAN, *supra* note 19, at 152–55, 174–75, 212–20 (discussing the need for a binding treaty); TAHZIB, *supra* note 26, at 213–18 (summarizing official efforts to implement former Special Rapporteur Odio Benito’s call to draft a binding treaty). For a discussion of the long pending binding convention draft, see LERNER, *supra* note 55, at 28–29.

69. See Special Rapporteur of the Commission on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on*

time, financial resources, and political commitment of advocates of religious freedom should be focused on strengthening the existing mechanisms rather than advocating for a treaty.

First, this is a time in which religion is increasingly seen as a suspect category by States, and religious minorities are often associated with terrorism, subversion, or other threats to national security.⁷⁰ In the abstract, this suspicion of religion suggests a strong rationale in favor of better protection of religious freedom—a treaty might help to stem the tide of hostility towards religion and give succor to religious minorities in many States. The political reality, however, is that *States* must agree to negotiate a treaty, *States* will be responsible for drafting it, and *States* will have to ratify it in order for it to be effective. In the current climate, movement towards State negotiation and ratification of such a treaty faces significant difficulties.⁷¹

Even if these difficulties could be overcome, the current climate of fear could jeopardize the integrity of the treaty. As fear and distrust of religion grows, and as religious differences become public and apparent in international relations, there is a very real danger that a resulting treaty could water down already existing

Religion or Belief, ¶ 85, transmitted to members of the General Assembly, U.N. Doc. A/50/440 (Sept. 18, 1995) (noting that calls for a binding convention are “premature”); TAHZIB, *supra* note 26, at 423–94 (analyzing extensively the question of whether or not a binding treaty should be drafted and ultimately concluding that while a legally binding instrument is desirable in the long run, for the short term a focus on enhancing current legal protections is more desirable); Malcolm D. Evans, *Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 1, 13 (Tore Lindholm et al. eds., 2004) (noting that a majority of commentators see a binding instrument as desirable but feel it is premature to proceed); Davis, *supra* note 18, at 230–31 (concluding that pursuing a convention at this point is premature); 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, 519–20 (1988) (summarizing some of the arguments for and against attempting to create a binding treaty but ultimately concluding that strengthening the current regime is the best option).

70. See DRINAN, *supra* note 19, at 21 (discussing changing American attitudes about Muslim extremists after the events of September 11, 2001); Silvio Ferrari, *Individual Religious Freedom and National Security in Europe After September 11*, 2004 BYU L. REV. 357 (discussing how national security interests are balanced against religious freedom in a post-September 11 world); Nathaniel Stinnent, *Defining Away Religious Freedom in Europe: How Four Democracies Get Away with Discriminating Against Religious Minority Religions*, 28 B.C. INT’L & COMP. L. REV. 429 (2005) (stating that certain European democracies use public safety as a justification for treating minority religions as “cults” with limited legal rights).

71. See TAHZIB, *supra* note 26, at 444–45 (concluding that there is not a broad base of international support for a binding treaty with meaningful definitions and provisions).

commitments to protection of religious freedom.⁷² The reality of this possibility has been clearly demonstrated already in the decreasing protection of the right to change religion in international law. The Universal Declaration stated simply and clearly that the right to freedom of religion “includes freedom to change . . . religion or belief.”⁷³ By the time the Covenant on Civil and Political Rights was adopted nearly twenty years later, the right had been watered down to the more ambivalent concept of an individual’s freedom to “have or to *adopt* a religion or belief of his choice.”⁷⁴ By the time of the 1981 Declaration there is no express mention of changing religion; instead, there is a clumsily worded acknowledgement of the right to have “a religion or *whatever* belief of . . . *choice*.” In combination with the commitment in Article 8 that the 1981 Declaration does not restrict or derogate from the rights set out in the Universal Declaration or the Covenants, this provision is generally thought to sufficiently protect the right to change religion; nonetheless, this principle has been slowly eroded over time.⁷⁵ It should not, therefore, be assumed that a convention drafted in the current climate would necessarily lead to increased standards. Indeed, it is perfectly possible that it could actually lead to a watering down of current standards.

Another reason for suggesting that the time is not yet ripe for drafting a new treaty is that in the international realm, a non-binding resolution with strong moral or political support can be as effective as a legally binding treaty.⁷⁶ Even where legally binding treaties purport to protect human rights and provide mechanisms for

72. See Sidney Liskofsky, *The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives*, in RELIGION AND THE STATE, 441, 476 (James E. Wood, Jr. ed., 1985) (noting that two concerns about creating a binding treaty are that 1) some states might try to attach many more exceptions to a legally binding treaty and 2) during the long drafting process hostile elements would argue against discussing ongoing violations until terms of the treaty are agreed to).

73. *Universal Declaration*, *supra* note 9, art. 18.

74. ICCPR, *supra* note 9, art. 18(1).

75. Dickson, *supra* note 50, at 342 (pointing out that Muslim countries are largely responsible for the softening of language protecting the right to “change” one’s religion, since one interpretation of Islamic law is that it is a capital offense to convert to another religion); Natan Lerner, *Religious Human Rights Under the United Nations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 115–16 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (same).

76. Dickson, *supra* note 50, at 345–46 (stating that one argument against creating a new treaty is that the current Declaration is sufficiently binding).

enforcement, these enforcement mechanisms are weak because they rely heavily on voluntary compliance by individual States. For example, the committee system set up under the ICCPR is typical of the mechanisms created to protect rights in the United Nations' human rights system. Such systems provide for a variety of human rights committees that require States to report to them regarding compliance with the treaties and, in some cases, allow for individual complaints. However, many States do not comply with the reporting provisions, and all of the human rights committees have faced problems with processing the reports that they do receive. Further, States that refuse to comply with recommendations by the committees, whether resulting from the reporting process or individual complaints, are not subject to any sanctions. Consequently, the committees have no means of enforcement against States that continue to breach even the most fundamental religious rights.⁷⁷

Because committees have no real means to enforce compliance with the human rights principles outlined in treaties, they cannot be effective unless States either accept those principles internally because of their moral importance or accept them because of external political or economic pressures. A State may internally accept the moral or political importance of a treaty when the provisions of the treaty conform to its accepted social values. External forces (such as condemnation by other States, economic sanctions, negative reactions by foreign investors, or threats of military force) may also motivate States to comply with their human rights obligations even if they do not place any particular independent value on such requirements. Yet the decision to comply with rights, obligations, and internal and external pressure do not require the rights in question to be expressed in a document with effective legal status.⁷⁸ While the existence of a binding treaty obligation can be one form of argument or pressure favoring compliance with human rights obligations, such pressure can be as effectively generated through a General Assembly resolution. A resolution may be particularly

77. *Id.* at 353–54, 357 (noting the weak enforcement mechanisms currently available); Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT'L L. REV. 499, 537 (2005) (stating that enforcement mechanisms are essentially limited to international condemnation, which is not effective, at least in the short run).

78. Johan D. van der Vyver, *supra* note 77, at 530–37.

effective when it is clearly tied to a treaty, as the 1981 Declaration is to the ICCPR. Thus, time and resources may be better spent shoring up the legitimacy of the 1981 Declaration instead of working on a new treaty.

Finally, the flexibility of enforcement mechanisms provided by the current regime—particularly the role of the Special Rapporteur on Freedom of Religion or Belief—has some advantages over the formal committees and complaint mechanisms typically set up under treaties. Created by the Commission on Human Rights, the Office of the Special Rapporteur is charged with the responsibility to address religious freedom within the United Nations.⁷⁹ The Rapporteur writes annual reports on the status of religious freedom in the States that he or she has visited in the previous year. The Rapporteur also sometimes reports on particular issues of relevance to the international community (for example, the relationship between discrimination on the basis of religion and discrimination on the basis of race).⁸⁰ Importantly, the Rapporteur receives individual complaints (in a less formal manner than the committees), makes inquiries into them, and publishes the credible complaints, along with any government responses.⁸¹

This approach has a number of advantages over the traditional human rights committee approach taken in most human rights treaties. Religious freedom, perhaps more than most rights, requires the active support of a tolerant, educated, and committed community. Intolerance, discrimination, and intimidation which prevents people from freely exercising their religion often comes from non-State actors as well as from States. The Rapporteur has a greater degree of flexibility and freedom than the human rights committees to work with various parts of society—to encourage inter-faith dialogue, assist in the development of educational tools about religion, institute discussions with religious leaders, and suggest concrete changes to legal regimes. By contrast, the human

79. TAHZIB, *supra* note 26, at 199–200. For an overview of the development of the office of Special Rapporteur and an evaluation of the performance of the Rapporteurs, along with suggestions on ways to strengthen the office, see Evans, *supra* note 67.

80. TAHZIB, *supra* note 26, at 200. Copies of the annual reports are available at <http://www.ohchr.org/english/issues/religion/annual.htm>.

81. *See id.* at 202–11 (summarizing the contents of the Special Rapporteur's reports from 1988–1995).

rights committees are more limited in the activities that they can undertake and in the groups with which they can deal.⁸²

In addition, creating greater support—financial, legal, and political—for the Special Rapporteur and other civil society initiatives around inter-religious dialogues may more effectively protect religious freedom than drafting another treaty and establishing another committee.⁸³ The Rapporteur has at times been in dire financial positions and once was unable to produce even a full report because of cost-cutting.⁸⁴ Even though the position has improved, it may be more effective to use the United Nations' limited budget on the established and proven office of the Rapporteur, rather than diverting funds into a more formal and legalistic committee.

V. CONCLUSION

The brutal reality of international law is that the 1981 Declaration, or any treaty for that matter, is ultimately just words on paper. It is the actions of governments, courts, religious groups, human rights organizations, media outlets, and committed individuals that make those words a living reality. The representatives at the conference at which this paper was first presented, represented a wide variety of States, each of which has its own unique set of circumstances, difficulties, and strengths.⁸⁵ If the 1981 Declaration

82. Cf. Philip Alston & Bruno Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603, 607 (1988) (comparing the relative flexibility of the proposal of the Committee on the Elimination of All Forms of Discrimination Against Women to the rigidity of the Human Rights Committee).

83. See TAHZIB, *supra* note 26, at 214 ("The United States . . . expressed the fear that the opening of discussion on a convention on freedom of religion or belief 'with an inevitably long negotiation and ratification process' would divert attention and scarce resources from both the 1981 Declaration and the Commission's Special Rapporteur on the question of religious intolerance and might detract from the impact and significance of both." (quoting The Secretary-General, *Report of the Secretary-General Prepared Pursuant to Paragraph 11 of Commission on Human Rights Resolution 1987/15*, 2, U.N. Doc. E/CN.4/1988/44/Add.2 (Jan. 15, 1988))).

84. See Special Rapporteur of the Commission on Human Rights, *Implementation of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶8, submitted to the Commission on Human Rights, U.N. Doc. E/CN.4/1997/91 (Dec. 30, 1996) ("Because of drastic budget cuts, the Special Rapporteur has been unable to publish these communications and the replies from the States, contrary to the practice followed since the establishment of the mandate.").

85. This paper was presented on October 2, 2006 at "The Thirteenth Annual International Law and Religion Symposium: The 1981 U.N. Declaration on Religious Tolerance and Non-discrimination: Implementing Its Principles After Twenty-five Years."

can be a source of inspiration and common aspiration for all of those States as they strive to implement ideals of religious freedom into their own legal systems and societies, then it has achieved its purpose and its precise legal status is of little import. The Universal Declaration was not a legally binding instrument, but its influence on the world has been profound.

The time may well come for a treaty that can deal fully and thoughtfully with some of the complex issues raised by religious freedom. There may well be a time when states truly recognize the important role that religious freedom plays in the world and are prepared to create, and to fund, a robust mechanism for the protection of religious freedom (and, indeed, other important human rights). Thus far, states have been prepared to commit themselves to this position rhetorically in the Universal Declaration, which opens with a "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."⁸⁶ Yet, as this paper has argued, they are not yet likely to commit themselves politically and financially to a treaty that makes a real difference to the protection of religious freedom. In those circumstances advocates for religious freedom would be better served by concentrating on building up the political and moral prestige of the 1981 Declaration and the role of the Special Rapporteur rather than working on a treaty that is, in any event, unlikely to bring about meaningful change in the current political and social climate.

Forty-five States from all parts of the globe were represented at the conference.

86. *Universal Declaration*, *supra* note 9, pmb1.