2019

**International Standards for Protection of Religious Freedom**

Anthony Peirson Xavier Bothwell  
*Golden Gate University School of Law*

Follow this and additional works at: [https://digitalcommons.law.ggu.edu/annlsurvey](https://digitalcommons.law.ggu.edu/annlsurvey)

Part of the Comparative and Foreign Law Commons, First Amendment Commons, and the International Law Commons

**Recommended Citation**  
Available at: [https://digitalcommons.law.ggu.edu/annlsurvey/vol23/iss1/4](https://digitalcommons.law.ggu.edu/annlsurvey/vol23/iss1/4)

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.
 INTERNATIONAL STANDARDS FOR PROTECTION OF RELIGIOUS FREEDOM

ANTHONY PEIRSON XAVIER BOTHWELL*

ABSTRACT

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

---

* B.S.F.S., International Affairs, Georgetown University School of Foreign Service; M.S., Journalism, Boston University School of Public Communication; J.D., John F. Kennedy University School of Law; LL.M. with highest honors, Golden Gate University School of Law; current S.J.D. student Golden Gate University School of Law; former Assistant Dean, John F. Kennedy University School of Law; admitted to practice before the United States Supreme Court.
tradition and generally good enforcement of First Amendment rights, has not consistently interpreted freedom of religion in a manner conformance with international standards. For decades the Supreme Court and Congress went back and forth on trying to arrive at a formula on protection of religious minorities adversely affected by facially neutral laws. President Trump’s actions against immigrants and visitors from Muslim countries are a tragic departure from the values that were espoused by the American leaders since the founding of the Republic.

I. UNIVERSAL DECLARATION: RELIGIOUS FREEDOM WITHOUT DEFINITION

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

In a key provision, UDHR Article 18 declares:

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

Produced by a Commission to Study the Organization of Peace chaired by Eleanor Roosevelt,8 the UDHR, the Universal Declaration, was in-
spired by the 1941 State of the Union speech of President Franklin D. Roosevelt.9

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

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

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


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

13. LOUIS HENKIN, ET AL., HUMAN RIGHTS 639 (2d ed. 1999) (footnote omitted) (“Religious liberty . . . must be distinguished from religious tolerance. Tolerance as a legal concept is premised on the assumption that the state has ultimate control over religion and the churches, and whether and to what extent religious freedom will be granted is a matter of state policy. The right of religious liberty is a fundamental right, the essence of which is the right to entertain such beliefs as a person chooses, the right to declare such beliefs openly and without fear of hindrance or reprisal, and the right to manifest such belief by worship and practice or by teaching and dissemination.”).
the religion of his subjects.”¹⁴ The Augsburg maxim implied that the only person who really had freedom of religion was the prince.

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

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

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

---

¹⁴. Id.
¹⁵. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978) (“It remains to be proved that society or any of it any of its officers holds commission from on high to avenge any supposed offense to Omnipotence which is not also a writing to our fellow creatures.”).
¹⁶. Id. at 4 (“Like other tyrannies, the tyranny of the majority was at first, and still is vulgarly, held in dread, chiefly operating through the acts of the public authorities.”).
¹⁷. Id. at 49 (“If Christians would teach infidels to be just to Christianity, they should themselves be just to infidelity.”).
¹⁸. JOHN STUART MILL, supra note 15, at 8 (“Yet so natural to mankind is intolerance in whatever they really care about that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale.”).
¹⁹. Id. at 7 (“the odium theologicum. . .in a sincere bigot, is one of the most unequivocal cases of moral feeling”).
²⁰. Mark Weston Janis, Religion and International Law, 7 AM. SOC. INT’L L. INSIGHTS (Nov. 17, 2002) (“From its earliest days, international law has been intertwined with religion. The 16th Century Spanish Catholic priests, Suarez and Vitoria, who are often viewed as among the founders of the modern discipline of international law, argued from religious sources that the Spanish crown was obliged to treat native Americans as real peoples under the moral influence of the law of nations.”), available at https://asil.org/insights/volume/7/issue/13/religion-and-international-law.
itself.” Further: “Jurists usually distinguish the natural law from the *ius gentium* [law of nations],” Suarez reported, “in that the natural law is shared in common with brute creation, while the *ius gentium* is peculiar to men.” Another priest, Francisco de Vitoria, in 1696 endorsed the just war concept and referred to “the unlawfulness of the slaughter of children and other innocent parties . . .” Hugo Grotius, Protestant scholar also regarded as a founder of international law, likewise derived from the Bible rules to govern the conduct of nations.

### III. CHARTER REQUIRES NATIONS TO GUARANTEE RELIGIOUS FREEDOM

A nation, like a religion, depends on people who believe in it. At the conclusion of World War II, the leaders of nations around the world formed a common belief in the need for a global rule of law, to outlaw war and safeguard human rights. The United Nations Charter, adopted in 1945, established a system for international peace and security. Significantly, the Charter also sought to promote “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” The Charter is in effect “the constitution of the international community.” Addressing the closing session of the San Francisco conference in which the Charter was signed, President Harry S Truman (who was adamant about never putting a period after his middle initial) said, “The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to
race, language or religion—we cannot have permanent peace and security.”

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

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

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

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

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

30. Tahzib, supra note 8, at 68 n.18 (relying on HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 147-49 (1950), and on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21)).
33. Tahzib, supra note 8, at 96.
34. Genocide Convention, supra note 32, art. I.
35. Id. art. II.
37. Id. art. 27.
In 1951, still reacting to the Holocaust as well as postwar migrations, the international community adopted a convention for the protection of refugees facing religious or other persecution.\textsuperscript{38} The Refugee Convention mandates, “The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.”\textsuperscript{39}

A convention adopted by the U.N. International Labour Organization in 1957\textsuperscript{40} declared that signatories must take steps to protect their indigenous populations while taking “due account” of their “cultural and religious values.”\textsuperscript{41}

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

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

\begin{itemize}
\item Id. art. 4.
\item Id. art. 4(a).
\item Id. art. 1.
\item Davis, supra note 2 (“in terms of . . . enforceability in the courts, the 1966 Covenant would be the most important”); see also Javaid Rehman, Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities, 7 INT’L J. ON MINORITY & GROUP RTS. 139, 144 (2000).
\end{itemize}
thought, conscience and religion.” The promised freedom is spelled out as including a person’s right “to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” This language is broad enough to encompass all forms of religion and analogous belief systems.

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

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

46. ICCPR, supra note 44, art. 18.
47. Id.
48. Johan D. Vyver, Limitations of Freedom of Religion or Belief: International Law Perspectives, 18 Emory Int’l L. Rev. 499, 506 (2005) (footnote omitted) (ICCPR “Article 18 . . . [is] not limited in its application to traditional religions or to religions and beliefs which traditional characteristics or practices analogous to those of traditional religions.”).
50. Id.
52. Henkin, supra note 13.
53. Id. (“It was agreed that no restrictions of legal character could be imposed upon a person’s inner thought or moral consciousness, or his attitude towards the universe or its creator . . . .”)

https://digitalcommons.law.ggu.edu/annlsurvey/vol23/iss1/4
Mill long ago discerned, “belief” consists of one’s inner thoughts, regardless of subject matter, and is not subject to control or regulation by civil authority.\textsuperscript{55}

Although “freedom of thought, conscience and religion” must broadly be construed, freedom does not mean unrestrained license. “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,” as ICCPR Article 18 provides.\textsuperscript{56}

The year 1966 heralded the adoption of not only the ICCPR but also a convention on economic, social, and cultural rights (ICESCR),\textsuperscript{57} to be observed without discrimination on account of religion, political or other opinion, or other status.\textsuperscript{58} The UDHR, the ICCPR (and its two original protocols\textsuperscript{59}), and the ICESCR are considered to be “the five constituent parts of the International Bill of Human Rights.”\textsuperscript{60} This fulfills a forecast by President Truman who said when the U.N. Charter was adopted, “Under this document we have good reason to expect the framing of an international bill of rights . . . as much a part of international life as our own Bill of Rights is a part of our Constitution.”\textsuperscript{61}

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

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

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

\textsuperscript{56} ICCPR, \textit{supra} note 44, art. 18(3).


\textsuperscript{58} \textit{Id.} art. 2(2).

\textsuperscript{59} \textit{See Summary: International Convention on Civil and Political Rights, CAN. CIV. LIBERTIES Ass’n} (ICCPR’s first optional protocol allows victims of human rights violations to be heard; the second seeks to abolish the death penalty), https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpp/ (last visited May 1, 2018).

\textsuperscript{60} Tahzib, \textit{supra} note 8, at 69.

\textsuperscript{61} \textit{See} Truman, \textit{supra} note 29.
legally enforceable. The ICCPR and the ICESCR are multinational agreements that are more detailed and spell out rights that the states parties have a legal obligation to protect. Each nation has an obligation before the international community to conform its laws and policies to the human rights protections of the International Bill of Rights. Other international conventions that proclaim religious and other rights of particular groups – noncombatants, migrants, indigenous people, etc. – also create obligations that states owe to the community of nations. But, the International Bill of Rights articulates an overarching array of rights that belong to all members of the human community.

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

---

63. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 5(3) (Nov. 25, 1981) [hereinafter Elimination of Intolerance and Discrimination Based on Religion].
66. Elimination of Intolerance and Discrimination Based on Religion, supra note 63, art. 1(1).
67. Id. art. 5(1).
68. Id. art. 5(2-5).
69. Id. art. 6(a)-(i).
70. Id. art. 4(1).
71. Id. art. 7.
separated, although joining religion to the state implies discrimination between faiths, favoring one over others. An official state religion, even if approved by a majority of the population, means there is not truly a level playing field or true equality of rights for people of all religions and belief systems.

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

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

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

---

74. Id.
75. AARON XAVIER FELLMETH, PARADIGMS OF INTERNATIONAL HUMAN RIGHTS LAW 182 (2016).
77. Id. art. 14(a).
78. Id. art. 14(2).
Another convention, adopted in 1990, affirms the right of migrant workers and families to follow “a religion or belief of their choice,” free from coercion. 79

A Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 80 adopted by General Assembly resolution in 1992, provides for the right of minorities to practice their own religion 81 and maintain contact with related groups everywhere. 82 It also requires steps to “encourage conditions for the promotion” of the “identity” of minorities within the state’s territory. 83

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

An underlying purpose of international measures in support of religious liberty is to prevent not only destruction of property but also violence against people. After all, religious extremism has unleashed violence from the era of the Crusades to the era of 9/11. 87 Addressing a disturbing trend that is no less true today, 88 the U.N. Commission on Human Rights

81. Id. art. 2(1).
82. Id. art. 1(1).
83. Id.
85. Id.
86. Id. para. 8.
87. David Llewellyn & H. Victor Condé, Freedom of Religion or Belief under International Humanitarian Law and International Criminal Law, 12 TRINITY L. REV. 39, 41 (2004) (“religion has often been the definitive divisive element for disputes that degenerate into systemic violence of terrorism, rebellions, revolutions, civil wars and both non-international and international armed conflicts”).
observed in 2005, “the overall rise in instances of intolerance and violence directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia . . . .”89 The Commission urged that everyone in government “cultivate respect for all religions or beliefs, thereby promoting mutual understanding and tolerance.”90

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

V. RELIGIOUS FREEDOM BECOMES PART OF CUSTOMARY LAW OF NATIONS

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

90. Id. at 8(c).
93. Id.
94. The Paquete Habana, 175 U.S. 677, 700, 711 (1900). (“[B]y the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law” that noncombatant fishing vessels “are exempt from capture as prize of war. . . . International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly
A majority of legal scholars in the field have concluded that the UDHR, including its assertion of religion freedom, has become part and parcel of customary international law. Machado advises that “national courts would do well to take advantage of an existing *jus commune* [common law], developed by the most influential and international courts, whose core values are freedom of conscience and equality. Its formal corollaries are the prohibition of coercion, persecution and discrimination in the name of religion.”

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

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

---

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


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

99. *Id.* at 518.

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

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

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

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

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

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

VII. INSTRUMENTS ADDRESS RELIGIOUS RIGHTS ON THE REGIONAL LEVEL

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

The American Convention on Human Rights (ACHR) provides, “No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.” It also says, “Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights and freedoms of others.” Further, “[e]veryone has the right to freedom of conscience and religion.”

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

107. Id.
108. Id.
110. Id. art. 12(2).
111. Id. art. 12(3).
112. Id. art. 12(1).
The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{114}

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

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

\textbf{VIII. ATTIRE, CONVERSION, EVANGELISM CONFOUND REGIONAL TRIBUNALS}

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

\begin{footnotesize}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} ECHR, \textit{supra} note 114, art. 9(2).
\end{footnotesize}
It would seem reasonable to regulate the wearing of a burqa, which covers the face as well as the body, when there is a legitimate basis for surveillance such as in the secure area of an airline terminal or military base. However, it is difficult to see how wearing a headscarf while posing for a university photograph would harm anyone’s safety, order, health, morals, or other rights. If the argument be made that disorder would ensue because others saw her photograph showing the headscarf, it would seem more logical to find that those engaging in disorderly conduct should be disciplined, not the religious person who simply wants to wear her headscarf when photographed. The European Convention on Human Rights (ECHR) provides essentially the same standard as the ICPR. Yet, the Commission reasoned that pursuing studies in the secular university constitutes agreement to the university’s rules, which include submitting to be photographed with one’s head uncovered. Thus the tribunal decided the case on the basis of a rule of contract law, not an interpretation of the human rights convention. However, a better legal analysis would determine that, where the religious conduct poses no harm to safety, order, etc., the guarantee of religious freedom should take precedence over a contract rule. The Karaduman case has been cited as reflecting an unfortunate trend in decisions by international tribunals on the issue of attire as a form of religious expression.

The European Court of Human Rights (ECtHR) in Dahlab v. Switzerland, a 2001 case, decided that a primary school teacher barred from wearing the hijab in class was not protected by ECHR Article 9. The hijab, a scarf, covers the hair and neck but not the face. The court’s decision was reached despite the fact that there had been no complaints from any parents. The court based its reasoning on “the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children.” And yet the headscarf ban would seem “hard to square with the principle

120. Id. art. 9 (“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”).
122. INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 161 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010).
124. Id.
125. Id.
of gender equality” though the (weak) argument is made that it “might have some kind of proselytizing effect.”

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

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

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

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

---

127. General Comment No. 22, supra note 49 (“freedom to ‘have or adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain”).
128. Robert Taer, “Religion” in International Law, RELIGION AND HUMAN RIGHTS (“right to give up her religion for a belief, or to change to a different religion... strongly contested by some Muslim countries in the United Nations, who assert that no Muslim has the right to abandon Islam”), http://www.religionhumanrights.com/Research/religion.intlaw.htm (last visited Jan. 31, 2018).
129. Davis, supra note 2, at 229.
ing the statute and the leadership of the Muslim religion in Bulgaria.”

The Commission declared the application admissible.

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

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

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

132. Id.
133. Id.
135. Id.
136. Id.
137. Id.
138. ECHR, supra note 114, art. 9(1) (and associated text).
141. Id.
2018] PROTECTION OF RELIGIOUS FREEDOM 69

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

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

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

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

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

\(^{142}\) Id.


\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) Id. at 412-13.
day work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.\footnote{Id. at 403.}

In 1990, the Supreme Court in \emph{Oregon v. Smith} reversed \emph{Sherbert} outright.\footnote{Oregon v. Smith, 494 U.S. 872 (1990).} The judicial change of course meant that Smith, a Native American Indian who used peyote (a cactus-derived hallucinogen) in religious ceremony, was found to be criminally liable under Oregon’s drug laws.\footnote{Id.}

Modifying the rule it had enunciated, the Supreme Court in a split decision in \emph{INS v. Jairo Jonathan Elias Zacharias}, in 1992, imposed an “intent requirement.”\footnote{INS v. Jairo Jonathan Elias Zacharias, 502 U.S. 478 (1992).} This meant that a party claiming religious exemption from a facially neutral state act may prevail by presenting evidence of officials’ discriminatory intent.\footnote{Id.}

Members of Congress did not agree with the course the Supreme Court was on. Exercising its power to make the laws, Congress enacted the Religious Freedom Restoration Act,\footnote{Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).} which reversed \emph{Smith} and restored the \emph{Sherbert} rule. The statute itself said that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”\footnote{Id.} The act of Congress said its purpose was to “to restore the compelling interest test as set forth in \emph{Oregon v. Smith} . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . provide a claim or defense to persons whose religious exercise is substantially burdened by government.”\footnote{Id.}

In a 1997 case, \emph{City of Boerne v. Flores},\footnote{City of Boerne v. Flores, 521 U.S. 507 (1997).} the Supreme Court justices, disapproving of the Religious Freedom Restoration Act, struck down the federal act on constitutional grounds insofar as it applied to state and local government.

Congress responded by enacting the Religious Land Use Act,\footnote{Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).} which requires strict scrutiny of facially neutral state laws impacting freedom of
religion. This restored the Sherbert rule and restored the United States to following the international norm of safeguarding religious liberty. The religious exemption to facially neutral acts of federal and state government stands, consistently with the Constitution and international law.

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

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

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

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

157. Id.
158. Id.
160. Id. at 1581.
164. Id. at 462.
X. TRUMP’S MUSLIM TRAVEL BAN IS AN ABERRATION FROM COMMITMENT TO RELIGIOUS FREEDOM AND RULE OF LAW AFFIRMED BY FOUNDERS

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

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

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

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

---


166. *Id.*


168. *Id. at 7* (citing Alexander Hamilton, *Pacificus* No. 1 (June 29, 1793)), *reprinted in The Papers of Alexander Hamilton* 33, 33-43 (Harold C. Syrett, ed., 1969). See also U.S. Const. art. I, § 8 (“the law of nations”) and art. IV, cl. 2 (“treaties made, or which shall be made”).
2018] PROTECTION OF RELIGIOUS FREEDOM 73

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

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

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

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

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

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

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

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

---


conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.\footnote{Virginia Declaration of Rights of 1776, art. 14; The Statutes at Large, IX 109-112 (William W. Hening, ed. 1890-1923) (caps in original), available at http://www.history.org/almanack/life/politics/varights.cfm.}

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

> The universal toleration in matters of religion in most States, and the entire want of a power respecting them in the general Government, has as we understand induced the Barbary powers, to view us more favorably than other Christian nations, who are exclusively so, and with whom these powers consider themselves in perpetual hostility.\footnote{Secretary of State James Madison to Tobias Lear, Consul General, Algiers, July 14, 1803, in Naval Documents, 2:485, cited in Denise A. Spellberg, Thomas Jefferson’s Qur’an 209 (2013).}

Early United States treaties signed with Algiers\footnote{1795 art. XVII, 1815 art. XV, and 1816, art. 15, cited in Robert Renbert Wilson, United States Commercial Treaties and International Law 244 (1960).} allowed consuls and other public agents in the territory of the other state to exercise their religion in their own houses. Treaties with Tripoli\footnote{Id. at 1796 art. XI and 1805 art. XIV.} provided that “no pretext arising from religious opinions” should interfere with harmony between the two states – a treaty with Tripoli in 1796 said the Government of the United States “is not in any sense founded on the Christian religion,” and a treaty in 1805 disclaimed for the United States any enmity against the “laws, religion or tranquility of the Musselmen.”\footnote{Id.}

A surprisingly illuminating encounter took place when the Tunisian ambassador was in Washington at the same time as Native Americans were there negotiating treaties with the United States.\footnote{Denise A. Spellberg, Thomas Jefferson’s Qur’an 41, 221 (2013)} The Indians made a courtesy call on Ambassador Sidi Suleyman Mellimelli, who then asked them what God they worship.\footnote{Id.}

The Minister asked them what God they worshipped. The Indians answered The Great Spirit. He then asked them if they be-
lieved in Mohamed, Abraham, or Jesus Christ? They answered neither. He then asked what prophet do you worship. They replied none. We worship the Great Spirit without an agent.180

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

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

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

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

182. John Locke (1692), quoted in SPELLBERG, supra note 178, at 41.
183. Notes on Virginia, supra note 181, at 106-07.
184. SPELLBERG, supra note 178, at 89.
185. Id. at 155.
186. Id. at 30.
187. Id. at 31.
XI. CONCLUSION

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

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

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

The rights of sincere conscientious objectors, including those who selectively object to military actions that violate an upright conscience, should be respected consistently. Proclaiming religious liberty while denying the right of a conscript to refuse to bomb a populated city is analogous to declaring “all men are created equal . . . with certain unalienable rights” while engaging in the slave trade.
Religious minorities should be allowed exemption from facially neutral laws that materially interfere with religious freedom. It would be reasonable to outlaw use of marijuana without a physician’s prescription, but the Native American tribe whose members for generations have used ceremonial peyote should be allowed a special exception.

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

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