

## RELIGIOUS FREEDOM, DEMOCRACY, AND INTERNATIONAL HUMAN RIGHTS

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In January 2008, news headlines and human rights websites around the world broadcast the story of a death sentence handed down by a local Afghan court to a twenty-three-year-old journalism student, Sayed Perwiz Kambakhsh, for committing the crime of blasphemy.<sup>1</sup> The student had downloaded and distributed an article from the Internet after annotating it with words deemed to be an insult to the Prophet Mohammed.<sup>2</sup> The article in question was critical of certain Islamic beliefs and practices that were seen as oppressive to women.<sup>3</sup> Kambakhsh had allegedly added to the text some of his brother's criticisms of Mohammed's teachings on women's rights.<sup>4</sup> The death sentence drew criticism from journalists, human rights activists, and political leaders around the world, inspiring European Parliament President Hans-Gert Pöttering to make the following protest to Afghan President Hamid Karzai: "The alleged 'crime' of this person would appear to be that he has distributed publications aimed at improving the situation of Afghan women."<sup>5</sup>

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<sup>1</sup> *Afghan Senate Backs Death Penalty*, BBC NEWS, Jan. 30, 2008, <http://news.bbc.co.uk/2/hi/7216976.stm>; *Afghanistan: Journalist Given Death Sentence for 'Blasphemy'*, RADIO FREE EUROPE, Jan. 23, 2008, <http://www.rferl.org/content/article/1079389.html>; Nora Boustany, *Afghan Reporter's Death Sentence Draws Wide Condemnation*, WASH. POST, Jan. 25, 2008, at A15; Abdul Waheed Wafa & Carlotta Gall, *Afghan Judge Says Journalist Must Die For Blasphemy*, N.Y. TIMES, Jan. 24, 2008, at A8.

<sup>2</sup> Wafa & Gall, *supra* note 1, at A8.

<sup>3</sup> Boustany, *supra* note 1, at A15; Wafa & Gall, *supra* note 1, at A8.

<sup>4</sup> Boustany, *supra* note 1, at A15.

<sup>5</sup> Martin Banks, *EU Parliament President Calls for Life of Afghan Student to be Spared*, THEPARLIAMENT.COM, Jan. 21, 2008, [http://www.theparliament.com/no\\_cache/latestnews/news-article/newsarticle/eu-parliament-presidentnbspcalls-for-life-of-afghan-student-to-be-spared](http://www.theparliament.com/no_cache/latestnews/news-article/newsarticle/eu-parliament-presidentnbspcalls-for-life-of-afghan-student-to-be-spared); see also *Afghanistan: Journalist Given Death Sentence for 'Blasphemy'*, *supra* note 1.

At the appeal court, Judge Abdul Salam Qazizada, a holdover from the Taliban era, was reportedly antagonistic toward Kambakhsh.<sup>6</sup> In support of the blasphemy charge against Kambakhsh, the court considered as evidence anecdotal reports that the young man was a socialist, was impolite, asked too many questions in class, and swapped off-color jokes and messages with friends.<sup>7</sup> In October 2008, an Afghan appeals court overturned Kambakhsh's death sentence and sentenced him instead to twenty years in prison, presumably due to the considerable international attention to his case and international pressure on the Afghan government.<sup>8</sup> Kambakhsh began his prison term in March 2009, the same month in which Afghan President Hamid Karzai signed a law specifying circumstances in which Afghan women of the Shia Muslim tradition are required to have sex with their husbands under Muslim family law.<sup>9</sup> Interpretations of Islamic law as sanctioning marital rape may as well have been among the kinds of abuse of women's rights that the young journalist Kambakhsh was seeking to address in his writing.<sup>10</sup>

Such has been the state of religious liberty and human rights in Afghanistan—newly democratic and purportedly liberated from Muslim extremists.<sup>11</sup> This kind of story recurs in endless variations in the Middle East, Africa, the Balkans, and various former-Soviet nations and provinces in Eastern Europe and Central Asia.<sup>12</sup> Clearly, religion and freedom do not yet coincide in many countries, however rosy their new constitutional claims are as to religious rights and freedoms for all.<sup>13</sup> Apostasy, Blasphemy, Conversion, Defamation, and Evangelization—these are the new alphabet of religious rights violation in a number of regions around the world.<sup>14</sup> Occurring at the intersection of religion and international human rights, these violations

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<sup>6</sup> Jean MacKenzie, *Saving Parwez Kambakhsh*, RAWA NEWS, June 16, 2008, <http://www.rawa.org/temp/runews/2008/06/16/saving-parwez-kambakhsh.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Abdul Waheed Wafa, *No Death Sentence for Afghan Journalist*, N.Y. TIMES, Oct. 22, 2008, at A12.

<sup>9</sup> Carlotta Gall & Sangar Rahimi, *Karzai Vows to Review Restrictions on Women After International Criticism*, N.Y. TIMES, Apr. 5, 2009, at A14; HRW: *Politicized Case of Parwez Kambakhsh Shows Grave Threat to Freedom of Expression*, RAWA NEWS, Mar. 10, 2009, <http://www.rawa.org/temp/runews/2009/03/10/hrw-politicized-case-of-parwez-kambakhsh-shows-grave-threat-to-freedom-of-expression.phtml> [hereinafter *Politicized Case of Parwez Kambakhsh*].

<sup>10</sup> See *Politicized Case of Parwez Kambakhsh*, *supra* note 9.

<sup>11</sup> See *Two Years in the War on Terrorism*, VOICE OF AMERICA NEWS, Sept. 17, 2003, available at <http://www.voanews.com/uspolicy/archive/2003-09/a-2003-09-17-4-1.cfm?moddate=2003-09-17>.

<sup>12</sup> See generally RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES (Johan D. van der Vyver & John Witte, Jr., eds., 1996).

<sup>13</sup> See *id.*

<sup>14</sup> See *infra* Part IV.

are also challenges to the universality of human rights and the democratic institutions that generate and affirm them.

## I. THE HUMAN RIGHTS REVOLUTION AND GLOBAL AWAKENING OF RELIGION

The new concerns about religious rights and religious offenses come at a time in which religion has been a key beneficiary of a human rights revolution that is often viewed as universal, global, and democratic in normative aspiration, if not always in practical effect.<sup>15</sup> Cresting in the last third of the twentieth century, the modern human rights revolution has helped to catalyze a great awakening of religion around the globe.<sup>16</sup> One cause and consequence of this religious resurgence is that the ambit of human rights protections for and by religions has been substantially expanded.<sup>17</sup> In part because of the global “third wave” of democratization, more than 200 major new statutes and constitutional provisions on religious rights have been promulgated since 1975—many of them replete with generous protections for liberty of conscience and freedom of religious exercise; guarantees of religious pluralism, equality, and nondiscrimination; and several other special protections and entitlements for religious individuals and religious groups.<sup>18</sup> These national guarantees have been matched by a growing body of regional and international norms building upon the foundational guarantees in the 1948 Universal Declaration of Human Rights<sup>19</sup> and its successor instruments on religious freedom.<sup>20</sup> With their legal and political status thus guaranteed, religious groups have enjoyed greater capacity to ease the plights and expand the rights of women, children, and refugees in many parts of the globe;<sup>21</sup> furthermore, they have been particularly effective in addressing matters related to what are increasingly referred to as the “third generation” of human rights

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<sup>15</sup> John Witte, Jr., *Foreword* to NATAN LERNER, RELIGION, SECULAR BELIEFS, AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION, at xi (2006).

<sup>16</sup> *Id.* at ix.

<sup>17</sup> *Id.* at x.

<sup>18</sup> *Id.* See generally BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006); CENTER FOR THE STUDY OF HUMAN RIGHTS, RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS (Tad Stahnke & J. Paul Martin eds., 1998); FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK (Tore Lindholm et al. eds., 2004).

<sup>19</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter 1948 Universal Declaration].

<sup>20</sup> *Id.*; see, e.g., BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 18, at 74.

<sup>21</sup> See, e.g., BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 18, at 186, 288, 304, 429.

concerning health (particularly HIV/AIDS),<sup>22</sup> the environment,<sup>23</sup> disaster relief,<sup>24</sup> globalization,<sup>25</sup> peace-making, and conflict transformation.<sup>26</sup>

At the same time, however, this very same global human rights revolution has coincided with intensifying religious and ethnic conflict, oppression, and belligerence.<sup>27</sup> In Rwanda and Sudan, ethnic nationalism and religious extremism have conspired to bring violent dislocation or death to hundreds of rival religious believers each year, as well as persecution, false imprisonment, forced starvation, and savage abuses to other untold thousands.<sup>28</sup> In France, Belgium, and Germany, political secularism, laicization, and nationalism have combined to threaten civil denial and deprivation particularly to “sects” and “cults” of high religious temperature or of low cultural conformity.<sup>29</sup> And in many parts of the world today, barbaric Islamicist terrorists have waged a destructive jihad against all manners of religious, cultural, and ethnic enemies, both real and imagined.<sup>30</sup> Other European nations, such as the Netherlands, Sweden, and Denmark, have also seen increased tensions concerning their rapidly growing Muslim minorities.<sup>31</sup> In communities across Asia, the Middle East, and North Africa, Christians, Jews, and Muslims have faced sharply increased restrictions, repression, and more than occasional martyrdom.<sup>32</sup>

Indeed, in many areas of the world, a new “war for souls” has broken out— a battle to reclaim the traditional, cultural, and moral fabric of these new societies and a struggle to retain adherence and adherents to indigenous faiths.<sup>33</sup> In part, this is a theological war, as rival communities have often cast each other in religious terms.<sup>34</sup> The ecumenical spirit of the previous decades—characterized by the participation of the world’s nations and religious groups in the creation of the United Nations and the near-unanimous

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<sup>22</sup> See, e.g., *id.* at 253.

<sup>23</sup> See, e.g., *id.* at 53, 57, 241–42, 272.

<sup>24</sup> See, e.g., *id.* at 66.

<sup>25</sup> See, e.g., *id.* at 268, 600, 603.

<sup>26</sup> See, e.g., *id.* at 78, 239–40, 908–18.

<sup>27</sup> Witte, *supra* note 15, at x.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; NATAN LERNER, RELIGION, SECULAR BELIEFS, AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION 10 (2006).

<sup>30</sup> Witte, *supra* note 15, at x.

<sup>31</sup> INT’L HELSINKI FED’N FOR HUMAN RIGHTS, INTOLERANCE AND DISCRIMINATION AGAINST MUSLIMS IN THE EU 50–51, 105–06, 128–30 (2005).

<sup>32</sup> Witte, *supra* note 15, at x.

<sup>33</sup> *Id.*, at xi.

<sup>34</sup> *Id.*

approval of the 1948 Universal Declaration<sup>35</sup>—is giving way to new forms of religious balkanization.<sup>36</sup> In part, this is also a legal war, as local religious groups conspire with political leaders to adopt statutes and regulations restricting the constitutional rights of their foreign religious rivals.<sup>37</sup> Several countries have recently passed firm anti-proselytism laws, imposed cult registration requirements, tightened visa controls, and instituted various other discriminatory restrictions on new or newly-arrived religions.<sup>38</sup> Several parts of the non-Western world seem to be facing a dawn of fundamentalist Islamic and Christian religious establishments.<sup>39</sup> These tensions exist under the surface of shiny constitutional veneers of international human rights instruments, regardless of the overall success of the human rights revolution.<sup>40</sup>

## II. “ON CONDITION NO ONE ASKS US WHY”: HUMAN RIGHTS AS UNIVERSAL *IUS GENTIUM* AND *LINGUA FRANCA*

Questions concerning religious freedom, democracy, and human rights are not new in international law. They confronted the drafters of the “international bill of rights” from the very beginning.<sup>41</sup> Some Muslim nations, particularly Pakistan, Egypt, and Saudi Arabia, objected to provisions of the 1948 Universal Declaration of Human Rights that dealt with marriage and family and guaranteed the right to change one’s religion.<sup>42</sup> In the end, Saudi Arabia remained as the lone dissenter on the religious freedom provision and the only Muslim nation to withhold its full support through abstaining from the final vote.<sup>43</sup> The Declaration was adopted with forty-eight votes in favor, eight abstentions, and no opposition.<sup>44</sup>

In the sixty years since the Universal Declaration, human rights, including religious rights, have emerged as part of the common law, the *ius gentium*, of

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<sup>35</sup> JOHN NURSER, FOR ALL PEOPLES AND ALL NATIONS 11, 22–23 (2005).

<sup>36</sup> Witte, *supra* note 15, at xi.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; see also ANTHONY GILL, THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY 4–5 (2008).

<sup>41</sup> MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 166–67 (2001).

<sup>42</sup> *Id.* at 154, 168, 222.

<sup>43</sup> *Id.* at 168.

<sup>44</sup> *Id.* at 170.

an emerging world culture.<sup>45</sup> Historically, the *ius gentium* was the set of principles and customs that were common to several political communities and often was the basis for treaties and other diplomatic conventions.<sup>46</sup> The *ius gentium* was not static, but changed over time and across cultures as new interpretations of law were offered and became increasingly conventional.<sup>47</sup> Thus, the *ius gentium* provided a transtemporal, transcultural, and more or less universal set of norms and a consistent body of principles by which a person and a people could govern themselves.<sup>48</sup>

What gave the *ius gentium* enduring authority in Western history was that it drew heavily from all manners of legal and cultural traditions.<sup>49</sup> The *ius gentium* provided the foundation on which the international human rights apparatus emerged haltingly in the eighteenth and nineteenth centuries while emerging more fully in the twentieth century in the aftermath of the two devastating world wars.<sup>50</sup> Universal and global inquiries into common laws and principles of right living, in fact, predate the current calls for cosmopolitanism and globalization by many centuries.<sup>51</sup>

In recent years, discussions of “Asian values” and Islamic human rights have revived earlier questions about the universality of human rights, particularly of those grounded in or having to do with religion.<sup>52</sup> The charge has been that human rights are the hegemonic creatures of Western Christianity, Enlightenment liberalism, or some admixture of the two.<sup>53</sup> For some, these debates have raised questions about the foundations, even the mere existence, of human rights per se, whether or not the rights in question involve religion.<sup>54</sup> To the extent that these debates have prompted religious traditions to reconsider and retrieve their own history and commitment to human rights, these conversations are worthwhile. But inquiries into the relationship between religion and human rights need not be so foundationalist in their character and consequence.

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<sup>45</sup> John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707, 720–23 (2001).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 715–17.

<sup>51</sup> *Id.* at 720–22.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Philosopher Jacques Maritain, one of the philosophers summoned by the United Nations Educational, Scientific, and Cultural Office (“UNESCO”) to consult on the Universal Declaration of Human Rights, when asked how proponents over different ideologies could agree to a list of fundamental rights, replied: “Yes, we agree about the rights *but on condition no one asks us why.*”<sup>55</sup> The goal, he elaborated, was to agree “not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action.”<sup>56</sup> Philosophers and jurists since have also found value in non-foundational, practical, anthropological, hermeneutical, and discursive approaches to human rights.<sup>57</sup> Whatever their foundation, religious or otherwise, it is increasingly the case that “human rights are accepted as a transcultural language”<sup>58</sup> and that “the language of human rights has become the moral *lingua franca.*”<sup>59</sup>

The human rights norms that underlie much of the emerging international common law are not a static belief system born of Western Christendom and Enlightenment liberalism. They are fluid, elastic, and open to challenge and change. The human rights regime is not a fundamental belief system. It is a relative system of ideas and ideals that presupposes the existence of fundamental beliefs and values that will constantly shape and reshape it. Human rights norms have grown in international law out of longstanding religious and cultural traditions. They have traditionally provided a forum and a focus for subtle and sophisticated philosophical, theological, and political reflections on the common good and our lives. They are derived from, and are dependent upon, the transcendent principles that religious traditions, more than any other group, continue to cultivate. But they are aimed universally at the common good of all peoples. The human rights regime is neither the child of Christianity and the Enlightenment, nor a ward under exclusive guardianship of either.

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<sup>55</sup> GLENDON, *supra* note 41, at 77 (emphasis added) (internal quotation marks omitted).

<sup>56</sup> *Id.* at 77–78 (internal quotation marks omitted).

<sup>57</sup> See Abdullahi Ahmed An-Na'im, *Toward an Islamic Hermeneutic for Human Rights*, in HUMAN RIGHTS AND RELIGIOUS VALUES: AN UNEASY RELATIONSHIP? (Abdullahi A. An-Na'im et al. eds., 1995); THE PROJECT ON RELIGION AND HUMAN RIGHTS, *Universality vs. Relativism in Human Rights*, in RELIGION AND HUMAN RIGHTS (John Kelsay & Sumner B. Twiss eds., 1994); Robert A. Schapiro, *The Consequences of Human Rights Fundamentalism*, 54 EMORY L.J. 171 (2005).

<sup>58</sup> JÜRGEN HABERMAS, RELIGION AND RATIONALITY 153 (Eduardo Mendieta ed., 2002).

<sup>59</sup> MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 4 (2007) (emphasis added).

Human rights norms are the *lingua franca* and the *ius gentium* of our times, the common law of nations, and the “middle axioms” in our moral and political discourse between the traditions and practices of the past and our aspirations and goals for the future. Human rights have emerged today as one of the richest products of the interaction of religion and international law—the common law and common power of the emerging cosmopolitan world order. But the progress has not always been smooth, and there have been many obstacles and detours along the way.

### III. THE INTERNATIONAL LAW FRAMEWORK OF RELIGION AND HUMAN RIGHTS

If the 1948 Universal Declaration provided the foundation for religious freedom as a human right,<sup>60</sup> subsequent documents supplied the framework. Four international instruments contain the most critical protections of religious rights and liberties: (1) the International Covenant on Civil and Political Rights (“ICCPR”),<sup>61</sup> (2) the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (the “1981 Declaration on Religion and Belief”),<sup>62</sup> (3) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (“1989 Vienna Concluding Document”),<sup>63</sup> and (4) the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (“1992 Minorities Declaration”).<sup>64</sup>

The ICCPR largely repeats the capacious guarantee of religious rights and liberties first announced in the 1948 Universal Declaration. Article 18, the key religion provision, protects the “right to freedom of thought, conscience, and

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<sup>60</sup> See *id.* at 76.

<sup>61</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

<sup>62</sup> United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., 73d plen. mtg., Supp. No. 151, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) [hereinafter 1981 Declaration on Religion and Belief].

<sup>63</sup> Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Jan. 17, 1989, 28 I.L.M. 527 [hereinafter 1989 Vienna Concluding Document].

<sup>64</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc. A/RES/47/135/Annex (Dec. 18, 1992) [hereinafter 1992 Minorities Declaration].

religion,”<sup>65</sup> defined to include “freedom to have or to adopt a religion or belief of [one’s] choice, and freedom, either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching.”<sup>66</sup> Permissible restraints on religious freedom are limited to instances that pose a risk to the “public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>67</sup> Additional provisions of the ICCPR call upon state parties to prohibit “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence,”<sup>68</sup> to require equal treatment of all persons before the law, to prohibit discrimination based on religion,<sup>69</sup> and to guarantee religious minorities the rights “to enjoy their own culture” and “to profess and practise their own religion.”<sup>70</sup>

The 1981 Declaration on Religion and Belief elaborates the religious liberty provisions that the ICCPR adumbrated. The 1981 Declaration on Religion and Belief sets forth a lengthy, illustrative catalogue of freedoms that emphasizes more concretely the ICCPR’s guarantees.<sup>71</sup> Specifically enumerated rights include the rights to worship and assemble, to maintain charitable and humanitarian institutions, to acquire and use ritual objects and materials, to produce and disseminate publications, to teach religion, to solicit and receive financial and other charitable contributions, to designate religious leaders, to celebrate holy days and days of rest, and to communicate to those within and without the faith both nationally and internationally.<sup>72</sup> The 1981 Declaration on Religion and Belief also includes more elaborate prohibitions than the ICCPR on religious discrimination and intolerance by barring religious “discrimination by any State, institution, group of persons, or person”<sup>73</sup> and defining discrimination as “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its

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<sup>65</sup> ICCPR, *supra* note 61, art. 18(1).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, art. 20(2).

<sup>69</sup> *Id.* art. 26.

<sup>70</sup> *Id.*, art. 27. It should be noted that the ICCPR has been ratified by 162 of the 192 countries that are members of the United Nations, including almost all of the Muslim states who are members of the Organization of the Islamic Conference (“OIC”). See United Nations Treaty Collection, International Covenant on Civil and Political Rights, [http://treaties.un.org/pages/viewdetails.aspx?src=Treaty&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=Treaty&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Nov. 15, 2009).

<sup>71</sup> 1981 Declaration on Religion and Belief, *supra* note 62, arts. 1, 6.

<sup>72</sup> *Id.* art. 6.

<sup>73</sup> *Id.* art. 2.

effect nullification or impairment of the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal basis.”<sup>74</sup>

The 1989 Vienna Concluding Document extends the religious liberty norms of the 1981 Declaration, particularly for religious groups. It prohibits religious discrimination against “individuals or communities . . . in all fields of civil, political, economic, social and cultural life.”<sup>75</sup> It recommends norms of “mutual tolerance and respect between believers of different communities as well as between believers and non-believers”<sup>76</sup> and includes a number of specific free exercise grants that recognize and balance throughout the rights of “individual believers and communities of believers.”<sup>77</sup> A number of its provisions focusing on religious group rights reflect the international right to self-determination of peoples, long recognized as a basic norm of international law.<sup>78</sup>

The 1992 Minorities Declaration recognizes the right to self-determination of groups within pluralistic societies even more fully. It guarantees a religious community the right to practice its religion, an ethnic community the right to promote its culture, and a linguistic community the right to speak its language without undue state interference or unnecessary legal restrictions.<sup>79</sup> The Declaration recognizes “the promotion and protection of the rights” of religious, cultural, and linguistic minorities as “an integral part of the development of society as a whole and within a democratic framework based on the rule of law.”<sup>80</sup> So conceived, the right to religious self-determination provides religious groups with some of the same strong protections afforded to religious individuals under the freedom of conscience guarantee.<sup>81</sup> It also expands group rights beyond the usual parameters of language, ethnicity, and geography to include groups based on religious affiliation.<sup>82</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> 1989 Vienna Concluding Document, *supra* note 63, princ. 16(a).

<sup>76</sup> *Id.* princ. 16(b).

<sup>77</sup> *Id.* princ. 16(i).

<sup>78</sup> *See id.* prins. 16–17 (calling for states to implement freedom of thought, conscience, religion, and belief in their laws and regulations).

<sup>79</sup> 1992 Minorities Declaration, *supra* note 64, art. 2.

<sup>80</sup> *Id.* pmb1.

<sup>81</sup> *See* Hurst Hannum, *The Rights of Persons Belonging to Minorities*, in HUMAN RIGHTS: CONCEPTS AND STANDARDS 277, 288 (Janusz Symonides ed., 2000) (finding that the concept of a minority implies a community or group, and, by requiring states to protect the identity of minorities, Article 1 of the 1992 Minorities Declaration protects groups and not just individual members).

<sup>82</sup> *See* 1992 Minorities Declaration, *supra* note 64.

In recent years, two Islamic declarations on human rights have drawn attention for their distinctive views of religious freedom. The 1981 Universal Islamic Declaration of Human Rights,<sup>83</sup> as its title suggests, is framed in highly universal terms. Its foreword proclaims that Islamic human rights can provide a code for “mankind,”<sup>84</sup> invoking a classic Qur’anic passage describing the creation of humanity “into nations and tribes, so that you might come to know one another.”<sup>85</sup> It guarantees “freedom of belief, thought, and speech”<sup>86</sup> and, more specifically, provides for a person’s “right to freedom of conscience and worship in accordance with his religious beliefs.”<sup>87</sup> It condemns actions that “hold in contempt or ridicule the religious beliefs of others or incite public hostility against them,”<sup>88</sup> and declares that “respect for the religious feelings of others is obligatory on all Muslims.”<sup>89</sup> Above all, it declares that “[t]he Qur’anic principle ‘There is no compulsion in religion’ shall govern the religious rights of non-Muslim minorities”<sup>90</sup> and “[i]n a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.”<sup>91</sup> The Universal Islamic Declaration would appear to be a clear indication that notions of universal human rights do exist in Islam, including the right to religious freedom.

The more recent 1990 Cairo Declaration on Human Rights,<sup>92</sup> by contrast, contains no articles specifically devoted to religious freedom, but it does cite “race, colour, language, sex, *religious belief*, political affiliation, [and] social status” as impermissible bases of discrimination.<sup>93</sup> Religious rights are mentioned in a provision on educational rights,<sup>94</sup> as well as in the context of

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<sup>83</sup> Universal Islamic Declaration of Human Rights (Sept. 19, 1981), *available at* <http://www.alhewar.com/ISLAMDECL.html> (last visited Oct. 10, 2009).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting QUR’AN 49:13).

<sup>86</sup> *Id.* art. XII.

<sup>87</sup> *Id.* art. XIII.

<sup>88</sup> *Id.* art. XII.

<sup>89</sup> *Id.* art. XII.

<sup>90</sup> *Id.* art. X(a).

<sup>91</sup> *Id.* art. X(b).

<sup>92</sup> World Conference on Human Rights, Apr. 19–May 7, 1993, *The Cairo Declaration on Human Rights in Islam*, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993), *available at* <http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf> [hereinafter Cairo Declaration].

<sup>93</sup> *Id.* art. 1(a) (emphasis added).

<sup>94</sup> *Id.* art. 9 (“The State . . . shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam . . . . Every human being has the right to receive both religious and worldly education from the various institutions of, education and guidance . . . in such an integrated and balanced manner as to . . . strengthen his faith in God . . .”).

the believer's right "to live in security for himself, his *religion*, his dependents, his honour, and his property."<sup>95</sup> At the same time, the provision on free speech limits the applicability of free speech when such speech would "arouse nationalistic or *doctrinal* hatred or to do anything that may be an incitement to any form or [sic] racial discrimination."<sup>96</sup> In linking religion to race and other categories of identity, the Cairo Declaration is a precursor to the more recent connections made between religion, race, and ethnicity in the "combating defamation of religions" resolutions that have been introduced by the member states of the Organization of the Islamic Conference ("OIC") at the United Nations in the past decade.<sup>97</sup> As we shall see, the conflation of religion, race, and ethnicity in those resolutions suggests a potentially narrower ambit of religious freedom than the earlier Universal Islamic Declaration. However, it is equally important to recognize that the Cairo Declaration does affirm the fundamental nature of religious rights, even as it hints at the grounds for their restriction.

#### IV. THE NEW ALPHABET OF RELIGIOUS FREEDOM: POINTS OF TENSION AND A CHALLENGE FOR UNIVERSALITY

The various international human rights instruments set forth in the previous section, highlight and address a number of the hottest legal issues surrounding religion that have confronted national and international tribunals over the past half century:

- how to protect religious minorities within a majoritarian religious culture;
- how to place limits on religious, anti-religious, and cultural discrimination, or on religious and anti-religious exercises and expressions that cause offense or harm to others;
- how to adjudicate when a state's proscriptions or prescriptions run directly counter to a party's core claims of conscience or cardinal commandments of the faith;

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<sup>95</sup> *Id.* art. 18(a) (emphasis added).

<sup>96</sup> *Id.* art. 22(d) (emphasis added).

<sup>97</sup> *See infra* note 118 and accompanying text.

- how to negotiate the complex needs and norms of religious groups without according groups too much sovereignty over their members, or individuals too little relief from secular courts;
- how to adjudicate intra- or interreligious disputes; and
- how to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of vital social services.

These concerns have been the perennial issues that have long taxed the international human rights apparatus, as well as the courts and legislatures of many nation-states.

More recently, international attention and international law have come to focus on three particularly controversial issues: (1) proselytism (or evangelization in Christian terms); (2) conversion (especially when conceived as apostasy); and (3) blasphemy (recently reconceived as “defamation of religions”). Each of these three issues deserves further adumbration, as they are among the most hotly contested religious freedom issues today and arise particularly when religious traditions and religious believers confront each other in the current global resurgence of religion.

#### *A. Proselytism, or Evangelization*

Proselytism, or evangelization in Christian terms, is a feature and result of the democratic revolution of the modern world. New religious freedom has brought many new religious conflicts to tender, new democracies. In addressing instances of proselytism, states must balance one community’s right to exercise and expand its faith versus another person’s or community’s right to be left alone to its own traditions. The state must protect the juxtaposed rights claims of majority and minority religions, and of foreign and indigenous religions. And, in the end, the state must craft a general rule to govern multiple theological understandings of conversion—the contemplated result of successful proselytism.

On the issue of proselytism and its regulation, international human rights instruments provide some ample direction. The ICCPR protects a person’s freedom “to manifest . . . religion or belief” through “teaching,” but also prohibits outright any “coercion” that would “impair” another’s right “to have

or to adopt a religion or belief.”<sup>98</sup> At the same time, it allows legal restrictions that are necessary “[f]or respect of the rights or reputation of others; [f]or the protection of national security or of public order (*ordre public*), or of public health or morals”<sup>99</sup> and guarantees to religious minorities “the right . . . to enjoy their own culture”<sup>100</sup> and “to profess and practice their own religion.”<sup>101</sup> The ICCPR thus protects the general right to proselytize for the sake of peaceably seeking the conversion of another. It provides no protection for coercive proselytism, at a minimum barring physical or material manipulation of the would-be convert, and in some contexts even more subtle forms of deception, enticement, and inducement.<sup>102</sup> It also casts serious suspicion on any proselytism among children or among adherents to minority religions.<sup>103</sup> But, outside of these contexts, the religious expression inherent in proselytism is no more suspect than political, economic, artistic, or other forms of expression and should have, at minimum, the same rights.

The problems of proselytism and retaliation have grown worse in many regions of the world in the last decade. The clashes between foreign and local faiths, particularly between and among Christian and Islamic groups and subgroups, have also spread to other regions of the world that have been newly opened to foreign mission through democratization, warfare, terrorism, or force majeure. The problem of proselytism has taken a further ironic turn in the past decade with the establishment of aggressive new state policies of laicization and secularization in Europe, and the growing anti-sect movement in both Western Europe and the United States.<sup>104</sup> These regional developments have given the modern proselytism issue a strong new pluralistic dimension: how to protect the rights of religious minorities while maintaining the peace, order, and integrity of the modern nation-state and national society. The

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<sup>98</sup> ICCPR, *supra* note 61, art. 18(1)–(2).

<sup>99</sup> *Id.* art. 19(3).

<sup>100</sup> *Id.* art. 27.

<sup>101</sup> *Id.*

<sup>102</sup> *See id.* arts. 18, 19, 27.

<sup>103</sup> *See id.* arts. 18(4), 27.

<sup>104</sup> *See, e.g.,* Katherine Pratt Ewing, *Legislating Religious Freedom: Muslim Challenges to the Relationship Between “Church” and “State” in Germany and France*, 129 *DAEDALUS* 31, 40–43 (2000) (describing state policies of laicism in Turkey, France, and Germany); James T. Richardson & Massimo Introvigne, “Brainwashing” *Theories in European Parliamentary and Administrative Reports on “Cults” and “Sects,”* 40 *J. FOR SCI. STUDY RELIGION* 143, 162 (2001) (arguing European government reports on minority religions portray them negatively as cult-like and illegitimate because “the American cultural product of ideas about brainwashing and mind control is alive and well in Europe”).

expulsion of Korean Christian missionary groups in Afghanistan in 2006,<sup>105</sup> and charges by Muslims that Christians were dispensing religion along with humanitarian aid in tsunami-stricken Indonesia in 2005,<sup>106</sup> are recent examples of the proselytism concerns and allegations that can arise in some of the most vulnerable, conflict- and disaster-torn areas of the world.

### *B. Conversion and Apostasy*

Just as one person's or group's proselytism may interfere with another person's or group's liberty of conscience, one person's freedom to convert from one faith to another may amount to apostasy in the eyes of the faith left behind. Today, the issue of religious conversion has become more divisive than ever in legal, theological, and diplomatic circles alike. Most Western Christians experience easy conversion into and out of their faith, while conversion both into and out of Judaism is difficult for most Jews. Most Muslims easily convert into the faith but are denied conversion out of it, at least in the case of prominent members. Orthodox, Hindu, Jewish, and indigenous groups around the world tie religious identity not to liberty of conscience and voluntary choice, but to birth and caste, blood and soil, language and ethnicity. This conflation of religion with race, ethnicity, nationality, and other markers of identity generally taken to be given rather than chosen, while common to these religions and cultures, has, as we shall see, become problematic in recent debates over defamation of religions.

On the issue of religious conversion, the major international human rights instruments largely accept the insistence on religious voluntarism common among Western Christian and other proselytizing groups. The 1948 Universal Declaration included an unequivocal guarantee, despite the objections of some Muslim delegations and organizations, that religious freedom includes a person's right "to change his religion or belief."<sup>107</sup> Subsequent international instruments largely repeated this language.<sup>108</sup> But by the time of the 1981

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<sup>105</sup> *Afghanistan: Kabul Cancels Christian Group's Event, Expels Organizers*, EURASIANET, Aug. 6, 2006, available at <http://www.unhcr.org/refworld/docid/46f25828d.html>.

<sup>106</sup> *Relief Workers Accused of Seeking Converts in Muslim Indonesia*, 59 CHURCH & ST. 21 (2006).

<sup>107</sup> 1948 Universal Declaration, *supra* note 19, art. 18.

<sup>108</sup> See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 ("[T]his right includes freedom to change his religion or belief . . ."); Human Rights Committee, *General Comment No. 22 on the Right to Freedom of Thought, Conscience, and Religion (Art. 18)* ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (July 7, 1993) ("[T]he freedom 'to have or to 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 . . .").

Declaration on Religion and Belief, the dispute over the right to conversion had become more prominent. The controversy over conversion has continued, to this day, to prompt many state delegations to dissent from any move toward creating a binding covenant on the topic of religious rights and freedoms.

Christians and Muslims share a common predilection for proselytism, but differ profoundly on their views on the propriety of conversion. The question of conversion forces Christians to confront their own often violent histories of inquisition and heresy, in which banishment or execution were viewed as the only way to deal with heretics, and in which Jews, Muslims, and other non-Christians were at best tolerated in Christian society. While historically Muslims treated Jews, Christians, and Zoroastrians as fellow People of the Book (the *dhimmi*) who could enjoy a modicum of rights and autonomy, this tolerance has given way in some Muslim communities today to growing hostility.<sup>109</sup> Moreover, charges of heresy, or its stronger form, apostasy have been increasing in recent years in the Muslim world against those who seek to convert from the Muslim faith or resist conversion into it.<sup>110</sup> This new trend has elicited the concern and condemnation of many state governments and human rights organizations, particularly in cases in which the charges of heresy and apostasy are made against people who were born, married, or coerced into the faith and who later, upon opportunity for mature reflection, choose to leave.<sup>111</sup> Such charges seem to conflict directly both with human rights ideals of religious liberty and the Qur'anic injunction that "there be no compulsion in religion."<sup>112</sup> Nevertheless, the question of conversion persists in the "war for souls" taking place in many regions of the world today.

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<sup>109</sup> See, e.g., Donna E. Arzt, *Jihad for Hearts and Minds: Proselytizing in the Qur'an and the First Three Centuries of Islam*, in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM 79, 89–91 (John Witte, Jr. & Richard C. Martin eds., 1999) (describing the granting of religious freedom but denial of otherwise equal status to the *dhimmi*); Richard C. Martin, *Conversion to Islam by Invitation: Proselytism and the Negotiation of Identity in Islam*, in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM 95, 110 (John Witte, Jr. & Richard C. Martin eds., 1999) ("By the time Islam had established itself as the predominant religion in the tenth century, [proselytism] became less effective as a way of dealing with non-Muslims, especially those who lived as *dhimmis* . . .").

<sup>110</sup> See, e.g., Donna E. Arzt, *The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridha*, 8 BUFF. HUM. RTS. L. REV. 15, 41–44 (2002) (describing Muslim persecution of accused heretics and apostates in Yemen, Sudan, Saudi Arabia, Egypt, and Algeria).

<sup>111</sup> See, e.g., *Defending Human Rights in Islamic Countries*, INT'L HUMANIST & ETHICAL UNION, Aug. 1, 2003, <http://www.iheu.org/node/1023> (criticizing application of the death penalty or prolonged prison sentences for apostasy); Press Release, U.S. Comm'n on Int'l Religious Freedom, USCIRF Concerned Over Apostasy Death Penalty Threat to Christians, Baha'is, Muslim Dissenters; Calls for Release of Prisoners (Sept. 17, 2008), available at [http://www.uscifr.gov/index2.php?option=com\\_content&do\\_pdf=1&id=2264](http://www.uscifr.gov/index2.php?option=com_content&do_pdf=1&id=2264).

<sup>112</sup> QUR'AN 2:256 (Abdullah Yusuf Ali trans.).

### C. *Blasphemy and “Defamation of Religions”*

In an era in which the publication of a cartoon in Denmark depicting the Prophet Mohammed as a terrorist can incite religious riots around the world,<sup>113</sup> charges of blasphemy, seemingly as premodern as charges of heresy or apostasy, are making their way back into the headlines. Concerns about blasphemy are vividly illustrated in the Kambakhsh case in Afghanistan.<sup>114</sup> Concerns are also reflected in anti-blasphemy provisions that continue to remain on or have only recently been repealed from the criminal laws of a number of Western European nations.<sup>115</sup> Many Western European countries that outlaw denial of the Holocaust and “hate speech” also have in their midst thriving neo-Nazi and right-wing nationalist groups whose ideologies draw on religion, particularly Christianity, to entice and incite their constituencies.<sup>116</sup> What blasphemy is—critique of an established church; Holocaust denial; remarks that are anti-Semitic; anti-Christian sentiment; Islamophobia; or offensive acts to other religious, ethnic, and cultural groups—and whether it should be prosecuted remain open questions in many parts of the world.

Over the last decade, the issue of blasphemy has surfaced at the United Nations and other international bodies under the rubric of “defamation of religions.”<sup>117</sup> Beginning in 1999 when they were first proposed at the United Nations, and picking up steam after the terrorist attacks of September 11, 2001, resolutions for combating the “defamation of religions” have been generating increasing controversy.<sup>118</sup> These resolutions have been proposed at both the United Nations Commission on Human Rights (renamed the Human Rights Council in 2006), where they have been approved each year since 1999,<sup>119</sup> and

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<sup>113</sup> See, e.g., *Row Over Danish Cartoon Escalates*, BBC NEWS, Oct. 10, 2006, <http://news.bbc.co.uk/1/hi/europe/6037597.stm>.

<sup>114</sup> See *supra* notes 1–10 and accompanying text.

<sup>115</sup> See Jeroen Temperman, *Blasphemy, Defamation of Religions and Human Rights Law*, 26 NETH. Q. HUM. RTS. 517, 519–22 (2008) (summarizing blasphemy laws in the United Kingdom, Ireland, Greece, and the Scandinavian countries).

<sup>116</sup> Recent U.S. State Department International Religious Freedom reports catalog many such incidents and movements in European countries under the category of “societal abuses and discrimination.” See, e.g., U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT (2008), available at <http://www.state.gov/g/drl/rls/irf/2008/108448.htm> (finding in Germany that “most anti-Semitic acts were attributed to neo-Nazi or other right-wing extremist groups or persons”).

<sup>117</sup> See *infra* notes 118–120 and accompanying text.

<sup>118</sup> For a critique of these resolutions, see Issues Brief, The Becket Fund for Religious Liberty, Combating Defamation of Religions (June 2, 2008), available at <http://www.becketfund.org/files/a9e5b.pdf>.

<sup>119</sup> See Human Rights Council Res. 10/22, at 74, U.N. GAOR, 64th Sess., Supp. No. 53, U.N. Doc. A/64/53 (Mar. 26, 2009) (adopted by a recorded vote, twenty-three to eleven, with thirteen abstentions);

at the larger General Assembly, where they have been approved since 2005.<sup>120</sup> Early drafts were controversial for their singling out of Islam and Muslims for particular protection.<sup>121</sup> Subsequent versions were broadened to include respect for “cultural, ethnic, religious, and linguistic diversity” and for “people belonging to different cultures, religions and beliefs.”<sup>122</sup> Despite this more religiously plural formulation, the United States, several European nations, and religious freedom organizations have continued to object to the defamation of religions resolutions as a violation of freedoms of religion and speech.<sup>123</sup> The resolutions, while not having the force of law, demand respect for Islam, but also contain language that could be used to justify persecution of religious minorities, particularly in Muslim countries.<sup>124</sup> Indeed, the resolutions have

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Human Rights Council Res. 7/19, at 54, U.N. GAOR, 63d Sess., Supp. No. 53, U.N. Doc. A/63/53 (Mar. 27, 2008) (adopted by a recorded vote, twenty-one to ten, with fourteen abstentions); Human Rights Council Res. 4/9, at 42, U.N. GAOR, 62d Sess., Supp. No. 53, U.N. Doc. A/62/53 (Mar. 30, 2007) (adopted by a recorded vote, twenty-four to fourteen, with nine abstentions); Comm’n on Human Rights Res. 2005/3, at 21, U.N. ESCOR, 61st Sess., Supp. No. 3, U.N. Doc. E/CN.4/2005/135 (Apr. 12, 2005) (adopted by a recorded vote, thirty-one to sixteen, with five abstentions); Comm’n on Human Rights Res. 2004/6, at 28, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (Apr. 13, 2004) (adopted by a recorded vote, twenty-nine to sixteen, with seven abstentions); Comm’n on Human Rights Res. 2003/4, at 34, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (Apr. 14, 2003) (adopted by a recorded vote, thirty-two to fourteen, with seven abstentions); Comm’n on Human Rights Res. 2002/9, at 56, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (Apr. 15, 2002) (adopted by a recorded vote, thirty to fifteen, with eight abstentions); Comm’n on Human Rights Res. 2001/4, at 47, U.N. ESCOR, 57th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (Apr. 18, 2001) (adopted by roll-call vote, twenty-eight to fifteen, with nine abstentions); Comm’n on Human Rights Res. 2000/84, at 336, U.N. ESCOR, 56th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (Apr. 26, 2000) (adopted without a vote); Comm’n on Human Rights Res. 1999/82, at 280, U.N. ESCOR, 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999) (adopted without a vote). Significant here is the progression from adoption without a vote, to roll-call votes, and then recorded votes. Also significant is the steadily decreasing number of votes in favor and the increasing number of negative votes and abstentions.

<sup>120</sup> G.A. Res. 63/171, at 1, U.N. Doc. A/RES/63/171 (Dec. 18, 2008); G.A. Res. 62/154, at 1, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res. 61/164, at 1, U.N. Doc. A/RES/61/164 (Dec. 19, 2006); G.A. Res. 60/150, at 1, U.N. Doc. A/RES/60/150 (Dec. 16, 2005).

<sup>121</sup> See Yemen Draft Resolution, Agenda Item 71(b): Combating Defamation of Religions, U.N. Doc. A/C.3/60/L.29 (Oct. 31, 2005).

<sup>122</sup> See G.A. Res. 62/154, *supra* note 120, at 2.

<sup>123</sup> See Human Rights Council Res. 10/22, *supra* note 119, at 83 (United States not participating); Human Rights Council Res. 7/19, *supra* note 119, at 58 (United States not participating and France, United Kingdom, Germany, and Italy all against the resolution); Human Rights Council Res. 4/9, *supra* note 119, at 45 (United States not participating and France, United Kingdom, Germany, and Poland all against the resolution); Comm’n on Human Rights Res. 2005/3, *supra* note 119, at 24; Comm’n on Human Rights Res. 2004/6, *supra* note 119, at 364 ¶ 105; see also Press Release, The Becket Fund for Religious Liberty, Bush Administration Opposes U.N. Blasphemy Resolution (Sept. 20, 2008), available at <http://www.becketfund.org/index.php/article/831.html>.

<sup>124</sup> See Issues Brief, The Becket Fund for Religious Liberty, *supra* note 118, at 5–6; see also *supra* note 119.

already been invoked to justify harsh blasphemy laws in Pakistan, Egypt, Sudan, and Afghanistan.<sup>125</sup>

In recent years the defamation of religions resolutions have been drawing not only on international laws governing religious freedom, but also international resolutions against racism. The result has been a particularly provocative mixture of religion, ethnicity, and race that, rather than advancing growing moderation and pluralism in the movement against defamation of religions, has, arguably, had the effect of exacerbating the controversy further. These race and ethnicity arguments hearken back to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.<sup>126</sup> The Convention was largely directed at discrimination based on “race, colour, descent, or national or ethnic origin.”<sup>127</sup> But the Preamble also contemplated religious groups as beneficiaries of its nondiscrimination provisions in affirming “human rights and fundamental freedoms for all, without distinction as to race, sex, language, or *religion*”<sup>128</sup> and in including “freedom of thought, conscience and religion” in its list of fundamental freedoms.<sup>129</sup> As we have seen, the 1992 Minorities Declaration, coming just before two of the bloodiest recent conflations of religion and ethnicity in Bosnia and Rwanda, made similar connections between religion and other markers of group identity and minority status.<sup>130</sup>

The connections between religion, race, and ethnicity were made even more explicit in the Durban Declaration and Programme of Action that emerged from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa in 2001.<sup>131</sup> The Durban Conference adjourned just three days before the cataclysmic

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<sup>125</sup> See L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT’L L. REV. 69, 80–81 (2009) (discussing Pakistan and Sudan’s blasphemy laws); Rebecca J. Dobras, Note, *Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations’ Combating Defamation of Religions Resolutions and Pakistan’s Blasphemy Laws*, 37 GA. J. INT’L & COMP. L. 339, 354–55 (2009) (discussing Pakistan’s use of resolutions to justify blasphemy laws); Issues Brief, The Becket Fund for Religious Liberty, *supra* note 118, at 6–7 (discussing Pakistan’s and Egypt’s use of resolution to justify blasphemy laws and possible use of resolutions generally to justify blasphemy laws).

<sup>126</sup> Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 212.

<sup>127</sup> *Id.* art. 1(1).

<sup>128</sup> *Id.* pmb1.

<sup>129</sup> *Id.* art. 5(d)(vii)

<sup>130</sup> See 1992 Minorities Declaration, *supra* note 64; *supra* note 79 and accompanying text.

<sup>131</sup> See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, *Declaration*, 3, A/CONF.189/12 (Jan. 1, 2002).

events of September 11, 2001, and only after considerable rancor over the extent to which the Israeli-Palestine conflict dominated conference proceedings and news headlines. At Durban, issues of “race, colour, descent, or national or ethnic origin”<sup>132</sup> were combined with issues of “sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status” in fiery denunciations of “racism, racial discrimination, xenophobia and related intolerance.”<sup>133</sup> The United States and Israeli delegations pulled out of the conference midway because of draft platform language linking Zionism to racism, and the European Union refused to accede to demands by Arab nations that Israel be criticized for practices that the Arab nations deemed racist.<sup>134</sup> The United States also boycotted the Durban Conference’s sponsoring organization, the United Nations Commission on Human Rights, for the remainder of the Bush administration, during which time the media even referred to the Commission as a “sham.”<sup>135</sup> The introduction of defamation of religions resolutions at the United Nations, particularly since 2001, has carried echoes of the Durban discord.

The most recent version of the defamation of religions resolutions to reach the U.N. General Assembly, approved in December 2008 and presumably the most moderate after having been the subject of criticism and modification for nearly a decade, began by reaffirming “universal respect for and observance of all human rights and fundamental freedoms without distinction as to *race*, sex, language or *religion*.”<sup>136</sup> The resolution affirmed that human rights are “universal, indivisible, interdependent and interrelated.”<sup>137</sup> Despite this initial appeal to universal harmony, the opening portions of the resolution are sprinkled with numerous references to racism, xenophobia, and the controversial proceedings and program of the 2001 Durban Conference.<sup>138</sup>

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<sup>132</sup> See Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 126, art. 1.

<sup>133</sup> *Id.* pmb1.

<sup>134</sup> Colin Powell, U.S. Sec’y of State, Remarks at the World Conference Against Racism (Sept. 3, 2001), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2001/4789.htm>; see also Elain Engeler, U.N. Racism Conference: European, Muslim Nations Clash Over Israel, HUFFINGTON POST, Mar. 3, 2009, [http://www.huffingtonpost.com/2009/03/03/un-racism-conference-euro\\_n\\_171419.html](http://www.huffingtonpost.com/2009/03/03/un-racism-conference-euro_n_171419.html).

<sup>135</sup> Press Statement, Sean McCormack, Spokesman for the U.S. Dep’t of State, The United States Will Not Seek Election to the U.N. Human Rights Council (Apr. 6, 2006), available at <http://2001-2009.state.gov/r/pa/prs/ps/2006/64182.htm>; see also Ronan Farrow, *The U.N.’s Human-Rights Sham*, WALL ST. J., Jan. 29, 2008, at A16; Brett D. Schaefer, The Heritage Foundation, The United Nations Human Rights Council: A Disastrous First Year and Discouraging Signs of Reform (July 26, 2007), available at <http://www.heritage.org/Research/InternationalOrganizations/hl1042.cfm>.

<sup>136</sup> G.A. Res 63/171, *supra* note 120, at 1 (emphasis added).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

The resolution concluded by speculating on the “possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world.”<sup>139</sup> This correlation, borne out empirically by such incidents as the Danish cartoon controversy, carried the ominous implication that, if the resolution were not to pass, further violence would ensue.

Just three months after the most recent approval of a “defamation of religions” resolution at the General Assembly, a similar resolution was approved by the Human Rights Council in March 2009.<sup>140</sup> This latest version calls for combating defamation of religions in much the same manner as previous iterations, but with the addition of more positive and pluralistic language than those earlier drafts. The resolution calls not only for opposition to defamation of religions,<sup>141</sup> but also for “greater harmony and tolerance in all societies,”<sup>142</sup> for “respect and understanding of religious and cultural diversity throughout the world,”<sup>143</sup> and for recognition of the “valuable contribution of all religions to modern civilization and the contribution that dialogue among civilizations can make towards improved awareness and understanding of the common values shared by all humankind.”<sup>144</sup> Even with these pluralistic additions, the March 2009 resolution of the Human Rights Council was the first such resolution to be adopted with more countries voting against or abstaining than voting in favor.<sup>145</sup> This narrow approval has been interpreted by some as an indication that the movement against religious defamation has been largely repudiated by the international community.<sup>146</sup> It is also likely that those voting against or abstaining may have been anticipating and seeking to ward off further controversy in April 2009 at the ten-year review of the Durban Conference Against Racism.

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<sup>139</sup> *Id.* ¶ 24.

<sup>140</sup> Human Rights Council Res. 10/22, *supra* note 119.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> The vote proceeded along the usual lines—with supporting votes coming largely from OIC members and opposition coming mostly from Canada and various European nations represented on the Council. Those *voting in favor* included: Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia, Cameroon, China, Cuba, Djibouti, Egypt, Gabon, Indonesia, Jordan, Malaysia, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, and South Africa. Those *voting against* included: Canada, Chile, France, Germany, Italy, Netherlands, Slovakia, Slovenia, Switzerland, Ukraine, and the United Kingdom of Great Britain and Northern Ireland. Those *abstaining* included: Argentina, Brazil, Bosnia and Herzegovina, Burkina Faso, Ghana, India, Japan, Madagascar, Mauritius, Mexico, Republic of Korea, Uruguay, and Zambia. *See id.*

<sup>146</sup> Laura MacInnis, *U.N. Body Adopts Resolution on Religious Defamation*, REUTERS, Mar. 26, 2009, <http://www.reuters.com/articlePrint?articleId=USTRE52P60220090326>.

Even as the General Assembly and Human Rights Council were debating the most recent defamation of religions resolutions, preparations were being made for the Durban Review Conference (“Durban II”) scheduled to take place in Geneva in late April 2009. The OIC states lobbied, initially successfully, for the insertion of defamation of religions language into the Durban II draft platform.<sup>147</sup> The United States, Israel, Canada, Australia, New Zealand, and four European countries, namely Germany, Italy, Poland, and the Netherlands, withdrew their participation in the conference when Israeli-Palestinian issues again threatened to dominate, but the insertion of defamation of religions language into the draft platform became an additional reason for withdrawal.<sup>148</sup> The defamation of religions language was withdrawn in the weeks prior to the conference, but it remained to be seen whether the objecting countries would reconsider their withdrawal.<sup>149</sup> The United States reaffirmed its nonparticipation,<sup>150</sup> but also signaled a potential shift in policy with the announcement of its intent to seek a place on the Human Rights Council, with a view toward improving the body’s reputation through its participation.<sup>151</sup>

Though Durban II began bombastically with an opening speech by Iranian President Mahmoud Ahmadinejad denying the Holocaust and denouncing the state of Israel,<sup>152</sup> it ended with an outcome document that, even while controversially affirming the Durban I platform, also omitted the defamation of religions language that had made it into earlier drafts.<sup>153</sup> In its provisions addressing religion, the Durban II document (“Outcome Document”) officially deplored “the global rise and number of incidents of racial or religious intolerance and violence, including Islamophobia, anti-Semitism, Christianophobia and anti-Arabism” as well as the “derogatory stereotyping

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<sup>147</sup> Laura Trevelyan, *UN Racism Event Highlights Divisions*, BBC NEWS, Apr. 24, 2009, <http://newsweb.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/8017710.stm?ad=1>.

<sup>148</sup> Zhang Xiang, *UN Anti-Racism Conference Concludes with Hard-Won Agreement*, CHINA VIEW, Apr. 25, 2009, [http://news.xinhuanet.com/english/2009-04/25/content\\_11254637.htm](http://news.xinhuanet.com/english/2009-04/25/content_11254637.htm).

<sup>149</sup> *EU Still Undecided on Whether to Attend UN Anti-Racism Talks*, AGENCE FRANCE-PRESSE, Apr. 17, 2009, [http://www.dw-world.de/dw/article/0,,4187575,00.html?maca=en-en\\_nr-1893-xml-atom](http://www.dw-world.de/dw/article/0,,4187575,00.html?maca=en-en_nr-1893-xml-atom).

<sup>150</sup> Laura MacInnis & Sue Pleming, *U.S. Will Boycott U.N. Conference on Racism*, REUTERS, Apr. 18, 2009, <http://www.reuters.com/article/worldNews/idUSTRE53H1M120090418?pageNumber=2&virtualBrandChannel=0>.

<sup>151</sup> Press Release, Gordon Duguid, Acting Deputy of Department Spokesman, Office of the Spokesman, U.S. Dep’t of State, U.S. to Run for Election to the UN Human Rights Council (Mar. 31, 2009), <http://www.state.gov/r/pa/prs/ps/2009/03/121049.htm>.

<sup>152</sup> Trevelyan, *supra* note 147.

<sup>153</sup> See Durban Review Conference, Geneva, Switz., Apr. 20–24, 2009, *Outcome Document of the Durban Review Conference*, U.N. Doc. A/CONF.211/L.1 (Apr. 24, 2009).

and stigmatization of persons based on their religion or belief.”<sup>154</sup> It reaffirmed the prohibition of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>155</sup> The Outcome Document also expressed concern over “acts of incitement to hatred, which have targeted and severely affected racial and religious communities and persons belonging to racial and religious minorities, whether involving the use of print, audio-visual or electronic media or any other means.”<sup>156</sup> It then called on the international community to “fully and effectively prohibit any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>157</sup> Throughout the document, religion was more frequently analogized to more fluid and interpretive communities based on language and culture than to the more fixed and embodied categories of race, ethnicity, and nationality based on blood and land.<sup>158</sup> Overall, the Durban II Outcome Document sought to protect persons over religions and to prohibit objectively verifiable acts of incitement over the subjectively felt assaults of defamation in a way that is more congruent with extant and emerging international norms.

#### V. RELIGION, DEMOCRACY, AND THE *IUS GENTIUM* OF HUMAN RIGHTS

The “defamation of religions” resolutions may seem to be a trend that has peaked or the narrow province of the OIC states. In recent votes, support has been eclipsed by abstention or outright opposition.<sup>159</sup> Its removal from the Durban II proceedings may be taken as the international community’s acknowledgment that the issue serves more to divide than to unite. At the same time, “defamation of religions” and “hate speech” issues continue to roil certain countries and regions—most notably Africa, where post-colonial, multi-ethnic states have drawn the attention of Christian and Muslim missionaries and have been prone to genocidal conflicts,<sup>160</sup> and in Western Europe, where democratic, largely secular, and putatively liberal and tolerant societies have increasingly had to confront the status of religious minorities in

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<sup>154</sup> *Id.* ¶ 12.

<sup>155</sup> *Id.* ¶ 13.

<sup>156</sup> *Id.* ¶ 68.

<sup>157</sup> *Id.* ¶ 69.

<sup>158</sup> *Id.* ¶¶ 14, 70, 82, 99, 102, 106, 109, 110, 127.

<sup>159</sup> *See supra* note 119.

<sup>160</sup> *See* ETHNIC CONFLICTS IN AFRICA (Okwudiba Nnoli ed., 1998).

their midst.<sup>161</sup> In those contexts, allegations of defamation of religion and incitement of hatred may be less a cause than a symptom of deeper conflicts and controversies at the intersection of religion, race, sex, ethnicity, nationality, language, culture, and other markers of individual and group status.<sup>162</sup>

A truly democratic approach to religion and international human rights may require both normative distinctions and practical disentanglement. Rather than reducing religious rights to other civil and political rights, on the one hand, or analogizing religion to other aspects of individual and group identity, on the other, proponents of religious freedom may want to insist on the distinctness of religious rights as something more than the amalgamation of rights to speech, press, and association or just another identity category that can be conflated with race, ethnicity, and other criteria. Religious rights have been construed largely individualistically and voluntaristically in the world's secular, liberal democracies.<sup>163</sup> A more robust notion of "religious rights" may better capture their communal and identity-based dimensions—often experienced as given, not chosen—in ways that protect the true core of religion.<sup>164</sup> That said, the most difficult conflicts in years to come will be between individuals and societies for whom religion is a matter of choice regarding where one worships on the weekend and those for whom it is a matter of submission affecting all facets of life, both communally and comprehensively.

Religion may also need to be separated, as much as possible, from issues of race, ethnicity, and other "givens" of individual and group identity. These categories of identity may be better addressed individually than in a conflated manner. The ratcheting-up of religious claims through connection to more

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<sup>161</sup> See, e.g., Peter Cumper, *Religious Liberty in the United Kingdom*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 205, 225 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

<sup>162</sup> See Anver M. Emon, *On the Pope, Cartoons, and Apostates: Shari'a 2006*, 22 J. L. & RELIGION 303, 303 (2007) (discussing how recent Shari'a-based allegations of blasphemy, defamation, and apostasy by Muslims are "embedded within a larger discourse on identity, community, and difference").

<sup>163</sup> See Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1 (2008).

<sup>164</sup> There is an ongoing discussion in legal and jurisprudential circles concerning whether religious rights are "special" or "distinctive." See, e.g., Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990–1991); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment*, 2006 U. ILL. L. REV. 571 (2006).

fundamental, unassailable, organic, blood-and-soil categories of race and ethnicity serves to insulate religion from valid and civil forms of external and internal critique, but at the risk of inciting even more virulent and violent forms of conflict. In such contexts, religion itself is diminished, becoming a pretext for an instrument of conflict rather than a repository of wisdom and reconciliation, much less a defender of truth and justice. Again, a better understanding of religion—its power and its peril—might eliminate the need to “bootstrap” religion to greater prominence by connecting it to race, ethnicity, and other categories. In certain cases and conflicts, the correlations between religion and race or ethnicity are too strong to be ignored. But connecting religion to race risks ontologizing it and naturalizing it in a way that eclipses or elides the nonfoundational and hermeneutical understandings of religion that are more conducive to the intra- and interreligious dialogues and discourses that are necessary to realize a common law, *ius gentium* culture of international human rights that includes religious freedom.

The “defamation of religions” movement, from the local level of the Kambakhsh case to the international wrangling at the United Nations and Durban II, may be seen as a particularly pointed challenge to the universality of human rights, especially those pertaining to religion. It is illustrative of some important tensions that exist when law and religion play out in international affairs, particularly when it comes to the universality of human rights. The defamation debate has served both to illustrate and to reaffirm some principles that do seem to be part of the *ius gentium* of international religious freedom. First, international religious freedom provisions protect persons, and by extension groups of persons, not ideas, ideologies, or even religions per se. Religious freedom must be realized in the open and mutually self-critical dialogue of religious believers and religious bodies, not caricatured in insulation from critique and encounter of the religious other. Clashes of believers and bodies may be adjudicated through criminal laws against incitement of violence, but they should not be construed as or allowed to devolve into clashes of civilizations.<sup>165</sup> Second, the justification and framework of international human rights has a strong bias toward the protection of minorities. Thus, where “defamation of religions” arguments are used to defend majority traditions and established religions, they are inherently suspect. When asserted to protect ideas and beliefs, rather than the people and

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<sup>165</sup> See Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 201, 230–35 (2004–2005) (critiquing the laws prohibiting incitement to religious hatred in the European human rights system).

communities who hold them, and particularly when asserted to protect religious majorities from religious minorities without or from dissenters within, “defamation of religions” arguments are objectionable and anti-democratic.<sup>166</sup>

The universality of human rights has held up “on condition no one asks us why” in Maritain’s famous phrase.<sup>167</sup> The various covenants and conventions of international human rights law, as concerns religion, while not always unanimous in their acclamation or uniform in their application have generally been taken to be universal in their aspiration. What happens when increased globalization, communication, and internationalism in the legal sphere brings to light uncomfortable differences of opinion, orientation, and ontology in the religious sphere? Most religions have a stake in asserting the truth of their own beliefs against the apparent falsehood of the beliefs of others. At the level of normative interreligious engagement, refraining from asking the “why” questions may be difficult if not disingenuous, if one purports to want to truly understand and respect religious beliefs and religious diversity. How to have these conversations in a way that is both critical and constructive amid descriptive and doctrinal pluralism remains a crucial challenge for the international sphere.

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<sup>166</sup> For more on the legal dimensions of defamation of religions and similar claims, see Temperman, *supra* note 115.

<sup>167</sup> GLENDON, *supra* note 41, at 77.