

Articles

U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative

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This Article considers the tension in U.S. foreign policy between unilateral and multilateral approaches to the promotion and protection of religious freedom. In particular, it analyzes the recently enacted International Religious Freedom Act of 1998 that seeks to enforce international human rights norms through the imposition of unilateral sanctions on foreign countries that deny religious freedom and persecute religious groups. The Article suggests that this approach stands in an uneasy relationship with existing international and regional human rights regimes and institutions. It argues that as an instrument of foreign policy, the Act is vulnerable to politicization and abuse of the human rights agenda and serves ultimately to undermine the universality, legitimacy, and progressive development of multilateral human rights regimes and actors. Instead of unilateral coercive enforcement, it is suggested that effective compliance with international religious freedom norms depends upon a process of repeated interaction with international actors and participation in multilateral regimes so that the relevant norms become internalized in the constitutional, legal, and political systems of all states.

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I. INTRODUCTION

The international protection of religious freedom has long been a concern of U.S. foreign policy. As a nation founded on constitutional principles of religious liberty and freedom of speech, the United States has sought to promote and protect these values in other parts of the world through a range of unilateral, bilateral, and multilateral approaches. The United States, for example, played a major role after the Second World War in ensuring that one of the purposes of the newly created United Nations was to achieve international cooperation “in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion.”¹ The United States was influential in the drafting of the Universal Declaration of Human Rights (“UDHR”) and in transforming the Declaration into two principal human rights covenants.² During the Cold War, the United States also played a

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1. U.N. CHARTER art. 1, para 3; *see also id.* arts. 55, 56.

2. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc.

dominant role in the negotiation of the 1975 Helsinki Final Act (the "Helsinki Accords") whereby Communist states assumed political undertakings to respect human rights and fundamental freedoms, including religious freedom and the rights of religious minorities.³

Although the United States is a champion of religious freedom (and other fundamental civil and political rights) abroad, U.S. post-war foreign policy has had an uneasy relationship with the international human rights movement. Today, the United States is a party to only one of the two principal human rights covenants and to few other multilateral human rights treaties. Some conventions signed by the President have not been ratified, and even those that have been ratified have been subjected to extensive reservations, understandings, and declarations. The basic philosophy has been that international human rights are for "export only." As Louis Henkin has stated:

From the beginning, the international human rights movement was conceived by the United States as designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states). United States participation in the movement was also to serve the cause of human rights in other countries. To that end, the United States promoted and actively engaged in establishing international standards and machinery. It did not strongly favor but it did not resist the move to develop international agreements and international law, but, again, it saw them as designed for other states.⁴

This tendency has not been limited to Cold War politics. Since the end of the Cold War, not only has the United States strongly resisted the application of international human rights norms and standards to its own domestic legal order, it has gradually diminished its participation in and support of international human rights monitoring and implementation mechanisms. Skepticism of multilateralism and international legal process generally has dominated U.S. foreign policy thinking, and there has been a marked turn towards the adoption of unilateral or bilateral strategies to deal

A/6316 (1966), 993 U.N.T.S. 3, [hereinafter ICESCR]. All these documents are reprinted in CENTER FOR THE STUDY OF HUMAN RIGHTS, COLUMBIA UNIVERSITY, TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 6-29 (1994).

3. 1975 Final Act of the Conference on Security and Cooperation in Europe, *reprinted* in 14 I.L.M. 1292 (1975).

4. LOUIS HENKIN, THE AGE OF RIGHTS 74 (1990).

with human rights concerns in other states.

In this Article, I argue that a distinct feature of U.S. foreign policy regarding the protection of religious freedom in the post-Cold War era has been the adoption of a “new realism.” The traditional “realist” antipathy in the 1940s and 1950s towards Wilsonian “idealist” international law and institutions of the inter-war period has, to a large extent, faded.⁵ Contemporary foreign policy makers rarely suggest that international human rights law is not really “law.” Rather, as Henkin has observed, the suggestion today is that it is law, but law applicable only to other states and to be enforced, where necessary, by the United States through means of its own choosing.⁶ Accordingly, this policy has favored unilateral and bilateral mechanisms and has stood against U.S. participation in, and support for, multilateral treaty regimes.

This new stance in the area of international human rights has been part of a wider U.S. policy towards international relations generally. On the assumption that international legal process alone is unlikely to affect “rogue states,” the underlying concern has been how best to use American power and influence to deal with threats posed to strategic U.S. interests. A common strategy has been to use unilateral sanctions and isolation to achieve containment of, and to inflict economic damage on, violator states in order to pressure them into changing their behavior. A feature of this approach has been the invocation of international human rights standards to condemn the behavior of other states and to justify the use of U.S. legislative, judicial, and executive mechanisms to enforce those standards. At the same time, however, the United States stands largely outside existing international human rights treaty regimes and scrutiny.

Recent U.S. efforts to protect religious freedom and the rights of religious minorities in foreign countries should be viewed against this background. In response to growing domestic pressure from religious and civil society groups regarding the persecution of Christians in several authoritarian states, Congress enacted the

5. The primary concern of the realists with Wilsonian liberal internationalism was the presumption that the combination of democracy and international organization could vanquish war and power politics. Woodrow Wilson was seen as the high priest of the “legalist-moralist” tradition in U.S. foreign policy, projecting the ordered domestic existence of a liberal state onto the inherent anarchy of the international system. Hans Morgenthau, the leading American realist of the post-war era, declared in 1951 that the “iron law of international politics” was that “legal obligations must yield to the national interest.” HANS MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 144 (1951). See also GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900–1950* (1951).

6. See HENKIN, *supra* note 4, at 74.

International Religious Freedom Act of 1998 (“IRFA” or “Act”).⁷ Drawing upon international human rights instruments that deal with freedom of religion or belief, the Act provides for the appointment of an Ambassador at Large for Religious Freedom within the State Department and the creation of a Commission on International Religious Freedom charged with monitoring and identifying those countries that deny religious freedom and persecute religious groups. In relation to implementation and enforcement, the Act requires the President, subject to certain exceptions, to enter into a binding agreement with a designated state to end religious persecution, or to select from a sixteen-item menu of measures ranging from milder actions, such as diplomatic protest, to harsher measures, such as the imposition of sanctions and the termination of diplomatic relations.

The rationale of the Act is to use U.S. economic and political power to punish those states that engage in egregious violations of the rights of minority religious groups of special concern to U.S. interests. Consistent with its premises, the Act also contains a provision allowing for a presidential waiver of punitive measures in those instances where a U.S. rebuke of another state may jeopardize “the important national interest of the United States.”⁸ When employed, therefore, the Act is more punitive or coercive than cooperative or incentive-based. It is a stick—not a carrot—to be employed against “rogue” (to-date Islamic or Communist) states when deemed necessary to achieve strategic foreign policy objectives.⁹

The enactment of the IRFA raises important questions regarding the enforcement of international human rights law. In particular, the Act exposes the tension between unilateral versus multilateral approaches to promoting and protecting human rights. Today, it is universally accepted that religious freedom is a fundamental human right protected by customary and conventional international law. Article 18 of the International Covenant on Civil and Political Rights (“ICCPR”) is one of the internationally recognized human rights from which state parties may not derogate even in times of public emergency.¹⁰ At the same time, it is widely

7. International Religious Freedom Act, Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified as amended in scattered sections of 22 U.S.C.) [hereinafter IRFA].

8. *Id.* § 407.

9. As I argue in Part V below, this approach creates a range of risks for international human rights law and institutions which are premised on ideas of universality, consistent application of principle, and inter-state cooperation, rather than on *realpolitik* notions of power, strategic influence and coercive enforcement. See *infra* Part V.C-D.

10. See ICCPR, *supra* note 2, art. 18 (guaranteeing the right to “freedom of thought,

recognized that a divide persists between states' verbal assertions that they uphold the rights of individuals and their actual behavior. While the principle of religious liberty has been affirmed by virtually every national government as part of its domestic law, the violations that the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief ("1981 Declaration")¹¹ was designed to address remain evident in varying forms and degrees around the world.

If the implementation of global standards is of paramount importance,¹² what is the most effective means by which to narrow the distance between broadly accepted legal norms governing religious freedom and their repeated violation? While we are witnessing increasing interdependence, global awareness, and cooperation among states, nations, and groups (including strengthened inter-religious relationships), we are at the same time continuing to witness violent inter-religious conflicts, religious extremism, fundamentalism, and ethno-religious wars in many regions of the globe.¹³ From an international perspective, the problem to be addressed then is how, against the background of intersecting cultures, belief systems, political ideologies, economic disparities, and deeply seated feelings of intolerance and mistrust, to improve and ensure effective international monitoring and protection of freedom of religion or belief.

In addressing these questions, it is important to recognize at the outset the inchoate nature of the area of "religious human rights." As David Little has observed:

Investigating the 'history, grounds, character, scope and efforts at implementation' of existing legal means for protecting religious interests and prohibiting

conscience and religion").

11. G.A. Res. 36/55, 36 U.N. GAOR Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981) [hereinafter 1981 Declaration].

12. See, e.g., United Nations Seminar on The Encouragement of Understanding, Tolerance and Respect in Matters Relating to Freedom of Religion or Belief, Geneva, Switzerland, Dec. 3-14, 1984, U.N. Doc. G/SO 216/3 (37), U.N. Doc. HR/Geneva/1984/BP.3, and U.N. Doc. ST/HR/SER.A/16, at 6 (1984).

13. In particular, Islamic fundamentalism has risen in the Middle East and North Africa. Following the end of the Cold War, civil conflict of an inter-religious and ethno-religious nature emerged in Central and Eastern European states. In many respects, these conflicts have triggered a new interest in the connection between religion, international law, and politics. See, e.g., *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* (Mark W. Janis ed., 1991). The tragic events of September 11, 2001, and the obvious connections between international terrorism and religious fundamentalism have similarly generated new attention to these issues.

religious bias is obviously a highly complex activity. And complexities increase when the variety of considerations involved in examining 'the responses and the evaluations of various religious communities and traditions regarding these same legal means' is figured in.¹⁴

Mindful of this complexity, this Article attempts to identify the contours of these issues and to place them in the context of international human rights law, process, and institutions. In doing so, my primary concern is to compare international human rights theory and practice to the premises and mechanisms that lie at the heart of the IRFA. In particular, I seek to examine whether multilateral approaches are as ineffective as the United States suggests they are and, if they are ineffective, why and whether unilateral mechanisms are a preferable and effective means to promote and protect religious freedom.

Part II sets out the general scope of violations of religious freedom. Parts III and IV consider the relative merits of the unilateral, bilateral, and multilateral mechanisms that currently exist to monitor and protect freedom of religion or belief. I suggest that, while there remains disagreement over international standards governing religious freedom, the standard-setting achievements of international actors and institutions have been a relative success. The more significant challenges lie in seeking compliance with even minimally-agreed upon standards. Many factors are relevant here, among them the politics as well as the architecture of new international institutions. That architecture requires ongoing evaluation and revision, for much of the effectiveness of international human rights depends on the degree to which norms are not free floating, but anchored in competent institutions that are committed to their implementation.

On the key question of compliance, I argue in Part IV that regional and multilateral approaches are preferable to bilateral or unilateral attempts to monitor and enforce international standards of religious freedom. As evidenced by the IRFA, a state (or group of states) may seek to monitor the behavior of other states, which is perceived to be in violation of international legal standards concerning religious freedom, and to exert pressure upon those states to modify their behavior towards religious minorities. Inevitably,

14. David Little, *Studying "Religious Human Rights": Methodological Foundations*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—LEGAL PERSPECTIVES* 46 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

however, this exceptionalist strategy of elevating and isolating freedom of religion as a component of foreign policy stands in an uneasy relationship with multilateral mechanisms and institutions that seek to monitor and protect religious freedom. Before concluding in Part VI, I argue that the major weakness of the IRFA is not in the *end* that it seeks to promote (upon which there is increasing consensus) but rather in the *means* it employs, and that the Act, with its policy of unilateral enforcement of international norms, is open to criticism on four main grounds discussed in Part V.

First, the IRFA creates an irrational hierarchy of human rights in U.S. foreign policy that makes the act vulnerable to politicization and abuse of the human rights agenda, which create a range of negative implications both domestically and internationally.

Second, the Act demonstrates a failure of international participation and cooperation. While international human rights standards are employed to justify the use of sanctions against target states, the means used to promote and protect those standards are entirely domestic and predominantly unilateral. I argue that this exceptionalist, or what I have termed “new realist,” approach to enforcing international norms serves to undermine and weaken not only the legitimacy and progressive development of existing multilateral and regional human rights regimes, but also the universality that lies at the heart of the human rights idea itself.

Third, the rationale underlying the Act represents a misunderstanding of why states obey (or disobey) international law and how external actors are able to induce states to comply with international norms. In assessing the relative merits of unilateral and multilateral approaches to enforcing religious freedom norms, I suggest that the kind of coercive enforcement that lies at the heart of the U.S. approach, while perhaps more focused on the short term than current U.N. protection mechanisms, will prove ineffective in achieving the ends sought and involves a range of longer term risks. A preferable approach is for states to participate fully in, and to strengthen, external monitoring and international scrutiny through multilateral regimes. This is an increasingly effective option in the context of the decline of statist conceptions of sovereignty and the increasing penetration of international legal process in the conduct of states. I further suggest that evolving U.N. ad hoc mechanisms and the ability of individuals to bring communications to bodies such as the Human Rights Committee should be developed further. Similarly, non-governmental organizations (“NGOs”) and religious institutions are themselves significant actors, both internally and externally, that need to be fostered, encouraged, and developed.

Fourth, I suggest that the IRFA indirectly perpetuates a strand of thinking in U.S. foreign policy that views the international order as being divided into two camps—liberal and illiberal—with the latter being comprised largely of “rogue” or “outlaw” states that exist outside of the “zone of law.” I argue that this more general thesis is deeply flawed, and once translated into legislation such as the IRFA, will ultimately prove to be destructive of the universal values—the rule of law, democracy, human rights, and constitutionalism—that the United States seeks to promote and protect abroad.

II. CAUSES AND CONSEQUENCES OF VIOLATIONS OF RELIGIOUS FREEDOM

The publication in 1997 of *Freedom of Religion and Belief: A World Report*, by Boyle and Sheen,¹⁵ demonstrated in stark terms that widespread manifestations of intolerance and discrimination on religious grounds exist in the world today. In assessing how to monitor these violations, and how best to implement international standards, it is first necessary to understand something about the causes and consequences of religious discrimination, persecution, and oppression. Yoram Dinstein has commented as follows:

In all likelihood, freedom of religion is the most persistently violated human right in the annals of the species. Religious intolerance has generated more wars, misery and suffering than any other type of discrimination or bias. In the name of this or that deity, for the glory of a divine cause, or in order to settle abstruse theological disputes, human blood has been shed for thousands of years. History is replete with holy wars and crusades against infidels, religious persecution and oppression, inquisitions and *autos-da-fé*. The paradox is that the very groups who have been persecuted for religious deviation are frequently animated by a spirit of intolerance when encountering other beliefs.¹⁶

What, then, are some of the general factors or indicators that we might identify to assist in targeting those regions or types of

15. FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT (Kevin Boyle & Juliet Sheen eds., 1997).

16. Yoram Dinstein, *Freedom of Religion and the Protection of Religious Minorities*, ISRAEL Y.B. H.R. 155, 156 (1990).

violations most in need of international scrutiny? The first point to make is that religious intolerance is a phenomenon that implicates a seamless web of social, ethnic, cultural, political, and economic factors. Intolerance is most often a function of the unwillingness to accept the right of individuals to be different, and thus may stem from a lack of respect for the beliefs of others. Historically, this is what has often led majorities to exercise domination over minorities with different beliefs. Religious intolerance may also be a function of a perception of superiority and the desire to find a scapegoat for social or economic problems. Basic factors such as these are becoming better studied and understood today, especially as a result of the investigations conducted over the last few years by the U.N. Special Rapporteurs on Religious Intolerance.

In his 1996 report to the U.N. Commission on Human Rights, Special Rapporteur Abdelfattah Amor identified six broad categories of violations, as follows:

1. Violations of the principle of non-discrimination with regard to religion or belief including allegations of discriminatory policies and/or laws and regulations concerning religion and belief;
2. Violations of the principle of tolerance in the area of religion and belief, particularly concerning religious extremism;
3. Violations of freedom of thought, conscience and religion or belief including questions of conscientious objection, official campaigns to renounce faith and freedom to change one's religion;
4. Violations of the freedom to manifest one's religion or belief including control by the authorities of religious activities;
5. Violations of the freedom to dispose of religious property including destruction and desecration of places of worship; and
6. Violations of the right to life, physical integrity and health of persons including both clergy and believers.¹⁷

17. Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with C.H.R. Res. 1996/23 1996/23, U.N. ESCOR, 53d Sess., Provisional Agenda Item 19, at 21, U.N. Doc. E/CN.4/1997/91, paras. 18-24 (1996) [hereinafter Amor Report]. In similar terms, Dinstein has identified at least six

In assessing these categories of violations, two broad observations can be made. First, threats to religious liberty may originate not only with governments and official interference, but also with religious leaders and ethnic, religious, and cultural communities within states. Thus, religious groups, whether majorities or minorities, may themselves be the source of violations of human rights as against their own members, or as against other religious groups within the state.

Second, the relationships between different forms of discrimination need to be better understood in approaching the task of reforming and streamlining international monitoring and protection mechanisms. The findings of the various U.N. Special Rapporteurs on Religious Intolerance have established that no country in the world, indeed no economic, social, or ideological system, has escaped manifestations of intolerance and discrimination on the grounds of religion or belief.¹⁸

dimensions to the interplay between religion and discrimination, as follows: (a) religious discrimination against minority groups may be achieved by seemingly neutral laws of general application, such as legislation pertaining to a weekly day of rest in Christian states that may impact on the religious practices of Jewish and Muslim minorities; (b) religious discrimination may impinge on other human rights such as the right to work, to receive access to public education or freedom of emigration; (c) infringements of freedom of religion may occur not by discrimination *per se* but by absolute denial of free exercise, such as by an atheistic regime prohibiting all forms of religious worship in public; (d) freedom of religion may be impaired because of discrimination on a ground other than religion (e.g., discrimination between co-religionists on the basis of race or ethnic origin); (e) religious discrimination may occur when the State provides *illegitimate* financial support and benefits (i.e., leaving aside questions of affirmative action or special measures) to only certain religious groups; and (f) religious discrimination may derive from religious doctrine postulating the inferiority of some believers on the ground of race, sex, birth and so on, such as was involved in the constitutional abolition of "untouchability" in India. Dinstein, *supra* note 16, at 175–78. On religious intolerance and discrimination in general, see Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub. 2/200/Rev. 1 (1960), reprinted in RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 2–55 (Tad Stahnke & J. Paul Martin eds., 1998) [hereinafter Krishnaswami Study].

18. See, e.g., Vidal D'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. Doc. E/CN.4/1987/35, para. 89 (1986); *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, pt. I, para. 30 (1993).

On the relationship between "religion" and "belief," it should be noted that the international human rights instruments protect both non-religious and even anti-religious beliefs, so long as they are conscientious and fundamental. See Little, *supra* note 14, at 50 & n.12. Little has further suggested that religious minorities may be divided into two major types: "belief groups" and "ethnoreligious groups." Belief groups give special priority to embracing and adhering to a set of basic beliefs about the nature of reality and human destiny, together with the behavior patterns thought to be consistent with those beliefs, which the group is established to nurture and propagate. Membership in such collectivities is "achieved" with adherents joining voluntarily and being expected to assume a strong sense of personal responsibility for living up to the requirements of membership. Examples include

A. Possible Range of Responses

What are the appropriate responses to wide-ranging forms of discrimination and intolerance? In answering this question, we must first distinguish between *internal* and *external* actors, institutions, and regimes. The strategic role and significance of external pressure and monitoring by outside actors of human rights abuses occurring within states are increasingly being acknowledged. However, while external monitoring and protection by NGOs, international organizations ("IOs,"—such as the U.N.), and regional organizations (such as the European Union) may be necessary, it is not sufficient, nor was it ever intended to be. International and regional human rights regimes do not seek to replace the internal constitutional, legislative, or administrative systems and institutions of states. Rather, they seek to supplement and strengthen those systems. Thus, the most effective and direct response to religious intolerance and discrimination remains for states to reform their own anachronistic or unjust legal, economic, social, and political structures from within.

From an international perspective, the issue to be addressed is how *external* actors monitor and protect the rights of religious minorities, both in co-operation with state institutions and, where necessary, by exposing and seeking to redress violations by internal state and non-state actors. In analyzing these processes, it is helpful to distinguish between three types of *external* actors and their accompanying mechanisms: first, unilateral (or bilateral) mechanisms, whereby individual countries seek to monitor and exert pressure on the behavior of other countries; second, multilateral regimes, both global and regional, which are generally characterized by treaty bodies supervising a specific human rights convention or agreement; and third, NGOs that play an independent monitoring role and

the Jehovah's Witnesses, Mormons, Scientologists, Pentecostal Christians, and members of Hare Krishna and the Unification Church. By contrast, ethnoreligious groups are comprised of members bound together by loyalty to common ethnic origins, prominently including religious identity, but interwoven with language, physical (or "racial") characteristics etc. Membership is typically "ascribed" by birth rather than achieved by consent, and there is usually not the same emphasis on individual commitment and responsibility as with belief groups. Little further divides ethnoreligious groups into at least two subtypes: first, "settled residents" such as the indigenous peoples of the United States, Canada, and Southern Sudan or long-established communities such as Tibetan Buddhists and Uighur Muslims in China; and second "displaced residents" such as Turkish Muslims in Europe or communities of Jews, Greek Orthodox, or Italian Catholics in the United States. See David Little, *Religious Minorities and Religious Freedom*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 42-46 (Peter Danchin & Elizabeth Cole eds., 2002). For further discussion of ethnoreligious groups and their role in nationalist conflicts, see David Little, *Belief, Ethnicity, and Nationalism*, 1(2) NATIONALISM AND ETHNIC POLITICS 2 (1995).

contribute to the overall effectiveness of both. It is to these different types of actors, institutions, and regimes that I now turn, examining first the approaches of unilateral and bilateral mechanisms to the protection of religious freedom and then the approaches of multilateral regimes and NGOs.

III. UNILATERAL AND BILATERAL APPROACHES TO THE PROTECTION OF RELIGIOUS FREEDOM

Direct state-to-state monitoring and protection of religious freedom has generally taken one of two forms. First, a (powerful) state may unilaterally monitor human rights issues in other states as one element of the conduct of its foreign political and economic relations. Unlike bilateral or multilateral arrangements, unilateral monitoring and protection is solely the product of domestic laws, actors, and institutions that direct and implement foreign policy on selected issues. Compliance is sought through unilateral economic or political sanctions that are imposed without express regional or multilateral authorization. In the United States, this has become a common domestic enforcement mechanism to encourage foreign states to comply with international norms. The IRFA and its institutional progeny are the paradigmatic example of this type of unilateral approach. Second, individual countries may enter into bilateral treaties that contain provisions on the rights of minorities; particularly agreements between a state and an adjoining state, where a national, ethnic, or religious group exists as a majority in one state and as a minority in the second state. These types of minority agreements have typically been concluded as part of the conduct of foreign relations between geographically proximate European states. As discussed below, however, the IRFA provides for the option of binding bilateral agreements to be concluded between the United States and any foreign country obliging the government of that country to cease violations of religious freedom.

A. *Unilateral Monitoring and the International Religious Freedom Act of 1998*

The United States has been the most aggressive state in the world in scrutinizing human rights and other social goals abroad as a key part of its foreign policy agenda and its relations with other

countries.¹⁹ It often employs economic leverage in dealing with targeted problems like human rights, the environment, and labor.²⁰ More broadly, the United States has imposed economic sanctions for many years to fight against nuclear proliferation, traffic in drugs, weapons, and persons, international terrorism, hostile regimes, and territorial aggression.²¹ In this Part, I review the means by which the United States has recently sought to monitor and protect religious freedom and the rights of religious minorities in target states through a unilateral, economic-and-political-sanctions-based approach.²²

Religious freedom came to the forefront of U.S. foreign policy in 1996 when then-Secretary of State Warren Christopher announced

19. The United States has traditionally resorted to restrictions on foreign assistance and trade benefits to promote a range of social goals and foreign policy objectives. A recent study of sanctions imposed in the post-World War II era indicates that of 119 cases studied between WWII and 1990, thirty-nine involved only foreign states, seventeen involved the United States and other states or international actors, and sixty-three involved sanctions imposed only by the United States. See GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 16–27 (2d ed. 1990).

20. For example, under the Jackson-Vanik Amendment the United States predicated normal trade relations with non-market economies on those states' emigration policies. See 19 U.S.C. § 2432 (1994). Over time, this has expanded to allow broad human rights investigations before "most-favored-nation" status is granted. Young, *infra* note 95, 511. U.S. legislation affording human rights influence in the formation of foreign policy includes: Foreign Assistance Act of 1973 § 32, Pub. L. No. 93-189, 87 Stat. 714, 733 (1973) (denial of economic or military assistance to foreign governments that intern political prisoners); Foreign Assistance Act of 1974 § 502B, Pub. L. No. 93-559, 88 Stat. 1795 (1974) (denial of security assistance to foreign governments that engage in a consistent pattern of gross violations of internationally recognized human rights); and International Security Assistance and Arms Export Control Act of 1976 § 502B, Pub. L. No. 94-329, 22 U.S.C. § 2304 (1976) (goal of U.S. foreign policy is increased observance of international human rights and tying military aid programs and security assistance to human rights).

21. Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 31 (2001). Note, in particular, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), which aims to combat trafficking in persons, especially the sex trade, slavery, and involuntary servitude; to punish traffickers; and to protect their victims. This Act shares many of the features of the IRFA including provisions requiring the State Department to monitor, assess, and rank into "tiers" foreign countries regarding their compliance with minimum standards for the elimination of trafficking; annual reporting requirements; and provisions in relation to the imposition (and waiver) of unilateral economic sanctions. See Trafficking in Persons Report 2001 (U.S. Dep't of State 2001), <http://www.state.gov/g/drl/cls/traf/>.

22. Of course, unilateral and bilateral measures also include the full array of formal and informal activities and institutions that make up the regular conduct of diplomacy in international relations. This may include personal and confidential communications, tacit understandings, informal contacts, threats of withholding the distribution of direct or indirect aid (through institutions in the operations of which the United States has influence, such as the World Bank and International Monetary Fund), the threat of non-recognition of regimes, or the halting of diplomatic support. At least some of these measures are expressly provided for in the IRFA. See IRFA §§ 501–04 (Title V—Promotion of Religious Freedom); §§ 601–05 (Title VI—Refugee, Asylum, and Consular Matters).

the creation of an Advisory Committee on Religious Freedom Abroad.²³ The momentum towards enacting legislation that would punish dictators and regimes that brutalize individuals simply because of their religious beliefs began steadily to increase by mid-1997. During debate over the nascent legislation in 1997, Republican Representative Christopher Smith expressed the logic of employing U.S. political and economic power to address such violations: "Tyrants understand strength. They also understand weakness This bill is designed to help people whose situation is particularly compelling, and with whom many Americans feel strong bonds of affinity and obligation."²⁴

The Wolf-Specter bill,²⁵ which formed the basis of the IRFA, had its roots in a religious freedom movement modeled after the Cold War campaign to help Jews struggling under the communist regime in the former Soviet Union and was dedicated to highlighting the persecution of Christians worldwide.²⁶ In July 1997, the Bureau of Democracy, Human Rights and Labor Affairs released a detailed report that provided a summary of U.S. foreign policy initiatives in a number of countries dealing with the promotion of religious freedom and the countering of religious intolerance, discrimination, and persecution, with a focus on the protection of Christians from persecution.²⁷

23. The Committee, consisting of twenty American religious leaders and scholars, produced an interim report in 1998 and a final draft in 1999 that recommended a foreign policy agenda geared toward the promotion and protection of religious freedom worldwide. See Interim Report to the Secretary of State and to the President of the United States (Advisory Committee on Religious Freedom Abroad 1998) (released by the Bureau of Democracy, Human Rights, and Labor, Washington, D.C., Jan. 23, 1998), <http://www.usconsulate.org.hk/uscn/hr/1998/0123b.htm> [hereinafter Advisory Committee Interim Report]; Final Report to the Secretary of State and to the President of the United States (Advisory Committee on Religious Freedom Abroad 1999) (released by the Bureau of Democracy, Human Rights, and Labor, Washington, D.C., May 17, 1999) [hereinafter Advisory Committee Final Report].

24. Lawrence J. Goodrich, *Congress Moves to Punish Religious Persecution Worldwide*, CHRISTIAN SCI. MONITOR, Sept. 25, 1997, at 3.

25. H.R. 1685, 105th Cong. (1997); S. 772, 105th Cong. (1997).

26. It is widely acknowledged that the domestic political pressure to enact the IRFA came from conservative Christian and evangelical groups concerned about the persecution of Christians in countries such as China, Vietnam and Sudan. See Christy McCormick, *Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L. LEGAL STUD. 283, 285-6 (1998); Donna Cassata, *Congress Enters Uncharted Territory With Bill on Religious Persecution*, C.Q. WKLY, Special Report, vol. 55, no. 36, Sept. 13, 1997, 2121, at 2123.

27. UNITED STATES POLICIES IN SUPPORT OF RELIGIOUS FREEDOM: FOCUS ON CHRISTIANS, H. R. REP. 3610 (1997) (report consistent with the Omnibus Consolidated Appropriations Act) (released by the Bureau of Democracy, Human Rights, and Labor, July 22, 1997).

The issue of protection of religious freedom arose at a time when evangelical Christian groups in particular had been making substantial gains in developing countries, as well as in many East European and former Soviet states following the collapse of communism. One of the early champions of the legislation was Nina Shea, a conservative Catholic expert on religion at the human rights organization Freedom House, and a leader in the fight against the persecution of Christians overseas.²⁸ According to Jeffrey Goldberg writing in 1997:

Shea belongs to a new and potent coalition that includes Reaganite conservatives, labor activists, veterans of the Soviet Jewry movement and, most important, evangelical Christians. These unlikely partners are united by their desire to “remoralize” American foreign policy. Within the last year, they have seized an issue, Christian persecution, that existed on the margins of the human rights agenda and yanked it to the center of America’s foreign policy debate.²⁹

It was not long, however, before voices of opposition were raised against the proposed legislation. One of the main critics was John Shattuck, the Assistant Secretary of State for Democracy, Human Rights and Labor, who saw the bill as a “blunt instrument that is more likely to harm, rather than aid, victims of religious persecution.”³⁰ After various religious, business, and human rights groups further criticized the Wolf-Specter bill’s focus on the persecution of Christians and imposition of mandatory sanctions on

28. See NINA SHEA, *IN THE LION’S DEN: A SHOCKING ACCOUNT OF PERSECUTION AND MARTYRDOM OF CHRISTIANS TODAY AND HOW WE SHOULD RESPOND* (1997).

29. Jeffrey Goldberg, *Washington Discovers Christian Persecution*, N.Y. TIMES MAGAZINE, Dec. 21, 1997, at 46. See also William Martin, *The Christian Right and American Foreign Policy*, FOREIGN POL’Y 66–80 (Spring 1999) (discussing the more vigorous role of the Christian Right in U.S. foreign policy including mobilizing for legislation on the persecution of Christians and lobbying against the U.N.’s programs and instruments on women’s and children’s rights that are regarded as allowing a secular elite to threaten family values worldwide); Laurie Goodstein, *A Rising Movement Cites Persecution Facing Christians*, N.Y. TIMES, Nov. 9, 1998, at A1 (noting the rise of a new kind of solidarity movement gaining force among Christians across the United States).

30. The main concern of the Clinton administration was that the Act would circumvent, as it was intended to do, normal foreign policy procedures on the basis of a single consideration. Appearing before the House International Relations Committee the week of Sept. 8, 1997, Shattuck stated that the administration feared reprisals against innocent civilians if sanctions were imposed under the legislation, and that it opposed the creation of a *de facto* hierarchy of human rights violations and resulting new bureaucracy. Cassata, *supra* note 26, at 2123.

violator states,³¹ a revised version of the bill was introduced to include religious persecution more broadly and to provide the President with a waiver provision in circumstances deemed vital to national interests.³² In particular, Republicans in the Senate opposed automatic economic sanctions on the grounds that these would indiscriminately sanction close allies like Saudi Arabia, Israel, and Greece.³³ Finally, in October 1998, President Clinton signed into law the International Religious Freedom Act of 1998, which was passed unanimously by both the House of Representatives and the Senate, thereby directly incorporating concern for religious freedom into U.S. foreign policy.³⁴

1. Provisions and Mechanics of the IRFA

The IRFA is premised on the rationale that the United States has an obligation (derived primarily from its constitutional history, which places great importance on ideas of religious freedom, and from international law) to support and protect religious minorities around the world by fighting religious intolerance in states that limit rights to religious freedom.³⁵ “Under the Act, the United States will

31. It is interesting to observe that the coalition of groups supporting the Wolf-Specter bill viewed the wider (secular) human rights community as their main opponents. Goldberg notes that Shea’s “faith-based human rights insurgency sees the liberal human rights establishment, especially Human Rights Watch, as its *bête noire*.” Goldberg, *supra* note 29, at 46. The National Council of the Churches of Christ, which represents thirty-three Protestant and Orthodox denominations, also opposed the legislation, taking issue with “the creation of a separate White House office, the automatic sanctions and the asylum provisions.” Cassata, *supra* note 26, at 2123.

32. Donna Cassata, *Foreign Policy: Panel Backs Controversial Bill to Fight Religious Persecution*, C.Q. WKLY, Sept. 20, 1997, at 2238. Representative Frank Wolf first introduced the Act as H.R. 2431 to the House of Representatives on September 9, 1997. Senator Arlen Specter concurrently introduced the Senate version of the bill, S. 772. The House passed Wolf’s bill on May 14, 1998, by a vote of 375-41, and subsequently sent it to the Senate. While under consideration in the Senate, Senator Nickles offered an amendment in the nature of a substitute to H.R. 2431 that made various modifications to the Wolf-Specter bill. The primary modification, introduced as S. 1868 on March 26, 1998, was the introduction of the presidential waiver provision. See Thomas Lynch, *The International Religious Freedom Act of 1998*, 6 HUM. RTS. BR. 18 (1999), <http://www.wcl.american.edu/hrbrief/v6i2/lf.htm>.

33. Eric Schmitt, *Bill to Punish Nations Limiting Religious Beliefs Passes Senate*, N.Y. TIMES, Oct. 10, 1998, at A3.

34. “The Act was so uncontroversial that it passed the Senate 90-0.” Mordecai Rosenfeld, *An Unintended Consequence*, N.Y. L.J., Nov. 4, 1998, at 2. The legislative history indicates that the statute was directed initially at China (for its conduct in Tibet), Pakistan, and Sudan. See *id.*

35. See Lynch, *supra* note 32. The State Department has described the rationale for the Act as follows:

Religious freedom has always been at the core of American life and public policy. It is the first of the freedoms enumerated in the Bill of Rights—a

investigate allegations of religious persecution worldwide and impose diplomatic, cultural, or economic measures [or sanctions] against states where religious discrimination is found.”³⁶

As noted above, the Act achieves these ends by establishing an Office of International Religious Freedom within the U.S. Department of State to which an Ambassador at Large is appointed. The Ambassador at Large is responsible for investigating states that deny religious freedom, proposing potential U.S. responses, and acting as a policy advisor to the President on religious matters.³⁷ Similar to many multilateral treaty regimes, the Act requires the Secretary of State, with the assistance of the Ambassador at Large and taking into consideration the recommendations of the Commission on International Religious Freedom, discussed below,³⁸ to produce an annual report on international religious freedom (the “Annual Report”). The Annual Report is required to highlight the status of religious freedom in foreign countries (including “violations” and “particularly severe violations” of religious freedom engaged in or tolerated by governments); to assess and describe the nature and extent of violations of religious freedom in those countries; and to describe U.S. actions and policies in support of religious freedom.³⁹

The term “violations of religious freedom” is defined in the Act to mean violations of the “internationally recognized right to freedom of religion and religious belief and practice” as set forth in various international instruments,⁴⁰ including violations such as:

reflection of the founders’ belief that freedom of religion and conscience is the cornerstone of liberty. Freedom of religion and conscience, however, is not an American invention. Indeed, as recognized in the Universal Declaration of Human Rights [UDHR], religious liberty and other universal rights are not ‘granted’ by any state or society Nor is the U.S. effort to promote religious freedom an attempt to impose ‘the American way’ on other countries or cultures. The guarantee of religious liberty is an international norm—codified in the [UDHR], the International Covenant on Civil and Political Rights, and many other international instruments. The promotion of religious freedom is therefore an international responsibility—one that falls to all nations—in which we have agreed to hold each other accountable.

Religious Freedom: An International Responsibility, Fact Sheet, (Office of International Religious Freedom, Bureau of Democracy, Human Rights and Labor, Washington D.C., Apr. 16, 2001), <http://www.state.gov/g/drl/irf/fs/2264.htm>.

36. Lynch, *supra* note 32, at 18.

37. IRFA, § 101 (establishing the Office on International Religious Freedom and the position of Ambassador at Large for International Religious Freedom); § 102 (calling for annual reports).

38. See *infra* note 44 and accompanying text.

39. IRFA §§ 102(b)(1)(A)–(C).

40. The Act specifically refers to the UDHR, the ICCPR, the Helsinki Accords, the 1981 Declaration, the U.N. Charter, and the ECHR. *Id.* §§ 2(a)(2)–(3). In particular, the Act

(A) arbitrary prohibitions on, restrictions of, or punishment for—

- (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;
- (ii) speaking freely about one's religious beliefs;
- (iii) changing one's religious beliefs and affiliation;
- (iv) possession and distribution of religious literature, including Bibles; or
- (v) raising one's children in the religious teachings and practices of one's choice; or

(B) any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.⁴¹

Thus, while the Act is part of U.S. domestic law, it draws expressly on principles of international law in defining the meaning of the right to religious freedom and what acts or practices constitute violations of that right. The term "particularly severe violations of religious freedom" is further defined to mean "systematic, ongoing, egregious violations of religious freedom," including violations such as:

- (A) torture or cruel, inhuman, or degrading treatment or punishment;
- (B) prolonged detention without charges;
- (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or
- (D) other flagrant denial of the right to life, liberty, or

draws on article 18 of the UDHR and article 18 of the ICCPR (which the United States ratified with reservations in April 1992). *See infra* Part V.B.1.

41. *See* IRFA § 3(13). Thus, the Act covers a wide range of traditional human rights violations including torture, rape and extra-judicial killing, provided that those acts are committed on account of an individual's particular religious belief or practice.

the security of persons.⁴²

Finally, in accordance with international human rights instruments, the reach of the Act expressly extends to the conduct of non-state actors. The IRFA provides that the assessment of violations of religious freedom in the Annual Report must include consideration of “persecution of one religious group by another religious group, religious persecution by governmental and non-governmental entities, persecution targeted at individuals or particular denominations or entire religions, [and] the existence of government policies violating religious freedom.”⁴³

In terms of institutional machinery, the Act creates a Commission on International Religious Freedom (“IRF Commission”) that has nine members (in addition to the Ambassador at Large) and that is responsible for monitoring the effects of other states’ laws, policies, and practices on religious groups.⁴⁴ The IRF Commission is also required to submit an annual report to the President, the Secretary of State, and Congress setting out its findings and policy recommendations for the U.S. government with respect to matters involving international religious freedom.⁴⁵

The key part of the Act, however, is Title IV—Presidential Actions—that sets out a range of targeted actions required to be taken by the President in response to two types of situations: (a) violations of religious freedom and (b) “particularly severe” violations of religious freedom. In the case of the former, the President, acting on the basis of the annual report on international religious freedom and the IRF Commission’s recommendations, is required to oppose violations and promote the right to freedom of religion in those countries whose governments engage in or tolerate violations of religious freedom.⁴⁶ No later than September of each year, the President is required to take action by imposing any one or more of the following political or economic measures under section 405(a) with respect to each foreign government that has engaged in or

42. *Id.* § 3(11).

43. *Id.* § 102(a)(B).

44. *Id.* § 201 (setting forth the establishment and composition of the Commission on International Religious Freedom); § (setting forth the duties of the Commission). The first Executive Director of the IRF Commission was Steven McFarland who was formerly director of the Center for Law and Religious Freedom, which is part of the Christian Legal Society, an organization of evangelical Protestant lawyers.

45. *Id.* § 203 (requiring that the Commission produce an annual report).

46. *Id.* § 401 (setting forth general guidelines for Presidential action in response to violations of religious freedom).

tolerated violations:

- (1) A private demarche.
- (2) An official public demarche.
- (3) A public condemnation.
- (4) A public condemnation within one or more multilateral fora.
- (5) The delay or cancellation of one or more scientific exchanges.
- (6) The delay or cancellation of one or more cultural exchanges.
- (7) The denial of one or more working, official, or state visits.
- (8) The delay or cancellation of one or more working, official, or state visits.
- (9) The withdrawal, limitation, or suspension of United States development assistance in accordance with section 116 of the Foreign Assistance Act of 1961.
- (10) Directing the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve the issuance of . . . guarantees, insurance, extensions of credit, or participations in the extension of credit
- (11) The withdrawal, limitation, or suspension of United States security assistance in accordance with section 502B of the Foreign Assistance Act of 1961.
- (12) Consistent with section 701 of the International Financial Institutions Act of 1977, directing the United States executive directors of international financial institutions to oppose and vote against [specified loans].
- (13) Ordering the heads of the appropriate United States agencies not to issue [specific licenses,] and not to grant [specific authority] to export any goods or technology

(14) Prohibiting any United States financial institution from making loans or providing credits totaling more than \$10,000,000 in any 12-month period . . .

(15) Prohibiting the United States Government from procuring, or entering into any contract for the procurement of, any goods or services . . .⁴⁷

Alternatively, the President may negotiate and enter into a binding bilateral agreement with the foreign government in question, obligating it to “cease, or to take substantial steps to address and phase out, the act, policy, or practice constituting the violation of religious freedom.”⁴⁸ The availability of this option demonstrates that the IRFA provides for both unilateral and bilateral responses to violations of religious freedom.

In those situations where the President determines that a foreign government has engaged in or tolerated “particularly severe” violations of religious freedom,⁴⁹ the President is required within ninety days to take any one or more of the actions specified in sections 405(a)(9) through (15) only—that is, to apply economic sanctions—or to enter into a binding agreement as set out above.⁵⁰ The Act further requires the President to consult with foreign governments prior to taking these actions (including in multilateral fora⁵¹) and to report to Congress identifying the actions to be taken, their purpose, and their likely impact on the foreign country, the U.S. economy, and other interested parties.⁵² Finally, Title IV of the Act contains a provision allowing for a presidential waiver of punitive economic measures in those instances where application of any of the actions specified in sections 405(a)(9) through (15) towards another state may jeopardize “the important national interest of the United

47. *Id.* § 405(a) (Description of Presidential Actions).

48. *Id.* § 405(c). This is stipulated to be a “primary objective” in the case of responding to particularly severe violations of religious freedom.

49. *Id.* § 402(b)(1)(A). The President is required no later than September 1 of each year to designate those countries of “particular concern for religious freedom.” *Id.*

50. *Id.* § 402(c)(1)(A). This section also allows for a delay of a further ninety days for a continuation of negotiations, *id.* § 402(c)(3), and for certain exceptions in the case of ongoing presidential action, in particular where a country is already subject to multiple, broad-based sanctions imposed in response to human rights abuses, *id.* § 402(c)(4).

51. *Id.* § 403. Section 403(b)(2) allows the President to carry out consultations in a multilateral forum where he considers it “appropriate” or, at the least, to consult with appropriate foreign governments for the purposes of “achieving a coordinated international policy.”

52. *Id.* § 404.

States.”⁵³

2. IRFA and Multilateralism

The only substantive connection between the IRFA and international and regional human rights law and institutions is at the definitional level. As indicated above, the Act expressly defines violations of religious freedom to mean violations of the “internationally recognized right to freedom of religion and religious belief and practice” as set forth in U.N. General Assembly Declarations (the UDHR and the 1981 Declaration); non-binding human rights agreements (the Helsinki Accords); and binding international and regional conventions (the U.N. Charter, the ICCPR, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)).⁵⁴ Thus, the Act adopts an expansive interpretation of freedom of religion and belief, encompassing both settled conventional and customary international law and extending even further to include *lex ferenda* and non-binding political commitments. On its face, therefore, the United States could apply political or economic measures under the IRFA against a target state on the basis of violations of international norms and standards to which the foreign state is not a party and that have not yet attained the status of customary international law.⁵⁵

During the period leading up to the enactment of the IRFA, the Advisory Committee on Religious Freedom Abroad made a number of recommendations regarding the relationship between U.S. policies and multilateral diplomacy in the U.N. and regional organizations.⁵⁶ Apart from the issue of defining violations of

53. *Id.* § 407. Section 407 may also apply where (1) the foreign government has ceased the violations giving rise to the Presidential action, or (2) the exercise of a waiver would further the purposes of the Act. In all cases, there is a congressional notification requirement. *Id.* § 407(b). The Act expressly precludes judicial review of any presidential determination or agency action under the Act. *Id.* § 410.

54. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

55. On the relationship between the IRFA and international human rights law, see *infra* note 211 and accompanying text.

56. See Advisory Committee Final Report, *supra* note 23, at 40 (recommending that the United States comply with its obligations under the U.N. Charter and pay its dues to the U.N.; raise the profile of religious freedom at the General Assembly, the Human Rights Commission and the Office of the High Commissioner for Human Rights; work to strengthen the role of the High Commissioner and the work of the Special Rapporteurs; work for the ratification of human rights conventions; ensure adequate resources for U.N. human rights monitoring; and work to elevate the prominence of religious freedom in regional organizations).

religious freedom, none of these recommendations found their way into the design or substance of the IRFA. The sections of the Act that deal with the strengthening of existing law cover only U.S. domestic legislation and the one provision that deals with multilateral assistance mentions only the International Financial Institutions Act.⁵⁷ In terms of cooperation with transnational actors, the Act contains one provision instructing the IRF Commission to monitor facts and circumstances of violations of religious freedom “in consultation with independent human rights groups and nongovernmental organizations, including churches and other religious communities;”⁵⁸ another provision instructing U.S. chiefs of mission to seek out and contact religious (not secular) NGOs for the purpose of providing high-level meetings;⁵⁹ and a final miscellaneous provision indicating that it is the “sense of the Congress” that transnational corporations operating overseas have become important global actors with potential for providing positive leadership that should include upholding the religious freedom of their employees.⁶⁰ The Act does not contain a single provision on cooperation with or support for U.N. or regional multilateral agencies, treaty-bodies, or commissions that seek to monitor and protect freedom of religion.

Despite repeated statements that the IRFA is designed to foster international cooperation and dialogue on religious freedom,⁶¹

57. See IRFA §§ 421 (dealing with sections 116(c) and 502B(a) of the Foreign Assistance Act of 1961), 422 (entitled “Multilateral Assistance” and dealing with section 701 of the International Financial Institutions Act). The remaining provisions in this section deal with mandatory licensing and licensing bans. *Id.* § 423. As noted above, under section 403(b)(2) the President may employ multilateral fora to consult with foreign governments before imposing economic sanctions under section 402(c)(1)(A), but this section merely restates the current situation and provides for no assistance or cooperative action to be taken by the United States in conjunction with multilateral or regional institutions.

58. *Id.* § 202(e). Under section 102(c)(2), U.S. mission personnel are also instructed to seek out and maintain contacts with “religious and human rights nongovernmental organizations, with the consent of those organizations, including receiving reports and updates and . . . investigating such reports.” *Id.* § 102(C)(2).

59. *Id.* § 105. The term “religious nongovernmental organization” in section 105 is not defined but would appear not to include NGOs with a secular human rights agenda, such as Human Rights Watch or Amnesty International, which seek to promote and protect religious freedom as an internationally recognized human right.

60. *Id.* § 701.

61. See, e.g., Michael E. Parmly, Acting Assistant Secretary of State for Democracy, Human Rights, and Labor, *Religious Freedom Across the Atlantic: Developing the Habit of Cooperation*, Remarks at the Institute for Religion and Public Policy's Conference on Transatlantic Conversations on Religious Coexistence (Apr. 26, 2001), available at <http://www.state.gov/g/drl/rls/rm/2001/2486.htm> (arguing for the development of a “habit of cooperation” on the issue of religious freedom and continuing the State Department's work with the NGO/human rights/religious freedom community to promote international religious freedom).

the means ultimately employed rely almost exclusively on unilateral or bilateral mechanisms. The IRFA accordingly embodies an almost complete divide between unilateralism and multilateralism. The failure to incorporate, or even mention, existing multilateral mechanisms that monitor and protect religious freedom is astonishing given the stated purposes of the Act. Indeed, given the far-reaching normative influence of the ECHR and the judgments of the European Court of Human Rights in most European countries over the last half century, it is symptomatic of this willful blindness towards multilateral and regional regimes that the Advisory Committee recommended in its Interim Report that the United States work to “encourage” its allies in the Council of Europe to promote and protect religious freedom.⁶²

The rationale for such an approach would appear to be either that multilateral mechanisms are so ineffective or unnecessary as not to warrant mention, cooperation, or support or that such mechanisms could (or should) not be incorporated into the IRFA. In Parts IV and V below, both of these propositions are challenged and suggested to be in error.

3. U.S. Actions Taken Under the IRFA to Promote Religious Freedom

The most notable and impressive feature of the IRFA is the monitoring and reporting machinery created under section 102, which supplements recent State Department Human Rights Country Reports by providing additional information on international religious freedom. To date, there have been three Annual Reports on International Religious Freedom submitted to the Congress by the State Department under section 102(b).⁶³ The Executive Summaries

62. Advisory Committee Interim Report, *supra* note 23.

63. The Annual Reports divide violations of religious freedom in foreign countries into five categories: (1) totalitarian or authoritarian attempts to control religious belief or practice; (2) state hostility toward minority or non-approved religions; (3) state neglect of the problem of discrimination against, or persecution of, minority or non-approved religions; (4) discriminatory legislation or policies disadvantaging certain religions; and (5) stigmatization of religions by wrongfully associating them with dangerous “cults” or “sects.” See 2001 Annual Report On International Religious Freedom, at xvi–xvii (U.S. Dep’t of State 2001), <http://www.state.gov/documents/organization/9001.pdf>. The first Annual Report was released on September 9, 1999 following which the Secretary of State on November 3, 1999 designated five countries—Burma, China, Iran, Iraq and Sudan—as “countries of particular concern” under the Act for having engaged in or tolerated particularly severe violations. In addition, the Secretary identified Serbia and the Taliban regime of Afghanistan (neither of which were recognized as “countries” under the Act) as having committed particularly severe violations. 1999 Annual Report on International Religious Freedom (U.S. Dep’t of State

of the Annual Reports contain a final section that describes the actions taken by the United States during the period under review to promote international religious freedom.

In concluding this overview of the IRFA, it is instructive to consider the actions that have been actually taken under the Act against five countries that were designated by the Secretary of State in 1999 and 2000 as being of "particular concern" and against the Taliban regime in Afghanistan.⁶⁴ In relation to Burma, the United States has continued, and in some areas intensified, far-reaching economic and political sanctions that began in 1988 to promote increased respect for human rights, including religious freedom.⁶⁵

In relation to China, despite evidence of widespread and gross violations of religious freedom, the United States has imposed no economic sanctions. Instead, the United States has preferred to collect information through embassy officials and meetings with Chinese embassy officers in Washington, to maintain contact with China's religious communities, and to send Chinese religious leaders and scholars to the United States on international visitor programs.⁶⁶

In relation to Iran and Iraq, the Annual Reports indicate that U.S. actions taken under the Act have not extended further than a number of critical statements made by President Clinton and Secretary Albright regarding the poor treatment of religious

1999), <http://www.uscifr.gov/>. The second Annual Report was released on September 5, 2000 following which the Secretary of State designated the same countries as being "of particular concern." See 2000 Annual Report On International Religious Freedom (U.S. Dep't of State 1999), <http://www.uscifr.gov/>. The third Annual Report was released on October 26, 2001 following which the Secretary designated the same countries but added North Korea and removed Serbia from the list. See 2001 Annual Report On International Religious Freedom.

64. Under section 402(b)(1)(A) of the IRFA, the President is required to designate "each country the government of which has engaged in or tolerated" certain violations as a country of particular concern for religious freedom. IRFA § 402(b)(1)(A). The 2001 Annual Report states that the Taliban regime "cannot be designated as a 'country of particular concern' because it is not a government recognized by the United States." See 2001 Annual Report On International Religious Freedom, *supra* note 63, at xxix.

65. These have included: discontinued bilateral aid; suspension of licenses to export arms to Burma; suspension of the Generalized System of Preferences for Burma; suspension of tariff preference for imports of Burmese origin; suspension of Export-Import Bank financial services in support of U.S. exports to Burma; denial of any Overseas Private Investment Corporation financial services in support of U.S. investment in Burma; suspension of active promotion of trade and issuance of visas to high government officials; banned new investment by U.S. firms; opposition to all assistance by international financial institutions; and active support of the ILO decision to suspend Burma from participation in ILO programs. See *id.* at 120.

66. The 2001 Report also notes that various efforts by the U.S. government have been made to introduce resolutions in the U.N. Human Rights Commission in Geneva on the issue of religious freedom in China. See *id.* at 133.

minorities (in particular the Baha'i and Jewish communities) and the co-sponsoring each year of European-Union-proposed resolutions in the U.N. Human Rights Commission ("UNHRC"). The Reports further indicate that it is "the policy of the United States to encourage a change of regime in Iraq" and that contacts with opposition and religious groups in Iraq have occurred in that context.⁶⁷

In relation to Sudan, where the Reports indicate that children from Christian and other non-Muslim families continue to be captured, sold into slavery, and converted forcibly to Islam, no economic or punitive measures have been taken under the Act and U.S. actions have been limited to several visits to the region by special envoys and members of the IRF Commission to meet with religious communities and to expressions of concern to Sudanese embassy officials, UNHRC, and the press.⁶⁸

Finally, prior to the dramatic attacks of September 11, 2001 on the World Trade Center and the Pentagon, the U.S. government raised the issue of abuses committed by the Taliban regime in Afghanistan against religious minorities (and several pre-Islamic statues) with neighboring governments and in international forums, but imposed no economic or political sanctions under the Act.⁶⁹

It is also important to consider which states identified in the Annual Reports as consistent and widespread violators of religious freedom have *not* been designated by the Secretary of State as countries of "particular concern" and against whom relatively minor economic or diplomatic action has been taken. The most glaring example in this category is the Islamic monarchy—and oil-rich land—of Saudi Arabia where, according to the 2001 Report,

67. The 2001 Annual Report entry on Iraq states that the United States is "in frequent contact with opposition groups, including religiously oriented Shi'a, Sunni, and Christian groups. All of the groups designated as eligible for assistance under the Iraq Liberation Act have indicated their strong support for religious freedom and tolerance." The United States has also supported calls in the UNHRC for the sending of U.N. human rights monitors to "help in the independent verification of reports on the human rights situation in Iraq." *See id.* at 443.

68. The 2000 Report notes that during an October 1999 visit to Nairobi, the Secretary of State met with a group of Christian and Muslim representatives of civil society from northern and southern Sudan, including Catholic Bishop Erkanan Lodu Tombe of Yei, and discussed the difficulties encountered by both Christians and Muslims. A Special Envoy visited the country in March and June 2000 and raised the issue of religious freedom with the government and met with prominent Christian and Muslim leaders. *See* 2000 Annual Report On International Religious Freedom, *supra* note 63, at Sudan, § III.

69. The 2000 Report also notes that in August 2000, the State Department announced that it was doubling its refugee resettlement ceiling for the Near East and South Asian regions for the year 2000, in part to allow more Afghan women and their families into the United States. *See id.* at Afghanistan, § IV.

“freedom of religion does not exist” either as a matter of law or practice.⁷⁰ U.S. action against Saudi Arabia under the Act, however, has been limited to meetings of government officials and IRF Commission members with officers of the Saudi Ministry of Foreign Affairs to discuss issues of religious freedom, especially on the issue of private non-Muslim worship.⁷¹

Human Rights Watch also has observed, following the release of the third Annual Report on October 26, 2001 (and thus post-September 11), the omission of Uzbekistan and Turkmenistan from the list of countries designated as being of “particular concern.” This is the case despite the fact that in Uzbekistan “several thousand non-violent Muslims have been arrested in the last three years for practising their faith outside state controls” and in Turkmenistan there is “suppression of all forms of religious practice other than state-sanctioned Islam and Russian orthodoxy.”⁷² The Human Rights Watch press release proceeds to note that Saudi Arabia, Uzbekistan, and Turkmenistan are key allies in the U.S.-led coalition in the war against terrorism and are hosts of U.S. military bases and forces involved in operations in Afghanistan. It also notes that the section of the 2001 Report on China’s actions in Xinjiang, the predominantly Muslim region of northwest China, is strikingly less critical than in previous years.⁷³ A review of actions taken under the Act towards other countries in which the United States has important strategic or military interests but where widespread violations of religious freedom persist—such as Indonesia, Egypt, and Israel—reveals

70. The 2001 Report states that, based on its interpretation of the *hadith*, or sayings of the Prophet Muhammad, the Government prohibits the public practice of non-Muslim religions. While the Government recognizes the right of non-Muslims to worship in private, the distinction between public and private worship is not clearly defined, and at times the Government does not respect in practice the right to private worship. See 2001 Annual Report On International Religious Freedom, *supra* note 63, at 478.

71. The 2000 Report also notes that during the period under review, the U.S. Embassy’s human rights officer met several times with Filipino Christian group members and Philippine embassy staff during the period of detention and deportation of persons suspected of involvement with Christian proselytizing groups. Several official meetings were also held in which the issue of religious freedom was raised including the delivery of a demarche on religious freedom to the Saudi Ministry of Foreign Affairs official in charge of human rights. See 2000 Annual Report On International Religious Freedom, *supra* note 63, at Executive Summary.

72. Press Release, Human Rights Watch, U.S. Report on Religious Freedom is Flawed (Oct. 26, 2001), <http://www.hrw.org/press/2001/10/religious1026.htm>.

73. Unlike in the 2000 Report, the Chinese government’s “Strike Hard” anti-crime campaign in Xinjiang (under which a harsh crackdown on Uighur Muslims has occurred that has failed to distinguish between those involved in illegal religious activities and those involved in ethnic separatist or terrorist activities) is not directly mentioned in the 2001 Report.

similar diplomatic caution and, in fact, considerable development, training, educational and exchange cooperation, and support.⁷⁴

What preliminary conclusions might we draw from these varying actions, and failures to act, under the IRFA in terms of the Act's stated objective of principled and purposeful engagement with violator states? Despite the many complex factors and variables at work, I would make the following four observations and predictions regarding U.S. foreign policy under the Act. First, where relatively minor U.S. strategic or economic interests are at stake, economic sanctions and harsher punitive measures are more likely than not to be imposed, as has been the case with Burma. Second, where more significant U.S. economic interests but fewer strategic concerns are at stake, political or diplomatic foreign policy tools are more likely to be employed—including positive inducements such as economic aid and educational exchanges—but not economic sanctions, as has been the case with Indonesia and China. Third, where *both* greater U.S. strategic and economic interests are at stake, little substantive action will be taken under the IRFA other than at the level of rhetoric, as has been the case with Saudi Arabia, Egypt, and Israel (and post-September 11, with Uzbekistan, Turkmenistan, and Pakistan), including failure to designate these countries as being of "particular concern."⁷⁵ Fourth, in the case of countries considered to be "rogue states"⁷⁶ for a range of historical and ideological reasons beyond the

74. In relation to Israel, the Reports discuss the issue of religious freedom in the Occupied Territories separately and notes strong dialogue with and support for Israel in fostering tolerance and religious freedom in the region including small grants to local organizations promoting interfaith dialogue and to organizations examining the role of religion in resolving conflict. In relation to both Indonesia and Egypt, religious freedom is stated to be an "important part of the bilateral dialogue" and the Reports indicate extensive development activities by the United States Agency For International Development ("USAID") in both countries and a range of diplomatic, training, educational and exchange activities along similar lines to those being initiated by the United States with China. See 2001 Annual Report On International Religious Freedom, *supra* note 63, at 163, 429.

75. Saudi Arabia, in particular, has long been a key ally of the United States in the Middle East as the world's largest oil exporter, as a host for some of the most sophisticated military bases available to the United States in the region, and as the largest market in the region for U.S. goods and services, especially arms. Over half of Saudi Arabia's crude oil exports, and the majority of its refined petroleum exports, go to Asia, while the United States gets 17 per cent of its crude oil imports from the kingdom. According to the U.S. embassy in Riyadh, U.S. civilian and military merchandise exports to the country in 2000 totaled \$6.23 billion and investments in the country by U.S.-based multinationals are around \$5 billion. Saudi investments in the United States total nearly half a trillion dollars and the country remains the top buyer of U.S. arms exports among developing countries, taking deliveries worth more than \$28 billion in the 1993–2000 period. *Human Rights in Saudi Arabia: A Deafening Silence*, Human Rights Watch Backgrounder (Human Rights Watch), at 1, Dec. 2001.

76. For a definition and discussion of the notion of "rogue states," see *infra* notes 269–70 and accompanying text.

issue of violations of religious freedom (and where strategic and economic interests may also be involved),⁷⁷ the wider and shifting concerns of U.S. foreign policy will be paramount, as has been the case with Iran, Iraq, North Korea, and Sudan. In other words, in the conduct of foreign policy towards states that are severe violators of religious freedom, principle will likely be trumped by *realpolitik* where significant U.S. economic, security, and strategic interests are at stake. I further discuss and support these assertions below.⁷⁸

B. Protection of Minority Rights Under Bilateral Treaties

To date, no bilateral agreements have been negotiated or entered into by the President with foreign governments of “particular concern” under section 405(c) of the IRFA. Accordingly, it is difficult to assess how this mechanism will operate in practice. The experience of bilateral arrangements in the European context, however, while raising its own specific problems and prospects tied to issues of history, politics, and geography, provides some general insights into the effectiveness of bilateral mechanisms in monitoring and protecting the rights of religious minorities.

Article 18(1) of the Council of Europe’s Framework Convention on National Minorities provides that:

[T]he parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.⁷⁹

Over the last few years, many former socialist states in Eastern and Central Europe have attempted to improve their mutual bilateral relations by concluding agreements that Bloed and van Dijk refer to as bilateral treaties of “co-operation, friendship and good-neighbourliness.”⁸⁰ These agreements generally contain provisions that address the rights and obligations of the national, ethnic, and

77. Iraq, for example, is one of the world’s largest suppliers of oil. European countries alone consume over 2.5 million barrels of Iraqi oil a day. See *Human Right in Saudi Arabia*, *supra* note 75.

78. See *infra* Part V.B(3)—Selective and Uneven Enforcement.

79. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351, at 357 (1995).

80. PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES—THE CASE OF CENTRAL AND EASTERN EUROPE 2 (Arie Bloed & Peter van Dijk eds., 1999).

religious minority groups in their respective countries, and they borrow heavily from standards found in various multilateral instruments created by the U.N., the Council of Europe, and the Organization For Security and Co-operation In Europe ("OSCE").⁸¹

Since 1990, for example, Russia has entered into a complex web of bilateral agreements containing minority protections with Lithuania, Latvia, Estonia, Ukraine, Belarus, Moldova, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Georgia, Tajikistan, Uzbekistan, Turkmenistan, and a number of the previously-independent states (including the Federal Republic of Germany, Poland, Finland, Hungary, and Slovakia).⁸² This network of bilateral ties evidences an attempt by Russia to set legal standards and expectations that govern the status of ethnic Russians and the behavior of neighboring states. On October 21, 1994, Russia also concluded a Commonwealth of Independent States ("CIS") convention guaranteeing the rights of persons belonging to national minority groups. The convention expressly recognizes existing international human rights standards and, in the area of religious rights, contains legally binding obligations in line with the principles enshrined in the 1981 Declaration.⁸³

Concerns have been raised, however, that this attempt by Russia to develop standards and practices of minority protection amongst the CIS states may indicate a lack of willingness fully to implement OSCE, U.N., and Council of Europe norms. This fear is further confirmed by the fact that the CIS standard on minority rights is both lower than international standards and dramatically skewed toward the protection of ethnic Russians.⁸⁴ This type of state political

81. Note that most of these bilateral agreements contain a general clause stating that nothing in the treaty shall be construed as limiting or derogating from any minority rights standards ensured under any treaty or agreement to which the states are parties. *Id.* at 15. Indeed, there is evidence from recent bilateral treaties that OSCE standards in particular are often treated as legally binding. See, e.g., Treaty on Friendly Cooperation and Partnership in Europe Between the Federal Republic of Germany and the Republic of Hungary, Feb. 6, 1992, art. 19(1), reprinted in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80, at 352; Treaty on Friendly Relations and Partnership Between Romania and the Federal Republic of Germany, Apr. 21, 1992, art. 15(1), reprinted in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80, at 436; Treaty Between the Federal Republic of Germany and the Czech and Slovak Federal Republic on Good-Neighborliness, Friendship and Cooperation, Feb. 27, 1992, art. 20(1), reprinted in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80 at 422, 424.

82. See generally Heather Hurlburt, *Russian Bilateral Treaties and Minority Policy*, in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80, at 55-99.

83. *Id.* at 85-86.

84. *Id.* at 87-88.

self-interest is, of course, one of the major dangers of bilateral treaty arrangements regarding human rights protections when compared to either regional or global human rights treaty regimes.

Likewise, both Poland and Hungary have entered into a series of bilateral treaties and declarations.⁸⁵ The most heavily negotiated and controversial issue in these treaties has been the pursuit of protections safeguarding the autonomy of minority groups—that is, self-governing minority bodies and autonomous structures in neighboring “kin” states. Hungary, in particular, has sought strong protections for the autonomy of Hungarian minority groups in other states, while neighboring states such as Slovakia and Romania have rejected any recognition of collective rights that would “admit the creation of autonomous structures on the ethnic principle.”⁸⁶ It appears that the concept of autonomy is closely associated by these states with notions of internal territorial delimitation and even separatism, and this immediately elevates minority issues to a question of national security. Nevertheless, it is pertinent to note that Slovakia’s entry into the Council of Europe was ultimately delayed until such time as it had demonstrated compliance with specific provisions on minority rights.⁸⁷

What can we conclude about the comparative strengths and weaknesses of bilateral treaty arrangements in the area of the rights of religious minorities? Their main advantage would appear to be in contributing to regional stability and confidence-building. However, it is equally clear that weak and politically self-interested treaties ultimately can have the opposite effect and cause destabilization. Similarly, while international human rights norms and standards have had a strong influence on the content and language of these bilateral arrangements, it is equally clear that many of these agreements fall short in important respects in comparison with internationally

85. At the beginning of the transition period (1990–1994) Poland had concluded bilateral agreements on friendly co-operation with all its neighboring states including with: Germany (June 17, 1991); Czech and Slovak Republic (October 6, 1991); Ukraine (May 18, 1992); Russia (May 22, 1992); Belarus (June 23, 1992); and Lithuania (April 26, 1994). Poland also concluded treaties with Hungary, Latvia, Estonia and Romania during the same period. See Jan Barcz, *Poland and its Bilateral Treaties*, in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80, at 101–25.

86. Statement by the Government of the Slovak Republic on the Treaty with the Republic of Hungary, Bratislava (Mar. 18, 1995), cited in Patrick Thornberry, *Hungarian Bilateral Treaties and Declarations*, in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80, at 127–63, 144. See also Michael Geroe & Thomas Gump, *Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe*, 32 COLUM. J. TRANSNAT’L L. 673 (1995).

87. See *infra* note 191 and accompanying text.

accepted standards. Thus, while bilateral agreements may be tailored to be more situation specific, there is a tendency to relegate multilateral standards to the background if they prove inconvenient to entrenched state interests.⁸⁸

Alfredsson has summarized the legal and political disadvantages of bilateral minority treaties as follows:

- the danger of reduced standards as compared with the international and regional instruments,
- the emphasis on political rather than legal commitments,
- the unequal position of the parties to the situation,
- the possible discrimination between different groups within a contracting state, prompting a proposal for the ‘most-favored-minority-clause,’ and
- the possible destabilizing effects on relations between the parties.⁸⁹

In Alfredsson’s view, long-term peaceful relations between Central and Eastern European states would be better served by eliminating any direct role for kinship states, and by transferring the role of guaranteeing and monitoring respect for minority rights to the more balanced and objective scrutiny of international and regional organizations (that is, the monitoring mechanisms of the U.N., OSCE, and Council of Europe). The history of religious wars in the region dating back centuries reveals that the wish to protect religious minorities has been frequently used by rulers to justify their intervention in foreign states. This may suggest that regional and international approaches—at least in addition to, or as a supervisory check on, bilateral arrangements—offer a preferable way of advancing peaceful relations and respect for human rights.⁹⁰

88. See generally Elizabeth Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HASTINGS INT’L. & COMP. L. REV. 291 (1999).

89. Gudmundur Alfredsson, *Identifying Possible Disadvantages of Bilateral Agreements and Advancing the ‘Most-Favoured-Minority-Clause’*, in PROTECTION OF MINORITY RIGHTS THROUGH BILATERAL TREATIES, *supra* note 80, at 165–75.

90. See VLADIMIR ORTAKOVSKY, MINORITIES IN THE BALKANS 12 (2000).

IV. THE MULTILATERAL ALTERNATIVE—INTERNATIONAL MONITORING AND PROTECTION OF RELIGIOUS FREEDOM

If the IRFA constitutes the paradigmatic unilateral approach to the monitoring and protection of international religious freedom, what are the available multilateral alternatives and what are their requisite strengths and weaknesses? As discussed in Part III, the tacit assumption lying at the heart of the IRFA is that U.N. and regional institutions are at worst unable, and at best ineffective and too slow, to monitor and protect religious freedom, and that U.S. power, influence, and resources are better utilized developing stronger domestic means by which to confront the problem of violations of religious freedom. In this Part, I seek to challenge that assumption and to examine the role played by external actors in multilateral regimes and diplomacy in monitoring and protecting religious freedom before turning to assess, in Part V, the relative effectiveness of unilateral and multilateral approaches. An important threshold issue is the legitimacy of external actors, such as treaty bodies, regional organizations, or NGOs, in monitoring the internal affairs of other countries.

A. *Legitimacy of External Monitoring*

As a matter of international law and politics, states have been divided on the issue of their readiness to address charges of their own human rights violations. Some states have resisted the airing of such charges on the grounds that these are outside the proper sphere of operation of international organizations such as the U.N., which is forbidden under the terms of Article 2(7) of its own Charter “to intervene in any matters which are essentially within the domestic jurisdiction of any state.”⁹¹ As Henkin has observed, however, U.N. practice rejected that objection long ago,⁹² in effect reflecting the conclusion that human rights violations are not a matter of domestic jurisdiction, that U.N. discussion of them is not intervention, or both. Nevertheless, some states remain sensitive about anything in the nature of international examination of their human rights record, invoking arguments about their national sovereignty and Article 2(7) of the U.N. Charter. It has been a distinct achievement, therefore, to get many states to accept even the modest reporting measures

91. U.N. CHARTER art. 2, para. 7.

92. HENKIN, *supra* note 4, at 51–53.

established under the ICCPR.

Over the course of more than half a century, U.N. organs and other multilateral and regional institutions have systematically reduced the scope claimed for the so-called *domain réservé*. The Helsinki Accords and follow-up agreements have given rise to the OSCE, which has become a unique phenomenon in international relations.⁹³ The vast array of U.N. human rights, labor, environmental, and economic agreements increasingly allow review of behavior previously considered to be purely in the province of national governments. The case of Poland illustrates this point well. In 1983, Poland insisted on a very high threshold for alleged violations before U.N. organs could even begin to consider human rights concerns in a particular state. By October 1991, however, Poland had endorsed the following conclusion of the Moscow Meeting of the Conference on the Human Dimension of the Helsinki process:

The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE [Conference on Security and Cooperation in Europe] are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.⁹⁴

The result of the Helsinki Accords was that if a signatory country failed to abide by OSCE, then CSCE, standards, that failure was a legitimate matter for multilateral discussion and, most likely, action. In this way, states became able to appropriately and legitimately scrutinize the purely internal behavior of other countries

93. The original Conference on Security and Co-operation in Europe ("CSCE") was based on an intergovernmental conference of all European states, the United States of America and Canada in the first half of the 1970's. This conference resulted in the signature of the Final Act of Helsinki in August 1975. On the basis of the Final Act, an increasing number of CSCE follow-up meetings and specialized conferences took place, which resulted in the CSCE being referred to as the "CSCE process" or "Helsinki process." See Arie Bloed, *Monitoring the CSCE Human Dimension: In Search of its Effectiveness*, in *MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS* 45 (Arie Bloed et al. eds., 1993).

94. 30 I.L.M. 1670, 1672 (1991), cited in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 590 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000).

in an international setting.⁹⁵

The relationship between human rights and international institutions has subsequently deepened and broadened beyond the “political” nature of the Helsinki undertakings. The influence of U.N. bodies, such as the Human Rights Committee established under the ICCPR, and of regional bodies, such as the European Court of Human Rights established under the ECHR, have had a profound influence in inducing compliance by states with human rights standards. Equally important, a customary international law of human rights has been widely recognized since the drafting of the UDHR in 1948, and this too has exerted an influence on state adherence to basic human rights norms.⁹⁶

1. The Problem of Accountability and “Democratic Deficit”

A related and important dimension of the legitimacy of external human rights monitoring bodies is the concern that such bodies are unaccountable, undemocratic, and equally susceptible to political manipulation and unprincipled behavior as is the unilateral action of states. In the United States, for example, these kinds of objections are regularly voiced and represent a deep suspicion of both the erosion of national sovereignty by international institutions and intrusion of international institutions into national sovereignty and of multilateralism as the cornerstone of modern public international law.⁹⁷ While it is not possible to address these objections in depth here, four general observations may be made.

First, the source of legitimacy and authority of multilateral

95. See Michael Young, *External Monitoring of Domestic Religious Liberties*, 2 BYU L. REV. 501, 503 (1998).

96. See, e.g., Martti Koskeniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990) (discussing the extent to which states are bound by humanitarian or human rights norms regardless of treaties, by way of custom).

97. See, e.g., Edward Luck, *The United States, International Organizations, and the Quest for Legitimacy*, in MULTILATERALISM AND U.S. FOREIGN POLICY—AMBIVALENT ENGAGEMENT 47, 51–8 (Stewart Patrick & Shepard Forman eds., 2002) (arguing that U.S. ambivalence toward multilateral rules and organization reflects a distinctive conception of political legitimacy that judges the legitimacy of international institutions along five dimensions: (1) “whether they are deemed to be fair in their processes and consistent in their values;” (2) “whether they are considered to be sufficiently accountable and democratic;” (3) “whether their decisionmaking rules can be squared with U.S. exceptionalism;” (4) “whether they should be judged on process or results;” and (5) “whether they preserve or undermine national sovereignty.”) The recent strong opposition of the United States to the creation of an International Criminal Court epitomizes each of these objections. See, e.g., Peter Malanczuk, *The International Criminal Court and Landmines: What are the Consequences of Leaving the US Behind?*, 11 EUR. J. INT’L L. 77 (2000).

regimes is the consent of states themselves. For better or for worse, states have obligated themselves (on the basis of the principle of *pacta sunt servanda*) to abide by multilateral regimes in stipulated contexts, such as human rights. Given this fact, the burden of proof is, or should be, on those states that now assert a right to unilateral action in contravention of those commitments.⁹⁸

Second, it is a simple and uncontroversial point that multilateralism is not an unmitigated good or one that does not have its own problems of accountability and claims to “fairness” in terms of both legitimacy and justice.⁹⁹ It is a grave error, however, to view these issues solely through the lens of domestic conceptions of accountability and legitimacy. The domestic democratic notion of delegation of power to elected representatives who are thus empowered to exercise that power on behalf of and for the benefit of the people cannot be fully replicated in global or regional interstate organizations where the prime constituents are governments rather than individuals. Indeed, powerful states exercise their influence at the international level precisely to ensure that international organizations, from the U.N. Security Council to the Bretton Woods institutions, are substantively and procedurally undemocratic and instead correspond more closely to the reality of power relations between states.¹⁰⁰ Accordingly, unless the entire project of multilateral action is to be abandoned on these sorts of grounds, the more pressing question is how to improve the accountability, transparency, and fairness of international institutions.¹⁰¹

98. See, e.g., James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 122 (2000) (rejecting the argument that ambitious multilateral projects have failed to fulfill the political, economic or social goals assigned to them and pointing instead to the “real dilemma that confronts us today, namely the increasing propensity of powerful states to withdraw, formally or in practice, from the multilateral legal enterprise”).

99. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 477 (1995).

100. It is interesting to note that the United States has tended more often to question the legitimacy and fairness of institutions whose rules and procedures do not take into account the distribution of power in the inter-state system. For example, the United States has not sought to question the Bretton Woods institutions (where voting is weighted by financial contributions), the WTO and various treaty-based arms control bodies (where voting is not weighted but reciprocity rules on important matters), or in the Security Council (where the United States and two of its allies have veto power). Luck, *supra* note 97, at 55.

101. The irony, however, is that the more democratic and “fair” international institutions become, the more likely it is that they will be resisted by the most powerful states, which will thereby be unable fully to control them and protect their “national interests.” Again, the example of U.S. opposition to the International Criminal Court bears out this point. Despite negotiating vigorously to require the Rome Statute to contain extensive procedural and substantive safeguards in order ensure a high degree of “fairness,” the United States ultimately refused to shift from its exceptionalist position that no U.S. citizen could ever be tried by the Court (on the asserted basis that the ICC was “unaccountable,” “undemocratic,”

Third, and on a closely related point, the intrinsically non-democratic and counter-majoritarian nature of the concept of human rights itself needs to be taken into account in this calculus. Even at the domestic level, the protection of individual rights, such as freedom of expression or religion, is ensured and implemented by institutions such as courts and independent commissions that seek to interpret questions of principle rather than to determine matters of policy or implement majoritarian preferences. The members of these institutions are usually appointed on the basis of specified criteria by the executive branch rather than being popularly elected, much as the individual members of international monitoring bodies are usually nominated by the governments of states that are parties to relevant treaty regimes. To question the “democratic legitimacy” of the U.N. Human Rights Committee or the European Court of Human Rights each time one of these bodies determines that a state has violated the international right to freedom of religion is thus to misunderstand both the concept of human rights and the function and purpose of these bodies.¹⁰² Further, the extent to which states are bound to comply with the decisions of these kinds of international institutions varies according to the terms of their constitutive instruments. At no time, however, is national sovereignty irreversibly “forfeited.” States that have submitted themselves to international scrutiny remain free to withdraw from multilateral regimes and, subject to the basic tenets of international law, to pursue their national interests as they see fit.¹⁰³ As discussed in detail below, the guiding premise of multilateral human rights regimes and institutions is not, therefore, to supplant domestic decision-making procedures, but rather, to supplement them by creating the means to induce states to comply with internationally recognized norms and by encouraging cooperation between states for

and incurably “unfair”). On the rules and procedures of international and regional monitoring bodies in the area of religious freedom, see *infra* Part IV.C.

102. Of course, this is not to suggest that the structures or decisions of these institutions are always fair or correct; rather, it is to reject knee-jerk and self-interested arguments that question the legitimacy of the very existence of these institutions.

103. The one exception is the ICCPR. In its General Comment No. 26, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1997), the Human Rights Committee noted that the Covenant contains no provision permitting termination or withdrawal. The Committee observed that this was not an oversight but a deliberate decision. The Covenant codifies universal human rights that belong to the inhabitants of state parties and not to the states themselves; thus, no action by the state, including a change of government or disintegration, can destroy those rights. It should be noted, however, that the Covenant does expressly permit withdrawal of consent to the interstate procedure under Article 41, and to the individual communications procedure under the Optional Protocol. Thus, while a state always remains bound by the ICCPR and relevant norms of customary law, it nevertheless may remove itself from the direct scrutiny of the Human Rights Committee. See *infra* Part IV.C.1(b).

their protection.

Fourth, the need for concerted multilateral engagement is greater and the problems of accountability and legitimacy are likely to be less problematic in the area of fundamental human rights than in other areas of international concern. The reason for this is that human rights treaty regimes are based on core customary norms that are relatively clearly defined and accepted. Their enforcement mechanisms, however, are weak and governments historically have been reluctant to hold other governments to account for abuses. Thus, the “danger” of a global norm requiring a significant change to domestic constitutional or legal norms in a country such as the United States, with its own well-entrenched Bill of Rights and human rights culture, is relatively minor.¹⁰⁴ Conversely, the “danger” of states violating human rights in the face of a multilateral human rights regime that is continually weakened by assertions of exceptionalism by states such as the United States is relatively high. In other words, the failure to cooperate in the multilateral interpretation and internalization of international human rights norms on the asserted basis of the superiority of American values yields relatively minor advantages when compared to the damage done to the global struggle to promote and protect human rights in other parts of the world. Accordingly, my underlying thesis in this article is that even an imperfect international legal process is preferable to unilateral action by a powerful state whose own “democratic process” is more likely to result in a narrow and self-interested conception of the relevant international norms than a universal and broadly legitimate one.¹⁰⁵

B. Enforcing International Religious Freedom Norms

Before considering external monitoring and scrutiny by international organizations and NGOs of violations of religious freedom under multilateral regimes, it is first necessary to understand the nature and scope of international human rights obligations regarding religious freedom, and the practice and politics of their enforcement. This is important because it is often claimed, especially by proponents of unilateral enforcement measures, that international

104. On the issue of “norm internalization” in domestic legal orders, see *infra* note 128 and accompanying text.

105. For discussion on this argument in the context of the relationship between the IRFA and transnational legal process, see *infra* note 243 and accompanying text. On the issue of a lack of consensus on international standards and the problem of harmonizing religious laws with international human rights norms, see *infra* note 292 and accompanying text.

society lacks global enforcement mechanisms. For example, in defending the use of nonforcible unilateral sanctions under international law, Cleveland has suggested that:

Despite significant progress in the identification, definition, and promulgation of human and labor rights norms . . . international mechanisms for their enforcement remain underdeveloped. International monitoring bodies lack enforcement authority and rely substantially on the “mobilization of shame” to encourage governments to comply with international norms In light of the limited possibilities for multilateral enforcement of international norms, domestic law mechanisms for this purpose have become increasingly important.¹⁰⁶

In this way, the perceived shortcomings of international legal processes and mechanisms are used to provide justification and temptation for dominant states to resort to unilateral enforcement measures. The more powerful the state and the more important the violation of international norms, the greater the lure of unilateralism. This raises two sets of questions: first, is unilateral nonforcible action of the kind employed in the IRFA permissible under international law?; second, even if it is permissible, is it the best way to encourage foreign states to comply with international norms, and what are the consequences of such action for the conduct of international relations more generally?

I argue here that U.S. unilateral sanctions and other punitive measures imposed under the IRFA against foreign countries that violate international religious freedom norms are permissible as a matter of international law, but nevertheless ill-advised. Such action is a form of self-help by a powerful state that undermines rather than improves existing, albeit underdeveloped, multilateral enforcement mechanisms; this in itself creates a self-perpetuating cycle. A multilateral regime based on law cannot function effectively if one or more of its members choose to act outside of or even alongside that regime while at the same time refusing to submit to those same rules. Unless powerful states are willing to forgo unilateral countermeasures in favor of multilateral or regional enforcement mechanisms, as has occurred in Europe over the last half-century, resort to self-help will remain a seductive possibility. Central to this problem is an understanding of how and why states obey international human rights

106. Cleveland, *supra* note 21, at 3.

law, and how this relates to the problem of enforcement. It is to these questions that I now turn.

1. Freedom of Religion under International Law

The protection of religious liberty in international law did not occur until the modern era.¹⁰⁷ Early international recognition of the concept can be traced back in history, most commonly to the early sixteenth century. At that time, European peace treaties and treaties between European states and the Ottoman Empire included limited protections for religious minorities. Later, in the seventeenth century, the 1648 Treaty of Westphalia granted religious rights to Protestants in Germany and several other treaties incorporated clauses ensuring certain rights to individuals or groups adhering to a religion different from that of the majority.¹⁰⁸ It was not until after the Second World War, and the failure of the League of Nations minority treaty regime, however, that the individual right to freedom of thought, conscience, and religion became enshrined in international law as part of the human rights regime created under the auspices of the United Nations.

Today there are four rights recognized in international and regional human rights instruments that are most directly related to religion and belief: the right to freedom of thought, conscience, and religion;¹⁰⁹ the right to equal protection of the law, including the prohibition of discrimination on the basis of religion;¹¹⁰ the right of

107. For a discussion of the transformation of the right to freedom of thought, conscience and religion from the writings of early thinkers, into national law, and ultimately into international law, see the Krishnaswami Study, *supra* note 17. See also NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (1990).

108. See, e.g., the Treaty of 1536 signed by Francis I of France and Suleiman I of the Ottoman Empire (allowing for the establishment of French merchants in Turkey and granting them individual religious freedom). See Krishnaswami Study, *supra* note 107, at 11. See also Treaty of Oliva (1660) (in favor of the Roman Catholics in Livonia, ceded by Poland to Sweden); Treaty of Nimeguen (1678) (between France and Spain); Treaty of Ryswick (1697) (protecting Catholics in territories ceded by France to Holland); Treaty of Paris (1763) (between France, Spain and Great Britain in favor of Roman Catholics in Canadian territories ceded by France). See LERNER, *supra* note 107, at 7. See also MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 42-74 (1997).

109. See, e.g., ICCPR, *supra* note 2, art. 18 (General Comment No. 22); 1981 Declaration, *supra* note 11, arts. 1, 6; ECHR, *supra* note 54, art. 9; Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Jan. 17, 1989, princ. 16, 17, 28 I.L.M. 527 (1989); Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, arts. 10, 18(a), 24, 25, U.N. GAOR, World Conf. on Human Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [hereinafter Cairo Declaration].

110. See, e.g., ICCPR, *supra* note 2, arts. 2(1), 26 (General Comment No. 18); 1981

persons belonging to religious minorities to profess and practice their religion,¹¹¹ and the right to protection from incitement to discrimination, hostility, or violence.¹¹² In addition to these four basic rights, a number of other rights and freedoms bear a close relationship to religion and belief, including the rights to freedom of opinion and expression, freedom of assembly, and freedom of association.¹¹³

States are bound to ensure and respect these rights, whether by virtue of becoming parties to these international agreements or as a matter of customary international law, in relation to persons subject to their jurisdiction.¹¹⁴ Human rights agreements, such as the ICCPR and ECHR, create legal obligations between the state parties, although the agreements are for the benefit of individuals of the promisor state. The nature of these obligations differ, however, from ordinary international obligations. One of the most important modern ideas about international obligations is that at least some are universal in scope and cannot be reduced to bundles of bilateral interstate

Declaration, *supra* note 11, arts. 2, 3, 4; ECHR, *supra* note 54, art. 14; Cairo Declaration, *supra* note 109, art. 1.

111. See, e.g., ICCPR, *supra* note 2, art. 27 (General Comment No. 23); United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, plen. mtg. 92, Supp. No. 49, Annex at 210, U.N. Doc. A/RES/47/135 (1993), arts. 1–4, 8(3); Framework Convention for the Protection of National Minorities, Feb. 1, 1995, arts. 3, 4, 5, 8, 12, 13, 15, 17, 19, 20, 21, & 34 I.L.M. 351 (1995) [hereinafter European Framework Convention]; Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, paras. 30–39, 29 I.L.M. 1305 [hereinafter Copenhagen Document]; Report of the CSCE Meeting of Experts on National Minorities, Geneva, July 19, 1991, pts. III–IV, 30 I.L.M. 1692 (1991) [hereinafter Geneva Document].

112. See ICCPR, *supra* note 2, arts. 19 & 20(2) (General Comment No. 11); Race Convention, Art. 4; European Framework Convention, *supra* note 111, art. 6; Copenhagen Document, *supra* note 111, para. 40; CSCE 1991 Geneva Document, *supra* note 111, pt. VI; Cairo Declaration, *supra* note 109, art. 22.

113. As noted in numerous judicial decisions and by scholars, violations of religious freedom almost invariably abridge other human rights, including the right to life, liberty and the security of the person; the right to freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to freedom from discrimination; the right to a fair and public hearing by an independent and impartial tribunal; the right to freedom of movement and residence; and the right to privacy. These rights and freedoms comprise the penumbral rights that buttress the protection accorded to freedom of religion or belief. See Krishnaswami Study, *supra* note 17, at 19; RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—LEGAL PERSPECTIVES, *supra* note 14, at Introduction. In the context of U.S. First Amendment jurisprudence, Justice Douglas once referred to these as “penumbras” and “peripheral rights”—those areas beyond individual freedom to utter or print without which “the specific rights would be less secure.” See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The definition of “violations of religious freedom” in the IRFA expressly includes these penumbral rights. See *supra* note 41 and accompanying text.

114. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987) [hereinafter Restatement].

relations. As the International Court of Justice stated in the *Barcelona Traction* case, some obligations constitute “obligations of a State toward the international community as a whole,” including respecting the “basic rights of the human person.”¹¹⁵ Thus, it is widely accepted today that the international obligation to respect human rights is an obligation *erga omnes*, binding on all states.¹¹⁶ Closely related to this principle has been the recognition of the concept of *jus cogens*: peremptory norms of international law from which no derogation is permitted. States may not persistently object to *jus cogens* norms, which prevail over all competing principles of treaty and customary international law.¹¹⁷

Identifying which human rights constitute *jus cogens* norms, or indeed obligations *erga omnes*, remains controversial.¹¹⁸ Nevertheless, a consensus has emerged around several core rights. The *Restatement (Third) of the Foreign Relations Law of the United States* (“Restatement”) provides as follows in relation to the customary international law of human rights:

A State violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.¹¹⁹

115. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5).

116. International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, 63 INSTITUT DE DROIT INTERNATIONAL ANNUAIRE 338 (1989). See also 1 OPPENHEIM'S INTERNATIONAL LAW § 1 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

117. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 344 (defining *jus cogens* norms as principles “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

118. See, e.g., Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L. L. 1-23 (1986).

119. Restatement *supra* note 114 § 702.

The Restatement indicates that clauses (a) to (f) constitute violations of customary law even if the practice is not consistent or part of a "pattern." Clause (g), however, includes acts that become violations of customary law only if the state is guilty of a "consistent pattern of gross violations" as state policy. This includes "denial of freedom of conscience and religion and . . . invidious racial or religious discrimination."¹²⁰ The Restatement also indicates that the human rights norms in paragraphs (a) to (f) are *jus cogens* norms while violations of any of the norms in paragraphs (a) to (g) are "violations to all other states [*erga omnes*]" and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated."¹²¹

In applying these principles to the categories of violations identified in the three Annual Reports issued by the State Department under the IRFA¹²² and in the reports of the various U.N. Special Rapporteurs on Religious Intolerance, it is clear that many states are in violation of both conventional and customary law regarding religious freedom. Furthermore, many of these states are in violation of *jus cogens* obligations, for example in those instances where they practice, encourage, or condone murder, disappearances, torture, or arbitrary detention of individuals on account of those individuals' religious beliefs. In particular, countries identified by the State Department as falling in category one (totalitarian or authoritarian attempts to control religious belief or practice)¹²³ and category two (state hostility toward minority or non-approved religions)¹²⁴ appear

120. *Id.* cmt. m. The comment further notes that a "state party to the Covenant on Civil and Political Rights is responsible even for a single, isolated violation of any of these rights; any state is liable under customary law for a consistent pattern of violations of any such right as state policy."

121. *Id.* cmts. n & o. Note also that by specifying that a state violates customary law if, as a matter of state policy, it "encourages or condones" certain infringements of human rights, the Restatement obligates states to protect individuals against violations of their human rights by non-state actors and private persons. *See id.* § 702.

122. *See supra* note 63 and accompanying text.

123. The states mentioned in category one in the three Annual Reports are Afghanistan, Burma, China, Cuba, Iran, Iraq, Laos, North Korea and Vietnam. Note, however, that in the second Annual Report, Iran and Iraq were moved into category two. *See* 2001 Annual Report on International Religious Freedom, *supra* note 63, at xvi-xvii; 2000 Annual Report on International Religious Freedom, *supra* note 63, Executive Summary, Totalitarian or Authoritarian Attempts to Control Religious Beliefs or Practice; 1999 Annual Report on International Religious Freedom, *supra* note 65, Executive Summary, Totalitarian or Authoritarian Attempts to Control Religious Belief or Practice. *See also* note 63 and accompanying text.

124. The states mentioned in category two in the three Annual Reports are Pakistan, Saudi Arabia, Serbia (as part of the FRY), Turkmenistan, Sudan, and Uzbekistan. Turkmenistan, Uzbekistan, Iran, and Iraq were first mentioned in the 2000 Annual Report.

to practice a “consistent pattern of gross violations” in relation to freedom of religion and to violate many other core human rights through acts such as extrajudicial killings, unlawful arrests, and torture. A careful analysis of the laws and practices of the states identified in categories three and four would likely reveal similar violations and patterns of violations of religious freedom norms. The question then becomes what the consequences are for a state that violates both specific treaty undertakings and *erga omnes* (or *jus cogens*) obligations under customary law.

Human rights treaties ordinarily create obligations for states, and states are responsible for carrying out those obligations.¹²⁵ In legal terms, every state party is a promisee and entitled to request compliance by any other state party. In practice, however, states have expressed little interest in doing so and have been “especially reluctant to demand compliance for violation at the expense of friendly relations and diplomatic capital.”¹²⁶ For example, under the ICCPR, the Human Rights Committee (“Committee”) may hear complaints originating from member states that have declared that they agree to be subject to complaints to the Committee from other states parties.¹²⁷ This procedure has never been used by state parties. Rather, enforcement of international human rights obligations has been achieved primarily through “norm internalization,” the process by which states incorporate international law into their domestic legal orders,¹²⁸ whether as a result of the influence of monitoring and

Serbia was not mentioned in the 2001 Annual Report. See 2001 Annual Report on International Religious Freedom, *supra* note 63, at xviii; 2000 Annual Report on International Religious Freedom, *supra* note 63, Executive Summary, State Hostility Towards Minority or Nonapproved Religions; 1999 Annual Report on International Religious Freedom, *supra* note 63, Executive Summary, State Hostility Towards Minority or Nonapproved Religions.

125. See, for example, the ICCPR, *supra* note 2, art. 2, which requires states to respect and ensure the rights recognized in the Covenant for all persons subject to their jurisdiction, and to enact any laws and adopt any other measures necessary to that end.

126. Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 8 (Rudolf Bernhardt & John Anthony Jolowicz eds., 1987). It is primarily for this reason that continuing efforts have been made to develop special machinery to monitor and implement human rights obligations. Professor Henkin notes, however, that “there is nothing in the character of human rights obligations, or in the principal human rights agreements, that suggests that [monitoring and implementation] machinery is exclusive and is intended to replace the ordinary remedies available to any party to an agreement for breach by another party.” HENKIN, *supra* note 4, at 59.

127. ICCPR, *supra* note 2, art 41. See also *infra* note 167 and accompanying text.

128. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997). Even the European Court of Human Rights, the most advanced and effective of the regional human rights systems, is designed above all to ensure effective protection of Convention rights through national law and procedures, while providing an international

pressure by multilateral supervisory bodies or through the application of unilateral measures by powerful states in specific instances. In other words, current international legal arrangements provide no mandatory means by which international human rights obligations may be enforced against violator states.¹²⁹

The reasons for the disjunction between expansive human rights norms, on the one hand, and the relatively weak consequences of their violation, on the other, may be found, in large part, in the historical evolution of international law on state responsibility. The traditional position has been that international legal obligations are regarded as civil and not criminal in nature,¹³⁰ and that the law of state responsibility has been regarded as more closely analogous to private, rather than public law.¹³¹ Even under multilateral treaties, traditional international law has viewed the nature of obligations from a bilateral or bifocal perspective.¹³² This has reflected the horizontal, interstate, bilateral, and billiard-ball world view so familiar to international relations scholarship. In the post-U.N. Charter era, these four characteristics—horizontality, interstateness, bilateralism, and the aggregation of the state—have been steadily breaking down and the

(supplementary) remedy only where internal law fails. This is often described as the principle of "subsidiarity." See Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 41, 43 (R. St. J. McDonald et al. eds., 1993).

129. In recent times several jurists have in fact called for reforms to create stronger means by which to enforce international human rights obligations. Buergenthal, for example, has advocated the consolidation of the six existing human rights treaty bodies into two new committees (one to review state reports under all six treaties and the other to deal with individual and inter-state communications) and the establishment of a new "United Nations Court for Human Rights" which would initially have jurisdiction only to render advisory opinions, rather than binding judgments in contentious cases, but which could enlarge its jurisdiction through subsequent protocols to give individuals standing to appeal specific cases to it. Thomas Buergenthal, *A Court and Two Consolidated Treaty Bodies*, in *THE U.N. HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* 300-01 (Anne Bayefsky ed., 2000).

130. The position has been that states cannot commit crimes, only individuals can do so. As the Nuremberg Tribunal stated, "crimes against international law are committed by men, not by abstract entities." 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBURG 466 (1948).

131. See HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 134-43 (1927).

132. This can be seen in the law governing reservations to multilateral treaties. A reservation to a multilateral agreement is subject to acceptance by the other contracting states. Where a reservation is neither authorized nor prohibited by the agreement, "acceptance of a reservation by another contracting state constitutes the reserving state a party to the agreement in relation to the accepting state," whereas "objection to a reservation by another contracting state does not preclude entry into force of the agreement between the reserving and accepting states unless a contrary intention is expressed by the objecting state." Restatement, *supra* note 114, § 303. See also Vienna Convention on the Law of Treaties, *supra* note 117, arts. 19-23.

effects are being seen most acutely in the theory and practice of international human rights (and humanitarian) law. In what Louis Henkin has termed the “Age of Rights,”¹³³ this phenomenon can be viewed along two dimensions, the first concerning state responsibility and the second, individual responsibility.¹³⁴

2. State Responsibility under Conventional and Customary Human Rights Law

In a decentralized system such as that currently existing in international law there is no all-purpose representative, no *parens patriae* who can act on behalf of the collective. What then are the consequences when a state violates a *jus cogens* or *erga omnes* obligation either under a human rights treaty or as a matter of customary law? In this instance the bilateral analogy fails and the idea of obligations owed to the international community cannot be viewed in a simple sense as an obligation to an entity.¹³⁵

In its longstanding work on state responsibility, the International Law Commission (“ILC”) has attempted to resolve this conceptual problem. In its 1996 Draft Articles on State Responsibility (“Draft Articles”), the ILC drew a distinction between delicts and crimes in international law. Article 19 distinguished

133. According to Professor Henkin, our age is one of “rights.” Indeed, human rights are now heralded as “the idea of our time, the only political-moral idea that has received universal acceptance.” HENKIN, *supra* note 4, at xvii.

134. I discuss here only the issue of state responsibility. It should be noted, however, that international law on individual responsibility has been revolutionized over the last half century. Today, international criminal law establishes a number of serious crimes under custom or treaty for which an individual may be prosecuted and punished and identifies the institutions that may be involved in enforcement and prosecution of these crimes, including the two ad hoc international tribunals set up by the U.N. Security Council for the former Yugoslavia and Rwanda and the proposed international criminal court which is likely to come into existence in late 2002. See, e.g., Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263 (1950); M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW: CRIMES 1–9 (2d ed. 1998). The fields of international criminal law and the international law of human rights intersect. In many instances, crimes under international law for which an individual may be held responsible will also constitute a violation of internationally protected human rights. Thus, international criminal law and the institutions that enforce it are becoming an increasingly important avenue to vindicate and protect human rights. See LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 1314–1382 (4th ed. 2001). See also Theodor Meron, *The Humanization of International Humanitarian Law*, 94 AM. J. INT’L L. 239, 266 (2000) (noting that “offenses included in the ICC statute under crimes against humanity and common Article 3 are virtually indistinguishable from major human rights violations.”).

135. See James Crawford, *Responsibility to the International Community as a Whole*, at 12 (Apr. 5, 2000), at [http://www.law.cam.ac.uk/rcil/Snyderlect00\(f\).doc](http://www.law.cam.ac.uk/rcil/Snyderlect00(f).doc).

between an “internationally wrongful act” (defined as an act of State that breaches an international obligation regardless of the subject-matter of the obligation breached) and an “international crime” (defined as an internationally wrongful act that results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole).¹³⁶ The Article further stated that an international crime may result from, *inter alia*, “a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid.”¹³⁷

The consequences of the commission of an international crime were then set out in Articles 51–53. These included obligations for every other state not to recognize as lawful the situation created by the crime, not to render aid or assistance to the state that has committed the crime in maintaining the situation, and to cooperate with other states in carrying out these obligations and applying measures designed to eliminate the consequences of the crime. Thus, while Article 19 appeared to say that there are such things as “state crimes,” the Draft Articles provided not for the imposition of criminal penalties but rather for “solidarity” in not assisting the violator state and not recognizing the legality of the relevant acts. This concept has been termed the “multilateralizing of injury.”

Not surprisingly, Article 19 was extensively criticized.¹³⁸ The United States, in particular, voiced strong objections to the concept of international crimes.¹³⁹ Other states, especially in Western Europe,

136. See Report of the International Law Commission on the work of its forty-eighth session, U.N. GAOR, 51st Sess., Supp. No. 10, art. 19, U.N. Doc. A/51/10 (1996).

137. *Id.* art. 19(3)(c).

138. Crawford has observed that Article 19 creates a conception of crimes “divorced from any conception of due process and divorced from any consequences that could properly be described as penal. It is criminal responsibility, as it were, reduced to the level of denunciation.” Crawford, *supra* note 135, at 14.

139. The United States has argued that the concept of international crimes of state bears no support under customary law of state responsibility, would not be a progressive development, and would be unworkable in practice. It has pointed to three difficulties: (1) *institutional redundancy* (existing international institutions and regimes, such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda, “already contain a system of law for responding to international obligations,” which the ILC terms “crimes”); (2) *abstract and vague language* (the Draft Articles add nothing, and in fact obscure current international law); and (3) *principle of individual responsibility* (“two regimes of responsibility—one for individuals and the other for states—could actually help to insulate the individual criminal from international sanction”). U.S. Comments on the Draft Articles of State Responsibility, reprinted in 37 I.L.M. 468, 474–76 (1998). In relation to the U.S. comments on the latest Draft Articles issued by the ILC in August 2000, see Sean D.

questioned Article 19 because it implied the right of states not injured by the violation to take action against the violator. Their fear was that this would open the way for unilateral action by powerful states without any judicial determination of the crime. On the other hand, "proponents of Article 19 emphasized the importance of recognizing that all states were affected by violations of rules of a fundamental character and every state therefore should be able to take countermeasures that were appropriate and proportionate to the violation."¹⁴⁰ In this last respect, Article 19 must be read together with Article 40(2), which identified a wide range of states as individually injured by a breach of an international obligation and gave them essentially the same range of rights to seek reparation or otherwise respond to the breach. In the case of breaches of multilateral treaties or customary rules, an "injured State" meant:

- (e) any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

...

- (iii) the right has been created or is established for the protection of human rights and fundamental freedoms.

Thus, Article 40 was framed on the traditional basis that the general law of obligations gives rise to individual injuries on the analogy of private law. In substance, it multiplied bilateral relations and deemed a range of states to be injured by a violation of an international obligation in a variety of cases.

Under Article 40(2)(e)(iii), any state is injured by a breach of human rights obligations if it is a party to the human rights treaty in question or the right is protected under customary law. Thus, the United States would be an "injured state" in relation to gross violations of religious freedom in those countries it has designated as being of "particular concern." On one view, this represents a progressive development of international law by recognizing that in the absence of effective individual recourse measures, states have a range of legal interests in the performance of obligations even though they are not the primary beneficiary of those obligations. The problem, however, is that Article 40 treated all states deemed to be

Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 626, 626-8 (2001).

140. DAMROSCH ET AL., *supra* note 134, at 699 n.3.

injured as equally injured. They were all equated to the bilaterally injured state, and the 1996 Draft Articles failed to distinguish among the primary beneficiaries, the right holders, and those states with a legal interest in compliance.¹⁴¹

The latest Draft Articles on State Responsibility, adopted by the ILC in July 2001, have attempted to remedy this confusion in the law.¹⁴² The notion of state crimes has been abandoned and replaced with the concept of a “serious breach by a State of an obligation arising under a peremptory norm of general international law,” which is defined to mean a “gross or systematic failure by the responsible State to fulfill the obligation.”¹⁴³ The definition of an “injured State” also has been amended to include a requirement that, in the case of a breach of an *erga omnes* obligation, the breach of that obligation “specially affects” the state invoking the responsibility of the violator state.¹⁴⁴

This current uncertainty in the law of state responsibility bears directly on the question of unilateral and multilateral responses to violations of internationally protected religious freedom norms. The *erga omnes* (and in some instances *jus cogens*) character of these norms, whether protected under international agreements or customary law, renders their breach subject to non-forcible countermeasures.¹⁴⁵ This fact is acknowledged in the IRFA in the definition of “violations of religious freedom” which is stated to encompass violations of the “internationally recognized right to freedom of religion and religious belief and practice, as set forth in . . . international instruments.”¹⁴⁶ In such cases, the fact that

141. Crawford, *supra* note 135, at 15–16.

142. State Responsibility, Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, International Law Commission, U.N. GAOR, 53rd Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter 2001 Draft Articles].

143. *Id.* art. 40. The particular consequences of a serious breach remain similar, however, to those set out in the 1996 Draft Articles for state crimes. *See id.* art. 41.

144. *Id.* art. 42(a)(i).

145. Non-forcible economic measures employed unilaterally by a state in response to violations of international human rights norms do not violate articles 2(4) and 2(7) of the U.N. Charter or the customary law principle of nonintervention. *See* Lori Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 31–47 (1989); Tom Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405, 413 (1985).

146. *See supra* note 40 and accompanying text. The international instruments relied upon in the Act include treaties such as the ICCPR and ECHR, declarations such as the UDHR and 1981 Declaration, and political non-binding agreements such as the Helsinki Accords. To the extent that the Act relies upon international standards in treaties to which the United States is not a party (such as the ECHR) or non-binding instruments that have not

multilateral treaty monitoring and supervisory procedures lack compulsory enforcement mechanisms leaves open the availability of, and perceived need for, unilateral enforcement mechanisms such as the economic and political sanctions provided under the IRFA. Such non-forcible unilateral countermeasures are permissible provided that both the sanctioning and target states are parties to the international human rights treaty being violated (on the bilateral analogy discussed above), or that the target state is in violation of a *jus cogens* or *erga omnes* norm under customary law.¹⁴⁷ These measures are a form of self-help and are characteristic of the decentralized international legal system, reflecting its horizontal nature.¹⁴⁸ They perpetuate the private or bilateral view of international obligations that are more properly seen as public and multilateral. Alternatively, they open the door for powerful states enforcing international norms to serve their own political purposes through domestic means of their own design. Faced with this prospect, several states have suggested that while non-injured states have a legal interest in violations of obligations *erga omnes*, the law should require such rights to “be implemented within the framework of international institutions rather than unilaterally.”¹⁴⁹ For this to occur, both the law of state responsibility and the institutional means for its enforcement will need to develop beyond their current state and such development will require the political will and commitment of all states, but especially that of the world’s reigning superpower.

Even in the absence of compulsory enforcement mechanisms at the global level, however, the question remains whether existing multilateral and regional human rights treaty regimes may nevertheless be effective in monitoring and inducing compliance with international religious freedom obligations. It is to this question that I now turn.

yet attained the status of customary law, the justification for countermeasures is thin. But to the extent that the Act purports to constitute a response to violations of universally ratified human rights treaties such as the ICCPR or norms *erga omnes* or *jus cogens* under customary law, the resort to nonforcible countermeasures is legitimate as a matter of international law.

147. Cleveland, *supra* note 21, at 56. Note that under general international law, nonforcible countermeasures may be used only after other attempts at mediation and compromise have failed. Restatement, *supra* note 114, § 905 cmt. c. Further, the measures must be necessary to terminate the violation or prevent future violations and proportional to the violation or injury suffered. OPPENHEIM’S INTERNATIONAL LAW § 131.

148. See Jonathan Charney, *Third State Remedies in International Law*, 10 MICH. J. INT’L L. 57 (1989).

149. DAMROSCH ET AL., *supra* note 134, at 699 n.3.

C. *External Monitoring by International and Regional Organizations*

At both the global and regional levels, monitoring and supervisory mechanisms have evolved in principally three spheres: state reporting procedures; individual complaint procedures; and inter-state complaint procedures. While the last of these mechanisms has not been relied upon by states and has been superceded by the first two, in the space of a little over fifty years, reporting, supervision, and individual complaint procedures have revolutionized the international protection of human rights. These procedures have been built into human rights treaties and have usually involved the following characteristics:

- periodic reports by states in accordance with detailed guidelines;
- review by a committee, accompanied by questions to the reporting states;
- in some cases detailed inquiry by a subcommittee or individual rapporteur;
- a committee report noting discrepancies between the states' conduct and the requirements of the treaty or applicable law.¹⁵⁰

The opportunity for individuals or governments to initiate complaints before international treaty supervisory bodies has been achieved largely by the addition of optional protocols to the human rights covenants. The common pattern is for these complaints to be investigated by a committee or rapporteur who then issues public "views" or transmits conclusions to a relevant parent body. The crucial element here is the ability of the international rapporteur or authority to perform effective fact-finding—a process that depends to a high degree on the cooperation of the governments concerned.

1. *United Nations Mechanisms*

How then does the U.N. seek to monitor and implement existing international standards regarding religious freedom, and how effective is it in this endeavor? At the outset it should be observed

150. Oscar Schachter, *The U.N. Legal Order: An Overview*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 14 (Christopher C. Joyner ed., 1997).

that, in the absence of a binding international covenant, there is no specialized treaty supervisory committee of individual experts in the field of freedom of religion or belief. Rather, issues of religious intolerance and persecution fall under the general mandate of the human rights monitoring and protection functions of the U.N. that are carried out by three separate bodies.

The first body is the Commission on Human Rights ("UNCHR"), which is a functional commission of the Economic and Social Council ("ECOSOC"). The Commission is responsible for developing and overseeing all international human rights instruments, and also oversees numerous "extra-conventional mechanisms" such as thematic working groups and special rapporteurs appointed as the human rights monitors for selected countries. The Commission meets annually to hear reports and make recommendations regarding human rights performance of selected states. Accordingly, it considers annually what measures are necessary to implement the 1981 Declaration pursuant to requests by the U.N. General Assembly.¹⁵¹ For example, at its thirty-ninth session in 1983, the Commission requested the U.N. Secretary-General to hold a seminar on "the encouragement of understanding, tolerance, and respect in matters relating to freedom of religion or belief."¹⁵²

The second body is the Human Rights Committee created under the ICCPR.¹⁵³ The Committee reviews annual reports from member states and has the capacity to accept individual communications in the case of member states that have signed the Optional Protocol.

The third body is the Office of the High Commissioner for Human Rights ("UNHCHR") which has overarching responsibility for overseeing and coordinating all U.N. human rights activities.¹⁵⁴

151. See C.H.R. Res. 1995/23, U.N. ESCOR, 51st Sess., Supp. No. 3, at 88, U.N. Doc. E/CN.4/1995/176 (1995), *revised by* U.N. Doc. E/CN.4/1995/176/Corr.1 (1995).

152. C.H.R. Res. 1983/40, U.N. ESCOR, 39th Sess., Supp. No. 3, at 174, U.N. Doc. E/CN.4/1983/60 (1995).

153. For a discussion on the work of the Human Rights Committee regarding violations of religious freedom and religious discrimination, see *infra* Part V.C(1)(b).

154. The mandate of UNHCHR derives from articles 1, 13 and 55 of the U.N. Charter, the Vienna Declaration and Programme of Action, and GA Res. 48/141 of 20 December 1993, by which the General Assembly established the post of United Nations High Commissioner for Human Rights. See Office of the United Nations High Commissioner for Human Rights ("OHCHR"), at <http://www.unhchr.ch/html/hchr.htm>.

a. The Emerging Role of Ad Hoc and Extra-Conventional Monitoring

One of the rapidly evolving areas of external monitoring and protection lies outside the traditional judicial and quasi-judicial monitoring mechanisms that are established by convention and is in an area known today as extra-conventional and ad hoc human rights machinery.¹⁵⁵ Such ad hoc machinery includes the Special Rapporteurs and Working Groups of the U.N. Commission on Human Rights and various activities and operations of the recently reformed UNHCHR, both of which now will be discussed in turn.

In its first twenty years, the Commission on Human Rights maintained that it had “no power to take any action in regard to any complaints concerning human rights.”¹⁵⁶ As more petitioners sought individual assistance, however, in 1967 ECOSOC adopted Resolution 1235 authorizing the Commission to “make a thorough study of situations which reveal a consistent pattern of violations of human rights.”¹⁵⁷ Although not initially intended, the 1235 procedure soon became a vehicle for the establishment of country-oriented study groups and thematic rapporteurs. By 1994, seventeen countries were subject to some form of country-oriented procedure—twelve of these were monitored by special rapporteurs, three by representatives of the Secretary-General, and two by independent experts appointed under advisory services (a more consensual, cooperative form of human rights monitoring).

The first thematic procedure established by the Commission was in 1980 with the Working Group on Enforced or Involuntary Disappearances. The five-member working group proved to be a prototype for a new genus of U.N. monitoring machinery. In 1982, the post of Special Rapporteur on Summary or Arbitrary Executions

155. Judicial monitoring is employed in treaties such as the Genocide Convention, which allows for disputes in relation to a state's responsibility for genocide to be submitted to the International Court of Justice at the request of any of the parties. Quasi-judicial mechanisms encompass the treaty bodies established by the major international human rights conventions. See Alison Jernow, *Ad Hoc and Extra-Conventional Means for Human Rights Monitoring*, 28 N.Y.U. J. INT'L L. & POL. 785, 836 n.3 (1996).

156. Report of the Commission on Human Rights to the Economic and Social Council, C.H.R., 4th Sess., Supp. No. 4, at 6, U.N. Doc E/259 (1947).

157. E.S.C. Res. 1235, U.N. ESCOR, 42nd Sess., Supp. No. 1, 1479th plen. mtg. at 17, U.N. Doc E/4393 (1967). The 1235 procedure is based on Article 62 of the U.N. Charter which empowers ECOSOC to “make or initiate studies and reports with respect to international, economic, social, cultural, educational, health and related matters” and to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms.” U.N. CHARTER art. 62.

was created, and in 1984, the post of Special Rapporteur on Torture. Since 1985, special rapporteurs have become more numerous including, for present purposes, the post of the Special Rapporteur on Religious Intolerance.

While special rapporteurs attempt to examine information from all relevant sources, they are not mandated to respond effectively to individual complaints. They carry out investigations *in situ* if possible and make recommendations in a public report. Due to the inability of rapporteurs to provide rapid response to violations, the Commission now also convenes extraordinary sessions in the event of human rights emergencies, in addition to its annual sessions.¹⁵⁸

The main function of thematic rapporteurs is to transmit allegations of human rights violations to governments. Their role is humanitarian, not accusatory or judgmental. Although no explicit fact-finding function was included in the original grant of authority, the thematic procedures have evolved into a practice of making country visits (provided they have the consent and cooperation of the government concerned). The rapporteurs meet with governmental officials and interview members of the judiciary, NGOs, and individuals. They are not limited in their sources of information and draw on a wide range of governmental, inter-governmental, and NGO groups and organizations. Their mission reports contain judgments about country conditions in the form of conclusions and recommendations. Increasingly, the emphasis is on determining the facts implicating state responsibility.¹⁵⁹

Before the creation of the special rapporteur posts, the only remedial avenues open at the international level to individuals whose human rights had been violated were the individual complaint mechanism under the Optional Protocol to the ICCPR and the confidential procedure established by ECOSOC Resolution 1503. Both of these, however, involve significant procedural limitations. Under the ICCPR, an individual can obtain access to the Human Rights Committee only if his or her complaint derives from a country that has recognized the competence of the Committee to receive individual communications; the author of the communication must have suffered some direct injury; third parties such as NGOs or relatives cannot petition the Committee; and complainants are

158. For example, in August 1992 Special Rapporteur Tadeusz Mazowiecki was appointed in response to the deteriorating situation in the former Yugoslavia.

159. For a description of the mandate of the Special Rapporteur on Religious Intolerance, see Abdelfattah Amor, *Public Conference: The Mandate of the U.N. Special Rapporteur*, 12 EMORY INT'L L. REV. 945 (1998).

required to exhaust all domestic remedies. Even if an individual communication is successful, the primary purpose of the procedure is to establish whether a state party has breached its treaty obligations, not to provide relief to the injured individual or family member. Similarly, under the 1503 procedure, all deliberations are private and the purpose is to establish a pattern of gross violations, not to take action on particular cases.¹⁶⁰

To some extent, the special rapporteur and working group mechanisms avoid these restrictions. States need not have recognized the competence of a particular thematic procedure, or have acceded to a relevant international convention, for their human rights practices to be the subject of examination. There is no "standing" requirement, and friends, family, legal counsel, and NGOs may all submit information. Importantly, the purpose of these procedures is to provide redress to individuals, and not only to document patterns of gross violations. The thematic procedures are thus more focused on the situation of individuals.

At the same time, it should be noted that these thematic procedures are subject to other major weaknesses and resource constraints. Despite their proliferation within the U.N. system, no attempt has been made to formalize fact-finding procedures. Fact-finding guidelines have been resisted on the grounds that they would interfere with the need for confidentiality and the protection of witnesses. This has resulted in thematic procedures running the risk of inconsistency. Furthermore, rapporteurs have not always been provided unlimited access to regions or situations where human rights violations are thought to be occurring, and the ability of rapporteurs to recommend and ensure effective remedial measures for victims of human rights violations has generally been limited.

The broader significance of these thematic mechanisms, however, has been the diminishing relevance of the domestic jurisdiction defense by states in relation to U.N. monitoring and fact-finding procedures, even in the case of non-parties to the major international human rights conventions.¹⁶¹ The expansion and

160. This procedure is based on E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, 1693d plen. mtg. at 8, U.N. Doc. E/4832/Add.1 (1970). See also Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126, 145–55 (Philip Alston ed., 1992).

161. In 1992, the Special Rapporteur on Summary or Arbitrary Executions reported that among the more than 100 states to which he had transmitted allegations, only two had claimed that they did not consider themselves bound by the standards contained in the ICCPR. See Report by the Special Rapporteur on Summary or Arbitrary Executions, C.H.R., 48th Sess., Agenda Item 12, para. 12, U.N. Doc. E/CN.4/1992/30 (1992).

institutionalization of these mechanisms reflect changes in the position of the individual in the international system and the role of the U.N. itself. This has led Bruno Simma to comment that:

The decisive human rights bridgeheads in areas of formerly unfettered domestic jurisdiction of states . . . have been gained less by force of treatymaking [sic] than by . . . soft law processes on the modest hard-law basis of a few very general Charter provisions.¹⁶²

The growth of ad hoc and extra-conventional mechanisms also illustrates what has been termed the “NGO-ization” of the U.N.¹⁶³ These mechanisms have borrowed significantly from the procedures and methods of human rights NGOs, and indeed a number of NGOs have been significant actors in their creation. Techniques such as case-by-case reporting, urgent appeals, and the process of sending letters directly to governments about particular cases (as opposed to themes or wider phenomena) mirror much NGO activity. Exposure is thus now a major objective of both the NGO community and the U.N. This in turn has encouraged a greater degree of activism and flexibility in U.N. human rights machinery. In some instances, several of the Special Rapporteurs themselves had prior work experience with human rights NGOs. This has helped to ensure that U.N. monitoring has become more public and vocal than in former times when it was largely dominated by career diplomats. Indeed, in comparison with many international and domestic NGOs that lack the legitimacy and authority of the U.N., the Special Rapporteurs have achieved success in pressuring governments concerned about their international image to be more cooperative and responsive.¹⁶⁴

The creation of the Special Rapporteur mechanism has become an integrated part of the international monitoring functions of the U.N. As noted above, the other important actor in the area of ad hoc and extra-conventional monitoring is the office of the UNHCHR. The High Commissioner (like the Secretary-General) has the capacity to perform “good offices” functions in the field of human rights. This role is in many respects a formalization or institutionalization of the

162. *A Hard Look at Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 371, 380 (1988) (panel discussion by Gunther Handl, W. Michael Reisman, Bruno Simma, Pierre Marie Dupuy & Christine Chinkin).

163. Jernow, *supra* note 155, at 809.

164. See, e.g., Alston, *supra* note 160, at 180-81 (evaluating the effectiveness of thematic rapporteurs in comparison with other monitoring mechanisms and noting their success in “producing highly critical analyses while at the same time reassuring governments concerned that co-operation was all that [was] sought”).

Secretary-General's ad hoc good offices but with a specific human rights mandate. It involves engaging "in a dialogue with all Governments . . . with a view to securing respect for all human rights,"¹⁶⁵ but also provides the opportunity to create a type of "early warning" system designed to alert the U.N. to impending emergencies and situations requiring urgent action.

The effectiveness of the High Commissioner's role is linked in practice to day-to-day cooperation and consultation with governments, i.e., by facilitating the accession and ratification of international human rights instruments, promoting legislative reforms, by implementing recommendations of treaty bodies, seeking to strengthen the rule of law and democratic institutions, encouraging the training of the judiciary and the police, and elaborating national plans of action in the field of human rights. Thus, in comparison with the rapporteurs and other thematic mechanisms, the role of the High Commissioner emphasizes more consensual and cooperative activities.

The undefined and consensual nature of the role of extra-conventional and ad hoc human rights machinery is also the source of its major weaknesses. There are no formal follow-up procedures, nor are there procedures for systematic response on the part of the Human Rights Commission or the General Assembly to the reports of fact-finders such as the rapporteurs or, indeed, the High Commissioner herself.¹⁶⁶ Therefore, there is an urgent need to increase and improve communication between these bodies and to coordinate each component of the U.N. human rights machinery. The High Commissioner is likely to be a key actor in that process in the years ahead.

b. The Human Rights Committee

The Human Rights Committee is the permanent treaty body whose function is to monitor and implement the ICCPR. Membership of the Committee consists of eighteen experts elected by the state parties. The Committee has three main areas of operation: (1) the mandatory reporting procedure under Article 40, by which the

165. *High Commissioner for the Promotion and Protection of All Human Rights*, G.A. Res. 48/141, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/141 (1993).

166. The result is that warnings—like the report of the visit made by the Special Rapporteur on Executions to Rwanda in 1993, before the massacres occurred—may be overlooked.

Committee considers and studies reports submitted by states parties on the measures they have adopted to implement the rights recognized in the Covenant; (2) the optional inter-state procedure under Articles 41 and 42, by which the Committee may consider complaints that another state party is not fulfilling its obligations under the Covenant (this procedure has never been used); and (3) the optional individual communications procedure under the First Optional Protocol to the Covenant, by which the Committee may receive and consider communications from individuals, subject to the jurisdiction of a state party to the Protocol, who claim to be victims of a violation of any of the rights in the Covenant.¹⁶⁷ Apart from submitting an annual report on its activities to the U.N. General Assembly, the Committee also prepares General Comments on specific articles and in this way a jurisprudence of the Covenant is emerging on its meaning and scope. In the area of freedom of religion or belief, for more than two decades the Committee has scrutinized state reports, issued General Comments, and received individual communications in relation to both Articles 18 and 27.¹⁶⁸ While a full review of these activities is beyond the scope of this article,¹⁶⁹ a few general observations may be made.

The most effective function of the Committee in terms of monitoring and implementing these rights has been in the examination of state party reports. This has created an energetic dialogue between the experts on the Committee and states that have exerted pressure for domestic and constitutional systems to comply with international human rights standards. As might be expected, the Committee has been cautious in criticizing states for limitations or violations of rights of freedom of religion or belief. This has been

167. The Optional Protocol entered into force on March 23, 1976. Having considered a communication, the Committee forwards its "views" to the state party and to the individual. See generally DOMINICK MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 50-51 (1994).

168. ICCPR, *supra* note 2, arts. 18 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to 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"), 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language").

169. For a comprehensive review of the Committee's consideration of Article 27, see UNIVERSAL MINORITY RIGHTS (Alan Phillips & Allan Rosas eds., 1997). For a general overview of the decisions of the Committee, see MCGOLDRICK, *supra* note 167; SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* (2000).

due to the sensitivity and complexity of the subject and the need to maintain an ongoing dialogue with states parties. With the end of Cold War divisions and by virtue of its own maturation as a quasi-judicial deliberative body, however, it would be a mistake to underestimate the normative effects of an ongoing dialogue between the Committee and governments from divergent religious, political, economic, and social systems. For example, on July 23, 1993, the Committee adopted General Comment No. 22 on Article 18, providing a wide interpretation of religious freedom and indicating a willingness to confront controversies in this area (including the freedom to change religions and conscientious objection).¹⁷⁰ In relation to individual communications, between 1976 and 1995 there were fourteen communications alleging violations of Article 18 including issues of conscientious objection, manifestation of religion or belief, permissible limitations, and parental rights in education. These came from five states: Finland, the Netherlands, Canada, Germany, and Colombia. The Committee declared nine of these communications inadmissible and expressed views on the remaining five. In no case did it find a violation of Article 18. The Committee's interpretation of Article 18 has thus been restrictive, particularly in relation to conscientious objection,¹⁷¹ and it only infrequently has referred to the 1981 Declaration. In the area of minority rights under Article 27, the record during the same period is only marginally better, commencing with the well-known 1977 communication in *Lovelace v. Canada*¹⁷² and continuing more recently with the communication in *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*.¹⁷³ However, these communications have involved minority questions of language and culture, not religion. We can conclude, therefore, that during these years the individual communication mechanism failed to function in the sphere of freedom of religion or belief.

170. United Nations Human Rights Committee General Comment No. 22, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+22.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+22.En?OpenDocument).

171. See, e.g., *Westerman v. Netherlands*, Comm. No. 682/1996 (Nov. 3 1999), Report of the Human Rights Committee, vol. II, U.N. GAOR, 55th Sess., Supp. No. 40, at 41, U.N. Doc A/55/40 (2000) (finding no violation of Article 18 by the Netherlands for refusing an application of conscientious objection to compulsory military service). Note, however, the dissenting views of Committee members P. Bhagwati, L. Henkin, C. Medina Quiroga, F. Pocar and M. Scheinin.

172. Communication No. R.6/24, Communication No. 24/1977, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex 18, at 166, U.N. Doc A/36/40 (1981).

173. Communication No. 167/1984, Report of the Human Rights Committee, vol. II, U.N. GAOR, 45th Sess., Supp. No. 40, at 1, U.N. Doc A/45/40 (1990).

Since 1995, however, the position has begun to change. There has been a marked increase in the number of communications in relation to Articles 18, 26 (the non-discrimination provision), and 27, suggesting greater reliance by individuals on the procedure to allege instances of religious intolerance and discrimination. For example, on November 3, 1999, in *Arieh Hollis Waldman v. Canada*, the Committee found that because the Roman Catholic denomination is the only one that has the right to government funding in Ontario for the purposes of education, there was discrimination under Article 26 because the author, a member of the Jewish faith, had to meet the full cost of education in a religious school for his children.¹⁷⁴

The extent to which further communications of this kind will be initiated, and whether they will be successful before the Committee, is an open question. There are two foreseeable obstacles to this occurring. First, the Committee will need to interpret Article 18 more broadly than in its earlier views and more closely in accordance with General Comment No. 22. Second, the area most in need of reform is that of standing and access to the communication procedure itself. At present, only individuals may bring communications to the Committee. If the Optional Protocol were amended to allow NGOs to initiate communications or to act more closely in conjunction with individuals in preparing communications, it is conceivable that more cases would be brought as familiarity with the procedure increased.¹⁷⁵ This is particularly important in newly democratic states where increased involvement of NGOs in the work of the Committee would enhance knowledge and understanding of religious freedom and human rights more broadly, and would provide an avenue for redress and pressure on governments beyond local and regional legal systems.¹⁷⁶ If this were to occur, however, the workload

174. Communication No. 694/1996. See also *Grant Tadman et al. v. Canada*, Communication No. 816/1998 (Oct. 29, 1999) (ruled inadmissible on grounds that the authors had insufficiently established that they were victims of discrimination); MCGOLDRICK, *supra* note 167, at 86.

175. Note that under article 20 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Committee against Torture can act of its own volition if it receives well-founded information that torture is systematically being practiced in the territory of a State party. United Nations Commission against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 20, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85, 114 (1984).

176. For example, Scheinin notes that in the five Nordic and three Baltic countries (which have incorporated the convention into their domestic law and have a generally well-developed human rights culture) the ICCPR state reporting procedure has involved NGOs at all stages, creating a "continuing platform for a domestic human rights discourse." Martin Scheinin, *Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experiences*, in *THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING* 243 (Philip Alston & James Crawford eds., 2000).

of the Committee would increase and, without the allocation of far greater resources and personnel, it is unlikely that the Committee would be able to cope with the added influx of communications.

In conclusion, monitoring and protection of freedom of religion or belief at the international level is currently carried out by a number of ad hoc and extra-conventional mechanisms, principally the Special Rapporteur on Religious Intolerance and the High Commissioner for Human Rights, and by the treaty-based Human Rights Committee. The emphasis is on fact-finding, reporting, and exerting external pressure on governments as a matter of international law, politics, and relations to bring their domestic laws and practices into line with international human rights standards. While there is the capacity to bring individual complaints at the international level, this mechanism is relatively undeveloped and does not approximate judicial process or remedy under domestic legal systems.

2. Regional Organizations in the "New Europe"

At the regional level there exist today three independent human rights systems: the African, European, and Inter-American regional human rights arrangements.¹⁷⁷ Chapter VIII of the U.N. Charter expressly recognizes and contemplates a role for regional organizations and, notably, the Pan American Union long antedated the United Nations. In each system, regional institutions developed human rights programs early, adopted human rights conventions, and established human rights monitoring and protection bodies. This Part focuses solely on the European human rights system, not because the African and Inter-American systems do not monitor and protect religious freedom, but because the European system is more developed than the other two, particularly in relation to the availability of judicial remedies for individuals who have been subject to human rights violations. Thus, in examining the European system in some detail, I hope to illustrate how a well-functioning regional system, if fully accepted and supported by member states, can serve as an effective means by which to monitor and protect religious

177. In relation to the African system, the African Charter on Human and Peoples' Rights entered into force on October 21, 1986. The Charter was adopted by the Organization of African Unity in 1981 and has been ratified by 49 states. In relation to the Inter-American system, the American Declaration on the Rights and Duties of Man was adopted in 1948 (seven months before the UDHR was approved). The American Convention on Human Rights was signed on November 22, 1969 and came into force in June 1978. Elections to the Inter-American Court of Human Rights created by the Convention first took place in May 1979.

freedom and human rights more broadly.¹⁷⁸

There is today a variety of systems operating in Europe for the protection of human rights. The reasons for this variety reflect historical developments in a political and economic environment that has been in a steady state of evolution for the last fifty years. As Europe has become more politically homogenous, the membership of states in intergovernmental regimes such as the European Union ("EU") and the Council of Europe has become increasingly similar. There are now forty-one members of the Council of Europe, and therefore of the ECHR. This represents a massive increase in membership since the early 1990s, primarily from countries in Central and Eastern Europe, including many from the former Soviet Union.¹⁷⁹ As discussed below, human rights "conditionality" has become a key component for these states in the entry into and full participation in the Council of Europe and the EU.

The Council of Europe, the EU, and the OSCE are all concerned with ensuring that human rights are protected. As at the global level, each regional intergovernmental organization has its own

178. Thus, my more specific point in relation to the United States is that fuller participation in and support for the Inter-American human rights regime would be preferable to the kind of unilateral action exemplified by the IRFA. While the United States is a member of the Organization of American States ("OAS"), it has signed (in 1977) but not ratified the American Convention on Human Rights. It is not therefore subject to the jurisdiction of the Inter-American Court of Human Rights. The Inter-American Commission of Human Rights does have, however, the power pursuant to its statute to examine communications alleging violations of rights set forth in the American Declaration of the Rights and Duties of Man with respect to OAS member states. Thus, petitions have been lodged with the Commission against the United States alleging violations of the American Declaration, as occurred in March 2002 in relation to the detainees being held at the U.S. military base in Guantánamo Bay, Cuba. See also *White and Potter v. United States*, Case 2141, Inter-Am. C.H.R. 25, OEA/ser.L/V/II.54, doc. 9 rev. 1 (1980-1) (finding that U.S. laws permitting abortion did not violate the right to life); *Roach and Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R. 147, OEA/ser.L/V/II.71, doc. 9 rev. 1 (1986-7) (finding that the United States had violated the right to life for executing two men who were both 17 when they committed capital offences). But with the exception of this limited role of the Commission, the United States has not submitted itself to or actively supported the Inter-American regional human rights system, preferring instead to deal with human rights issues on a unilateral or bilateral basis in the region. See Cecilia Medina, *Toward Effectiveness in the Protection of Human Rights in the Americas*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 337-58 (1998).

179. The ECHR, a creation of the Council of Europe, was signed in 1950 and entered into force in 1953. The European Commission of Human Rights and the European Court of Human Rights were established in 1954 and 1959 respectively to interpret and apply the Convention for its member states. Ratification of the Convention is only open to members of the Council of Europe, and in recent times this has become a condition of membership of the Council itself. The conditions for admission into the Council of Europe in Article 3 of its statute provide that all member states are obliged to respect the "principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedom." Statute of the Council of Europe, May 5, 1949, art. 3, 87 U.N.T.S. 103, 106.

constitutive human rights instruments and institutional means for supervising compliance with the relevant obligations. As Giorgio Gaja has observed, these instruments and mechanisms supplement those established at the global level for the same rights, with the ensuing result being a “fairly complex picture.”¹⁸⁰ It is in fact possible for individuals to seek remedies at both levels, although some states that are parties to both the ECHR and the Optional Protocol have entered reservations to the Protocol in order to avoid having to defend themselves first against a petition to the European Court of Human Rights in Strasbourg, and subsequently against a communication to the Human Rights Committee.¹⁸¹ For example, in the case of *Coeriel and Aurik*,¹⁸² two years after the European Court held a claimant’s petition to be inadmissible, the Human Rights Committee found that the Netherlands had violated the Covenant when it denied the claimants the right to change their surnames for religious reasons.¹⁸³

a. European Court of Human Rights

The ECHR itself was adopted in Rome on November 4, 1950 primarily by a group of Western European states. As a direct response to the atrocities of the Second World War, the Convention was the first international treaty to provide legally enforceable judicial remedies to individuals whose human rights had been violated.¹⁸⁴ Over the last half century, the ECHR has established itself

180. Giorgio Gaja, *New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?*, in THE EU AND HUMAN RIGHTS 780 (Philip Alston ed., 1999). For a comparison between the ICCPR Optional Protocol and ECHR systems, see Manfred Nowak, *The Inter-relationship between the Covenant on Civil and Political Rights and the European Convention on Human Rights*, in ASPECTS OF THE PROTECTION OF INDIVIDUAL AND SOCIAL RIGHTS 131 (S. Vassilouni ed., 1995).

181. Gaja, *supra* note 180, at 788–9.

182. *Coeriel & Aurik v. The Neth.*, Comm. No. 453/1991, U.N. GAOR Hum. Rts. Comm., 49th Sess. Supp. No. 40, Annex X, at 23, U.N. Doc. A/49/40 (1994). The Commission’s decision on App. No. 18050/91 and the Committee’s views on Communication 453/1991, both in relation to this case, are reproduced in 15 HUM. RTS. L. J. 422 (1994).

183. At present there are no adequate rules for dealing with overlapping jurisdiction between international human rights institutions. The fact that petitions by the same individual have been addressed by both the Human Rights Committee and the Inter-American Commission on Human Rights was a key factor precipitating recent denunciations of the Commission and the Optional Protocol to the ICCPR by Jamaica, Trinidad and Tobago, and Guyana. See Benedict Kingsbury, *Foreward: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT’L L. & POL. 679, 683 (1999).

184. The ECHR provides recourse to both states and individuals to bring alleged

as the most effective regional system for the protection of human rights in the world. A large part of that success has been linked to the legal, political, and philosophical consensus amongst Western European countries regarding the need to respect and ensure fundamental civil and political freedoms. Since the collapse of communism in the late 1980s, however, and with the corresponding rapid increase in states parties to the Convention, for the first time the laws and practices of states that historically have asserted very different conceptions of human rights have become subject to the scrutiny of the European Court of Human Rights in Strasbourg. The question today therefore is how these changes will affect the ECHR system and how effective the Court will prove to be in protecting the rights of religious minorities, and religious freedom more generally, in the new member states across Central and Eastern Europe.

The jurisprudence of the Court on matters pertaining to religious freedom historically has been underdeveloped. In spite of the significant protections within the Convention relating directly and indirectly to religious freedom, from 1945 until 1993 not a single decision of the Court found a violation of an individual applicant's religious freedom. This is a remarkable fact given that, since its inception, the Commission has registered over 20,000 total applications. Article 9 is the provision that protects individual religious freedom, and in almost fifty years, the European Commission published only forty-five cases in which Article 9 challenges were directly raised. In only four of these forty-five cases did the Commission declare the applications to be admissible, and three of these cases were ultimately held not to warrant a finding of a violation of Article 9.¹⁸⁵ In the remaining case of *Darby v. Sweden*, the Court found that there had been a violation but based its decision

violations before an international body, and provides an enforcement mechanism to ensure that contracting parties respect their obligations under the Convention. Under Article 25 individuals claiming to be the victim of a violation by a contracting party can petition the Court claiming redress. ECHR, *supra* note 54, art. 25. Article 24 permits contracting parties to refer alleged breaches of the provisions of the Convention by another contracting party. *Id.* art. 24. Like the similar inter-state reporting provisions under the ICCPR and ICESCR, very few states have ever availed themselves of this mechanism. See European Court of Human Rights, Historical Background, Organization and Procedure, at <http://www.echr.coe.int/Eng/Edocs/HistoricalBackground.htm>.

185. T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—LEGAL PERSPECTIVES, *supra* note 14, at 309–10. Article 9(1) provides that “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 in private, to manifest his religion or belief, in worship, teaching, practice and observance.” ECHR, *supra* note 54, art. 9(1).

on grounds other than Article 9.¹⁸⁶

It was not until the historic 1993 case of *Kokkinakis v. Greece*¹⁸⁷ that the Court held that a state's conduct violated Article 9. This forty-eight year lacuna indicates a significant disjuncture between principle and practice in ECHR jurisprudence on questions involving freedom of religion or belief. It also indicates an unwillingness on the part of the Court to risk confrontations with member states on sensitive issues pertaining to deeply entrenched church-state arrangements and in relation to the treatment of minority faiths. However, since the *Kokkinakis* decision in 1993 the Court has exhibited a greater willingness to scrutinize state conduct under Article 9 and to narrow the operation of the margin of appreciation,¹⁸⁸ at least in relation to more clearly established violations.¹⁸⁹

b. Council of Europe and European Union

While the ECHR system provides a more effective means of obtaining judicial remedies for individuals than does the ICCPR, it should be noted that it does not expressly protect the rights of

186. 187 Eur. Ct. H.R. (ser. A) (1990).

187. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R., (ser. A), at 6 (1993). The case involved the criminal conviction of a Jehovah's Witness for proselytism. For a discussion of the case, see Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1 BYU L. REV. 251, 268 (1999); Keturah A. Dunne, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT'L L.J. 117, 134 (1999).

188. The "margin of appreciation" doctrine, in the context of the ECHR, states that national authorities are allowed a margin of appreciation regarding whether a given restriction is necessary, and also the further interpretation of the values protected. See PIETER VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF EUROPEAN CONVENTION ON HUMAN RIGHTS* 585-606 (1984).

189. The Court has found violations of religious freedom in cases such as *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387 (1997) (Greek government's regulation of religious practice in requiring explicit civil authorization in order to open a public place of worship held to be in violation of Article 9); *Serif v. Greece*, 1999-IX Eur. Ct. H.R. 73 (1999) (interference by Greece with the Muslim community's leadership amounted to an interference under Article 9(1)); *Larissis v. Greece*, 1998-I Eur. Ct. H.R. 362(1998) (held that the proselytism conviction of Pentecostal servicemen regarding the proselytism of civilians was a violation of Article 9); *Canea Catholic Church v. Greece*, App. No. 25528/94, 27 Eur. H.R. Rep. 521 (1997) (held that governments cannot unreasonably discriminate between religious confessions regarding the requirements they must comply with to be acknowledged as juridical persons, in particular where legal personality is crucial to assert their rights before civil courts); *Hasan & Chaush v. Bulgaria*, App. No. 30985/96, (2000), available at <http://www.echr.coe.int/eng> (Bulgaria's interference with the leadership of the Bulgarian Muslim community held to be in violation of Article 9); *Buscarini v. San Marino*, App. 1991-I Eur. Ct. H.R. 605 (a compulsory oath on the Gospels for recently elected members of parliament held to be in violation of Article 9).

religious minorities. The only reference to the rights of minorities is in Article 14, which deals with, *inter alia*, the question of discrimination against national minorities. Nevertheless, the political changes in Eastern and Central Europe and the increase in the mobility of people have created more awareness of issues of intolerance and discrimination against ethnic and religious minority groups. The Council of Europe has responded in a number of ways. First, it has cooperated with and contributed to the work of the OSCE on minority issues. Second, and crucially, the Parliamentary Assembly and the Committee of Ministers now take into account principles of genuine pluralist democracy and human rights in considering applications for membership to the Council of Europe. Pluralist elections must be held at reasonable intervals, by secret ballot and with universal suffrage, to parliaments made up of political party representatives who are free to organize and express themselves.¹⁹⁰ In dealing with applications for membership, special attention is paid to the treatment of minorities.¹⁹¹

An important result of external monitoring and protection mechanisms is the normative influence of regional and international human rights norms on domestic laws and practices. Schwartz has suggested that the civil and political rights jurisprudence of most of the ex-Communist states may soon be determined not so much by how the various constitutional courts interpret and apply their own constitutions, but by how the European Court of Human Rights interprets the ECHR.¹⁹² Countries such as Bulgaria, Russia, Poland, Hungary, Slovakia, the Czech Republic, Albania, Georgia, Slovenia, and Estonia are all now members of the Council of Europe and are thus bound by the Convention.

Similarly, human rights have come to play a greater role in EU policy and membership criteria. The progressive development of the

190. THE COUNCIL OF EUROPE AND HUMAN RIGHTS 2 (1993).

191. See Eero J. Aarnio, *Minority Rights in the Council of Europe: Current Developments*, in UNIVERSAL MINORITY RIGHTS, *supra* note 169, 124. A good example of this is the case of Slovakia, which was admitted to the Council of Europe in May 1993 subject to ten requirements, including specific provisions on minority rights. When the Meciar government initially refused to comply with the Council of Europe's requirements, especially in relation to the rights of their Hungarian minority, Hungary began to protest and gained much external support. The result was that the Slovakian government's minority policy was a factor in Slovakia's denial of first-wave entry into the European Union. Similarly, Latvia's admission to the European Union in 1999 was linked to implementation of recommendations made by the OSCE High Commissioner on National Minorities on citizenship and language. See Steven Ratner, *Minority Disputes in Europe: Toward New Roles for International Law*, 32 N.Y.U. J. INT'L L. & POL. 591, 639 (2000).

192. HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 234 (2000).

EU into an “area of freedom, security and justice” has now been recognized as one of the five objectives of the Union. Article 6(1) of the Treaty on European Union (“TEU”)¹⁹³ has been revised substantially to read as follows:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States.¹⁹⁴

Whether or not human rights are regarded as an objective or merely as a principle of the EU, they now have achieved such prominence in the EU’s internal and external policies that they were proclaimed in the Amsterdam Treaty as explicit preconditions for EU membership.¹⁹⁵

D. External Monitoring by NGOs

Central to the increasing legitimacy of external monitoring at both the global and regional levels has been the contribution of NGOs to the protection of human rights. NGOs were active in promoting human rights even before the post-war human rights movement and contributed greatly to initiating and maintaining that movement. They pressed governments to internationalize human rights and to develop an international law of human rights. They helped promote the human rights provisions in the U.N. Charter, the UDHR, the two principal human rights covenants, and subsequent conventions on human rights. They continue to press for better laws. Especially since the establishment of the “Helsinki monitors” acting pursuant to the Helsinki Accords, NGOs have established themselves as principal monitors of human rights compliance.¹⁹⁶ With the support of the communications media, they have continued to mobilize “shame” and

193. Feb. 7, 1992, O.J. (C 191) 1 (1992) (forming the European Union as it is currently constituted) [hereinafter TEU].

194. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2 1997, O.J. (C 340) 1 (1997) [hereinafter Treaty of Amsterdam].

195. According to a new section in Article 49 of the TEU only a European state which “respects the principles set out in Article 6(1) may apply to become a member of the Union.” See Manfred Nowak, *Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU*, in *THE EU AND HUMAN RIGHTS* 689-90 (Philip Alston ed., 1999).

196. See, e.g., International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America—Report 2000* (2000).

to press governments to terminate human rights violations and to improve their laws and institutions so as to prevent or avoid future violations. NGOs are also more free to criticize where criticism may be due, as states are generally more concerned to keep bilateral relations on a friendly basis.

It is possible that NGOs can play a vital role in protecting and monitoring religious freedom in cooperation with the various treaty supervisory bodies. As less than two percent of the U.N.'s total budget is allocated to human rights work, the U.N. human rights machinery lacks the resources needed to obtain credible, systematic, and detailed information on rights violations.¹⁹⁷ It is here that NGOs have a key role to play. For example, as part of the scrutiny of state party reports by the Human Rights Committee, NGOs are able, in certain instances, to work with the Committee to help with the formulation of questions to be used in investigations and to be asked of states appearing before the Committee. Under the European Convention, individuals, NGOs, or groups of individual petitioners can submit applications against states that have accepted the right of individual petition. It is therefore possible for NGOs to institute proceedings or intervene as a party, act as an expert, testify as a witness, or act as *amicus curiae*. Other domains where NGOs have been effective are in convening international conferences to raise awareness and in conducting research to document violations. While these NGO functions have undoubtedly increased the effectiveness of human rights regimes, reform is still needed if NGOs are to play a more dynamic role in the process of implementing human rights standards in the domestic sphere.

NGOs are crucial international monitoring mechanisms and means of exerting pressure on targeted countries. They do this through publicity and lobbying of their own governments and by encouraging international and regional organizations to exert pressure on states. This form of coalition between NGOs and multilateral regimes has the advantage of relative objectivity and legitimacy. Unlike bilateral monitoring between countries, NGOs are more neutral and tend to target the highest priority issues for scrutiny, whether at home or abroad. Given the inevitability today of some form of monitoring, states are beginning to realize that it is politically wise to allow and indeed facilitate neutral, even-handed monitoring. For a country such as the United States, the existence of this type of

197. Michael Roan, *The Role of Secular Non-Governmental Organizations in the Cultivation and Understanding of Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—LEGAL PERSPECTIVES, *supra* note 14, at 144.

monitoring operating in conjunction with effective intergovernmental organizations may gradually reduce the pressure for unilateral action under the IRFA.

V. ASSESSING UNILATERAL AND MULTILATERAL APPROACHES

Part IV.B suggested that the unilateral sanctions and related measures provided for in the IRFA were permissible and legitimate as a strict matter of international law, at least in those instances of either severe violations of rights protected under universally ratified human rights agreements or of *erga omnes* or *jus cogens* norms under customary law. If this is the case, how should we assess the effectiveness of the IRFA in monitoring and protecting religious freedom in foreign countries?

This Part argues that the IRFA and its policy of unilateral enforcement of international norms is open to criticism on four main grounds. First, the Act creates an irrational hierarchy of human rights in U.S. foreign policy that has negative implications both domestically and internationally. Second, the Act represents a failure of international participation and cooperation. While international human rights standards are employed to justify the use of sanctions against target states, the means used to promote and protect those standards are entirely domestic and predominantly unilateral. This exceptionalist, or what I have termed “new realist,” approach to enforcing international norms serves to undermine and weaken not only existing multilateral and regional human rights regimes but also the universality that lies at the heart of the human rights idea itself. Third, the rationale underlying the Act represents a misunderstanding of why states obey (or disobey) international law and how external actors are able to induce states to comply with international norms. Unilateral sanctions are ineffective in achieving the ends that they seek and that multilateral treaty regimes, if seriously supported and resourced, offer a better alternative. Finally, the IRFA indirectly perpetuates a strand of thinking in U.S. foreign policy that views the international order as being divided into two camps—liberal and illiberal—with the latter being comprised largely of “rogue” or “outlaw” states that exist outside of the “zone of law.” This more general thesis is deeply flawed and, once translated into legislation such as the IRFA, will prove ultimately to be destructive of the universal values that the United States seeks to promote and protect abroad.

A. *IRFA and a Hierarchy of Human Rights*

The IRFA, by isolating one right and developing special machinery by which to protect it, has created an irrational hierarchy of human rights in U.S. foreign policy with religious freedom at the apex.¹⁹⁸ This creates a number of problems at both the domestic and international levels. As illustrated above, the right to religious freedom is inextricably intertwined with other human rights and more general issues of democracy, constitutionalism, and the rule of law. Will torture on the basis of religious belief now receive preferential treatment as a matter of U.S. foreign policy in comparison with, say, disappearances, torture, or suppression on the basis of racial, ethnic, political, cultural, or other factors? Can religious freedom ultimately be respected and ensured without corresponding protections for all other human rights, including both civil, political, and economic, and social and cultural rights? The Act has the effect of artificially elevating just one aspect of a complex series of relationships for special treatment and ignores the interrelated root causes of human rights violations.¹⁹⁹

Defenders of the Act suggest, however, that as a matter of *policy*, such a strategy is sound.²⁰⁰ Not every foreign policy objective

198. See Kristin Wuerffel, *Discrimination Among Rights? A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 VAL. U. L. REV. 369, 371–72 (1998). It should be noted, of course, that there is nothing objectionable *per se* with the prioritization of norms. Indeed, as discussed in Part IV.B. 1 and 2 *supra*, international law itself has developed a hierarchy of norms with *jus cogens* at the apex. See Meron, *supra* note 118. The point here is that the hierarchy of human rights norms created by the IRFA is based not on reasoned considerations of principle but rather on irrational projections of ideology and self-interest.

199. During a Committee hearing on an initial version of the bill, Secretary John Shattuck acknowledged these dangers stating that the legislation would “create a *de facto* hierarchy of human rights violations under U.S. law that would severely damage our efforts to ensure that all aspects of basic civil and political rights, including religious freedom, are protected. It would differentiate between acts motivated by religious discrimination and similar acts based on other forms of repression or bias, such as denial of political freedom, or racial or ethnic hatred. In doing so, the bill would legislate a hierarchy of human rights into our laws.” See *Freedom From Religious Persecution Act, 1997: Markup on H.R. 1685 Before the House Comm. On International Relations*, 105th Cong. (1997) (statement of John Shattuck, Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State).

200. “We wished to employ a fuller array of actions from our foreign policy toolbox In essence, our objective was to put in place a permanent apparatus that would wisely and strategically leverage our government’s influence on this central human right, constantly monitor this issue around the world, and respond to egregious problems with appropriate emphasis through an array of measures available through our nation’s diplomatic relationships.” John Hanford, *The International Religious Freedom Act (IRFA): A View From Congress*, in RELIGIOUS PERSECUTION AS A U.S. POLICY ISSUE 9 (Rosalind Hackett et al. eds., 2000).

can be achieved at once and international religious freedom, an issue of historical and contemporary importance to the United States, is as good a place to being as any. As a question of *human rights*, however, this approach is problematic. The idea of human rights is premised on fundamental principles of human dignity, liberty, and equality that are not regarded as being subject to the usual trade-offs made in weighing competing policy concerns in a utilitarian calculus. The IRFA selectively draws on this constitutive idea, and justifies doing so through reliance on international human rights law; it then attempts to enforce compliance through economic and political means. In doing so, international protection of religious liberty becomes a matter more of power politics rather than of law—more of policy calculations than of principle. Religious freedom is elevated to a higher position than political freedom and other civil and political rights, and becomes a bargaining chip in the strategic game of foreign relations. This approach presents universal human rights as a menu from which the United States, driven by fluctuating domestic forces and interest groups, will choose in formulating and implementing its foreign policy. Faced with such an overtly self-interested conception of human rights, foreign countries will surely question the true motives and legitimacy of U.S. action.

Internationally, the consequences of this approach are far-reaching. A state-created hierarchy, especially by one of the world's most powerful countries, may significantly undermine the universality and "common understanding" upon which the international human rights regime depends. Human rights defenders and scholars, both in the United States and abroad, who have been seeking ways of reconciling religious values with international human rights standards in countries that commit egregious violations of human rights are particularly affected by this factor.²⁰¹ The problem arises at both the definitional and implementation stages. In defining freedom of religion, the relationship between this right and other human rights needs to be fully explored, as must the specific context and perspectives of societies with differing histories, cultures, and traditions. Both of these issues are sidelined under the IRFA which provides only for the interpretation of the right to freedom of religion by a U.S. commission comprised of members appointed by the U.S. government. At the implementation stage, these elements combine to threaten the credibility of universal human rights standards

201. See, e.g., Adullahi An-Na'im, *Islamic Foundations of Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—RELIGIOUS PERSPECTIVES 337, 341 (Johan van der Vyver & John Witte eds., 1996).

themselves. Both local and international human rights defenders, struggling in the name of the Universal Declaration and ICCPR against repressive governments, are increasingly accused of advancing U.S. rather than universal values. This evasive move is further strengthened by the historical and widely resented unwillingness of the United States to adhere to many international human rights treaties.²⁰²

B. Unilateralism as a Failure of International Cooperation

The United States has consistently failed to adhere to the majority of international human rights conventions and has refused to allow international scrutiny of its own domestic human rights situation.²⁰³ Other states may perceive a certain lack of good faith on the part of a powerful state that claims to be promoting and protecting international human rights abroad as part of its foreign relations while, at the same time, remaining highly selective in the rights it elects to promote and in refusing itself to comply or cooperate with multilateral human rights regimes. There are three broad concerns, each of which is reflected to varying degrees in the IRFA.

1. Adherence to International Human Rights Treaties

First is the concern that the United States is seeking to enforce against other states rights that are not binding on itself. Despite early U.S. involvement and leadership in the drafting of the UDHR and two Covenants, today, the United States is party to few international human rights treaties and even then subject to extensive reservations, declarations, and understandings ("RUDs"). The two principal human rights covenants were opened for signature in 1966, but the United States did not sign them until 1977. In 1978, President Carter

202. Abdullahi An-Na'im, *Religious Persecution in the Middle East and Sudan*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE—RELIGIOUS PERSPECTIVES, *supra* note 201, at 25 (arguing that the U.S. approach under the IRFA is neither universal nor international and that if the United States joined other states in protecting and promoting *all* human rights, instead of focusing exclusively on one particular right while refusing to ratify other human rights treaties, then it would be unnecessary to attempt the "impossible task of isolating religious freedom from other aspects of the life of human societies around the world").

203. The United States has not ratified the ICCESR nor the International Covenant on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. It also entered numerous reservations in ratifying the ICCPR. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, *supra* note 94, at 1039–43.

transmitted to the Senate the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), and the American Convention on Human Rights. In 1980, he also submitted to the Senate the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").²⁰⁴ The ICCPR lay before the Senate until 1992 when President Bush requested and received Senate consent to ratification subject to extensive RUDs (including that the Covenant not be self-executing).²⁰⁵ The ICESCR remains before the Senate, and neither the first Bush nor Clinton Administrations sought Senate action on it. The Convention on the Prevention and Punishment of the Crime of Genocide was signed by President Truman in 1948 and lay before the Senate from 1949 until 1986. In February 1986, the Senate gave its consent, subject to several reservations and other conditions.²⁰⁶ In 1988, the United States signed the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Senate gave consent in 1990 with reservations and required the President to delay ratification until Congress had adopted implementing legislation.²⁰⁷ In 1994, the Senate gave its consent to CERD, accompanied by RUDs, including a declaration that the Convention was not self-executing. Congress has still passed no implementing legislation. In 1994, the Senate Committee on Foreign Relations recommended Senate consent to CEDAW, subject to a series of RUDs, including that the convention was not self-executing. As of 2002, the full Senate has not acted on CEDAW. Nor has there been any Senate action on the American Convention and the ICESCR remains unratified, meaning, in effect, that the United States continues not to accept legally the economic and social rights that it

204. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

205. A treaty that is "non-self-executing" does not have the effect of law in the absence of necessary implementation. Restatement, *supra* note 114, § 111. The United States' use of "non-self-executing" declarations is highly controversial. See e.g., Stefan A. Risenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991); Lori Fidler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991).

206. One of these required the President to delay ratification until Congress enacted legislation, required by the Convention, to make genocide a crime. Congress passed the Genocide Convention Implementation Act in 1988 and the United States ratified the Convention in 1989.

207. See 136 Cong. Rec. S17486, 101st Cong., 2d Sess. (Oct. 27, 1990). In 1992 Congress enacted the Torture Victim Protection Act, 28 U.S.C. § 1350, but the Act was not intended to, and did not in fact, implement the Torture Convention. In 1994, Congress enacted the Torture Convention implementation legislation, 18 U.S.C. §§ 2340-2340B, whereupon the United States ratified the Convention.

voted for in 1948 in the UDHR and that Franklin Delano Roosevelt championed in his famous Four Freedoms speech earlier in 1941. Finally, as of 2002, no U.S. action has been taken on the Convention on the Rights of the Child, leaving the United States alone with Somalia as the only two states not to have ratified this major human rights treaty.²⁰⁸

In spite of this poor record, there have been many instances where the United States has sought to protect and enforce rights under human rights instruments in foreign countries despite its own failure to adhere to them. U.S. statutes withholding development and security assistance for acts of torture, cruel, inhuman, or degrading treatment, arbitrary detention, disappearances, and other severe violations of life, liberty, and security of the person were enacted fifteen years before the United States ratified the ICCPR, Torture Convention, and the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").²⁰⁹ In the areas of children's rights and labor rights, the situation has been even more extreme given the continuing failure of the United States to ratify the relevant international instruments.²¹⁰ In the area of religious freedom, these failures are less apparent given that the United States has ratified the ICCPR and given that the IRFA seeks to enforce predominantly *erga omnes* and *jus cogens* norms universally recognized under customary law. As already noted, however, a close reading of the Act's definition of "violations of religious freedom" reveals that the United States is relying not only on *lex lata* but also *lex ferenda* in the form of General Assembly declarations and non-binding political agreements such as the Helsinki Accords. This opens at least a theoretical possibility of the United States applying

208. See DAMROSCH ET AL., *supra* note 134, at 615–23. As noted above, many of the objections in U.S. domestic politics to treaties such as CEDAW and CRC have come from the Christian Right—one of the driving forces behind the IRFA—which views the U.N. as not only a threat to the American family but as a mechanism that allows a secular elite to threaten family values worldwide. U.N. programs and standards regarding abortion and reproductive freedom are, in particular, regarded as an anathema. See *supra* note 29 and accompanying text.

209. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

210. Federal statutes such as the Foreign Assistance Act of 1961, 22 U.S.C. § 2151n (1990) and the International Financial Institutions Act of 1977, 22 U.S.C. § 262d(e) (1990), target the foreign exploitation, forced labor, and conscription of children despite the fact that the United States has ratified neither the Convention on the Rights of the child nor the original ILO Child Labor Convention. For almost two decades the United States has purported to protect "internationally recognized worker rights" despite the fact that it has ratified only one of the ILO Conventions defining these rights. See Cleveland, *supra* note 21, at 70.

economic sanctions against target states for violations of norms that have not yet attained the status of settled customary law.²¹¹ More importantly, this broader dissonance between U.S. sanctions and ratification practice, though reduced over the last decade by adherence to at least a few of the core human rights conventions, perpetuates a sense that the United States may be trying to achieve abroad what it is not practising at home, thereby undermining both unilateral and multilateral enforcement efforts.²¹²

2. Neglect of Multilateral Mechanisms

Second is the concern that unilateral efforts by the United States to enforce global norms such as the IRFA reflect a basic neglect of and failure to cooperate with international and regional human rights regimes and institutions. Rather than investing its resources and political power in supporting existing treaty regimes and mechanisms as recommended by the Advisory Committee on Religious Freedom Abroad,²¹³ in particular the badly under-resourced U.N. Human Rights Committee, the Special Rapporteur on Religious Intolerance, and the Office of the High Commissioner for Human Rights, the United States has opted instead to create its own domestic commission and bureaucracy within the State Department. What this evidences is not a general lack of respect for human rights (leaving aside for present purposes U.S. non-adherence to economic and social rights and its focus instead on civil and political rights that are entrenched in U.S. constitutional law and practice), but a failure of international co-operation.²¹⁴ Of course, by employing domestic

211. See *supra* note 55 and accompanying text.

212. Recent Supreme Court decisions such as *Employment Division v. Smith*, 494 U.S. 872 (1990), where it was held that religious minority groups (in this case, an indigenous group—the Native American Church) can claim no special exemption from criminal laws of general applicability only further this appearance of U.S. exceptionalism and lack of regard for international and regional human rights jurisprudence. Concerns have also been raised whether the IRFA excessively entangles the U.S. government in matters of religion and thereby violates the Establishment Clause in the First Amendment to the federal constitution. See, e.g., Johan van der Vyver, *International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L. J. 775, 828 (2001) (suggesting that the appointment of functionaries of the Act is “constitutionally suspect” and that the IRFA requires the U.S. government to “engage in conduct on the international level which it is prohibited from doing domestically”).

213. See *supra* note 56 and accompanying text.

214. See Stefanie Grant, *The United States and the International Human Rights Treaty System: For Export Only?*, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING, *supra* note 176, at 317 (arguing that the United States has played a strong role in promoting international human rights abroad but its record in doing so at home has been slow and

means of implementation, the effectiveness of the Act is increased, at least from the U.S. point of view, by avoiding the need for achieving consensus with other states and by sidestepping the bureaucratic and political constraints of a multilateral organization. As with the bilateral agreements discussed in Part III, however, this increase in effectiveness is achieved at the expense of universality and the interrelation of human rights because international standards are being co-opted by a powerful state for subjective political and strategic purposes. This demonstrates an imperialist approach to human rights and runs counter to the aims and spirit of the international human rights movement upon which both the Act and the IRF Commission largely depend for their legitimacy.²¹⁵

As in the case of treaty ratification practices, U.S. cooperation with international human rights institutions has been sporadic. Under the Clinton administration, the United States took steps to strengthen multilateral participation in the area of child labor and in certain regional contexts such as Burma.²¹⁶ The United States has participated in the decision-making processes of the Human Rights Committee under the ICCPR, although it has not adhered to the Optional Protocol allowing for individual communications from the United States to the Committee. In 1998, the Clinton administration also adopted new guidelines regarding the imposition of U.S. economic sanctions, requiring international cooperation to be sought prior to unilateral action and only after diplomatic efforts have failed.²¹⁷ Lastly, as evidence of what I have termed the “new realism,” the major U.S. statutes conditioning development and security assistance on human rights compliance now require the State Department country reports to assess both a foreign state’s compliance with monitoring efforts by and the relevant findings of international organizations such as the

contradictory and has excluded any discussion of economic and social rights).

215. This was the position taken by the National Council of Churches in mid-1998 arguing that the United States should not act as the religious police of the world, that a sanctions-based approach would hurt the very people it is intended to help, and that the effort would be best made multilaterally. See National Council of Churches, *NCC Statement on Proposed Federal Legislation Addressing Religious Persecution* (June 2, 1998), at <http://www.nccusa.org/assembly/june2.html>.

216. See, e.g., 19 U.S.C. § 2467(6) (2000) (internationally recognized worker rights are defined in the GSP to include three of the four core ILO labor standards and directly incorporate the ILO definition of the worst forms of child labor). In relation to Burma, see the 1996 Federal Burma Statute, Pub. L. No. 104-208 § 570, 110 Stat. 309, 3166 (1996) (instructing the President to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices” in Burma and directing the President to cooperate with members of ASEAN).

217. See Cleveland, *supra* note 21, at 73–4.

U.N., Red Cross, Amnesty International, and other NGOs.²¹⁸

Since the Bush Administration came to office in 2001, however, even the idea of international human rights for “export only” has been viewed with skepticism. This skepticism has extended beyond the issue of human rights to other issues of global concern subject to regulation by international law and institutions. As Richard Falk has noted, President Bush came to power pledging a foreign policy not of isolationism but of a form of internationalism based on a blend of post-Cold War unilateralism and militarism (including vastly increased spending on weapons and missile defense).²¹⁹ In the first six months of its term, the Bush administration repudiated an array of widely supported multilateral treaties including the Kyoto Protocol on global warming, the ABM treaty on missile defense and the militarization of space, and the Biological Weapons Convention prohibiting the development of biological weapons.²²⁰ It also has rejected new treaties such as the Small Arms Convention, the Land Mines Convention, and the Rome Statute of the International Criminal Court.²²¹ In the aftermath of the events of September 11, the United States launched an intense form of intergovernmental political

218. International Financial Institutions Act, 22 U.S.C. § 262d(e) (1990) (requiring consideration of the target country's participation with international human rights monitors such as the Red Cross, Amnesty International, the International Commission of Jurists, and U.N. and OAS entities); Foreign Assistance Act § 115, 22 U.S.C. § 2151n(c) (1990) (directing executive officials to consider the extent of a country's cooperation with international human rights investigations by international organizations such as the Red Cross or the UN); Foreign Assistance Act § 502B; 22 U.S.C. § 2404(b) (1990) (requiring the President to consider the relevant findings of international organizations and NGOs and the foreign state's cooperation with human rights investigations in determining whether a country is engaging in gross human rights violations). See also Cleveland, *supra* note 21, at 72.

219. Richard Falk, *A Just Response*, THE NATION, Oct. 8, 2001, at 2.

220. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22; Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

221. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). The Rome Statute was approved on July 17, 1998 by a vote of 120 states in favor and seven opposed. The United States voted against approval, as did China and Israel, and four other states that did not declare themselves publicly. On U.S. rejection of the ICC, see THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT (Sarah Sewall & Carl Kaysen eds., 2000). See also American Service Members Protection Act of 2002, Pub. L. 107-206, 116 Stat. 899, *codified at* 22 U.S.C. §§ 7421-7433 (prohibiting U.S. cooperation with the ICC; requiring immunity from the ICC before U.S. troops are to be involved in U.N. peacekeeping missions; limiting foreign aid to allies in the absence of bilateral agreements that prevent U.S. troops within their borders from being delivered to the ICC; and granting the President the power to use “all means necessary and proper” to free any American detained by the ICC).

and military cooperation to eradicate international terrorism,²²² but it has retained its avowedly unilateralist position in these traditional areas of multilateral cooperation.

Of course, U.S. foreign policy on participation in and cooperation with international institutions has fluctuated historically. As Edward Luck has stated:

Persistent strains of idealism and cynicism, multilateralism and unilateralism, internationalism and isolationism have long coexisted across the spectrum of American thinking. The resulting ambivalence, the product of fundamentally contrary political impulses, is as alive and as destructive in 1999 as it was in 1919 when President Wilson and Senator Henry Cabot Lodge clashed over the soul and shape of America's place in the world. Their struggle has yet to be resolved either intellectually or politically, leaving Washington unable to abandon world organization or to give it full support.²²³

In explaining American ambivalence, Luck has suggested eight core themes that run through the domestic debates and political struggles over the relationship between the United States and the U.N. These are (1) the notion of American exceptionalism and the difficulty of reconciling national power with the decision-making processes of global bodies; (2) the preservation of national sovereignty in an increasingly interdependent world; (3) negative attitudes toward other countries, races, and social systems; (4) the minority status in which the United States frequently finds itself in international forums; (5) the dilemmas involved in putting military forces at the disposal of global organizations; (6) the extent to which national security interests and international commitments overlap; (7) the persistent questions of U.N. reform and restructuring; and (8) the recurrent squabbles over burden sharing and the financing of

222. Even in the area of international terrorism, the United States has only recently ratified the International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998) (adopted by the U.N. General Assembly in 1997; entered into force on May 23, 2001; signed by the United States on January 12 1998, and ratified by it on June 26, 2002) and the International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 160, at 408, U.N. Doc. A/54/109 (1999) (ratified by the United States on June 26, 2002).

223. EDWARD LUCK, MIXED MESSAGES: AMERICAN POLITICS AND INTERNATIONAL ORGANIZATION 1919–1999 3 (1999). *See generally* MULTILATERALISM AND U.S. FOREIGN POLICY—AMBIVALENT ENGAGEMENT, *supra* note 97.

international organizations.²²⁴ Many of these themes are reflected in the approach adopted in the IRFA, sending a signal of U.S. preference for an international sphere where politics and power are dominant and where principle and law are relevant only for instrumental reasons that serve other policy considerations. Unless and until a shift in thinking occurs returning the United States to the position it has held at other points in its history—at the vanguard of the movement to build international norms, laws, and institutions—multilateral and regional efforts to promote and protect human rights, and thereby religious freedom, will remain unduly ineffective.

3. Selective and Uneven Enforcement

Third is the concern that even if the United States is legitimately seeking to enforce universally accepted norms, selectivity and hypocrisy in imposing sanctions under domestic mechanisms such as the IRFA undermines international respect for unilateral action as well as comparable multilateral efforts. The three Annual Reports have identified various states as severe violators of religious freedom. Only a few of these states, however, have been designated by the Secretary of State as being countries of “particular concern” and thus subject to Presidential action under section 401. Missing from this list are egregious violators of religious freedom such as Saudi Arabia, Uzbekistan and Turkmenistan, states of obvious economic and strategic importance to the United States (and even more so post-September 11 with the U.S. coalition combating international terrorism). Similarly Pakistan, Egypt, Indonesia, and Israel, all states with severe problems concerning religious freedom, have escaped punitive U.S. action under the IRFA and have been instead the beneficiaries of considerable development, training, educational and exchange cooperation, and support.²²⁵

In examining U.S. action taken under the Act against those states actually designated as being of “particular concern,” the

224. LUCK, MIXED MESSAGES, *supra* note 223, at 7.

225. See *supra* note 74 and accompanying text. The situation in relation to Pakistan post-September 11 is perhaps the most striking. Following the attacks on the United States, the President lifted Glenn Amendment sanctions on the export of defense items, military financing, and sensitive technologies concluding, as required by law, that these restrictions ran counter to U.S. national security interests. Presidential Determination No. 2001-28 (September 22, 2001). Additionally, the Bush administration waived Pressler Amendment sanctions against Pakistan and the nuclear-related prohibition in the Export-Import Bank Act of 1945. Then, in late October, President Bush signed legislation lifting all remaining sanctions against Pakistan as a reward for its prominent support of the U.S.-led military campaign against terrorism, paving the way for a sizeable aid package to Pakistan.

situation is even more problematic. Only where relatively minor strategic or economic interests have been at stake has the United States been prepared to apply economic sanctions, as in the case of Burma. It is difficult to imagine any principled reason why stronger measures have not been applied, under the IRFA's own terms, against Iran, China, and Sudan (Iraq already being subject to various U.N. monitoring and sanctions measures related to the 1991 Gulf War and fears of nuclear proliferation, rather than concern in Washington for religious freedom). It is worth recalling that it was this very danger that led the realist international relations scholar Hans Morgenthau, more than half a century ago, to oppose including moral and idealistic components in U.S. foreign policy. Morgenthau argued that such an approach has the potential of depriving the United States of the flexibility required to address overall foreign-policy interests and opened the United States to allegations of unequal implementation of its own standards. As already noted, Morgenthau's fears have been accommodated in the Act by virtue of the presidential waiver provision in section 407, which allows the President to waive economic sanctions towards another state where they may jeopardize the "important national interest of the United States."²²⁶ While this may solve the problem of restrictions on flexibility in conducting foreign relations, however, it serves only to exacerbate the impression of U.S. manipulation of the rhetoric of human rights to serve its own political purposes.

Differential application of sanction measures has led critics, such as Alston, to contend that U.S. sanctions policies, far from being motivated by respect for international norms, merely reflect the changing priorities of U.S. domestic politics.²²⁷ As part of a comprehensive analysis of U.S. unilateral sanctions practice, Cleveland has noted that the United States has "picked" and "chosen" among countries that violate human rights, ignoring states that are strategically and economically important (such as China and

226. It should be noted that waiver provisions are routinely used in sanctions statutes authorizing the Executive to waive the restrictions based on a discretionary finding that waiver will accomplish certain goals or further U.S. interests. For example, the waiver provision of Title III of the Helms-Burton Act requires the President to find both that the suspension is "necessary" to U.S. national interests and that it will "expedite a transition to democracy in Cuba." Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(b)(1), 110 Stat. 785 (1996).

227. "It is difficult to escape the conclusion that the United States is, in reality, imposing its own, conveniently flexible and even elastic standards upon other states." Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"?*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 79 (Lance A. Compa & Stephen F. Diamond eds., 1996).

Indonesia) and targeting those that are already isolated from the United States for other reasons (such as Cuba and Iran) or those where there is little at stake economically or strategically (such as Burma and Haiti).²²⁸ As will be discussed below in relation to “rogue” or “non-liberal” states, it is unsurprising that the countries designated by the U.S. State Department as state sponsors of terrorism—Sudan, Cuba, Iran, Iraq, North Korea, Syria, and Libya—correspond closely to the countries designated as being of “particular concern” for religious freedom.

C. *Unilateral versus Multilateral Norm Enforcement*

Apart from these criticisms of the legitimacy and prudence of the IRFA, the question remains whether the unilateral sanctions-based approach of the Act may, nevertheless, prove to be effective in achieving the ends it seeks—the promotion and protection of religious freedom in foreign countries—and how that mode of enforcement compares with implementation mechanisms under regional and global human rights regimes. In order to address these issues, it is first necessary to understand why states violate human rights (here, the rights of religious minorities in particular) and what the incentives are for states to comply with international regulatory regimes.

As expressed by Representative Christopher Smith during debate over the legislation in 1997, the rationale for the IRFA is to use the force and influence of U.S. economic and political power to punish those states that engage in egregious violations of the rights of minority religious groups.²²⁹ Is such an approach effective? There are I believe, in addition to the concerns outlined above, two major weaknesses to this form of unilateral pressure and sanctions. First, policies of this sort may actually do more harm than good to the very religious minorities whose protection is sought to be achieved.²³⁰ The vast literature on the use of economic sanctions against states such as Iraq and Cuba reveals that it is often the weakest and most vulnerable that are most affected by such policies.²³¹ Second, it is far from clear

228. Cleveland, *supra* note 21, at 75.

229. See *supra* note 24 and accompanying text.

230. See Sean Murphy, ed., *Contemporary Practice of the United States Relating to International Law: Sanctions Against States Tolerating Religious Persecution*, 93 AM. J. INT'L L. 480, 481 (1999) (arguing that sanctions will be counterproductive, may in fact strengthen the hand of those governments inciting religious intolerance, and may endanger the well-being of those the United States is seeking to help).

231. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW

that sanctions and related punitive measures are effective in enforcing belief-related rights. If problems of religious discrimination, intolerance, nationalism, and ethnic conflict are as complex and systemic as the various U.N. Special Rapporteurs have suggested,²³² then sanctions may merely be a crude response directed at the symptoms of the problem, leaving the root causes at the heart of the violations unaddressed. If this is correct, do regional or multilateral human rights treaty regimes offer a viable alternative?

It is clear that at a normative level, international instruments and institutions have greater legitimacy and objectivity in dealing with human rights violations. All states are held to the same standards and, therefore, the political and national interest dimensions that are so evident in bilateral mechanisms are diminished (although not entirely removed). The concern at the international and regional levels always has been that of effective implementation. U.S. policymakers often point to the apparent failings and lack of “teeth” of the various U.N. treaty bodies and actors as justifications for unilateral or bilateral measures. The United States itself (and other powerful states), however, have acted to impede the operation of the U.N. by withholding funding and refusing to adhere to most international human rights treaties, a fact usually overlooked in this calculus. Nevertheless, the question remains whether treaty regimes, even if better resourced and widely supported, can be effective in inducing compliance with human rights norms. This involves many complex questions of regime and compliance theory that are beyond the scope of this Article. However, it is possible to make a few observations in the context of international monitoring and protection of the rights of religious minorities. At the heart of this debate are competing conceptions of the international order.

Realist international relations theorists perceive a world of moral, political, and legal anarchy where state power and self-interest are the dominant variables.²³³ From this vantage point, economic and military sanctions and related coercive measures are the *lingua franca* of international relations. Liberal international legal and human rights theorists, on the other hand, start from the assumption famously made

SOVEREIGNTY—COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 52–66 (1995) (arguing that the Iraqi regime has been able to survive economic sanctions, and even to rebuild a good deal of infrastructure destroyed in the Gulf War, while at the same time exploiting the effects of the embargo for an international TV audience and doing little to mitigate the fact that sanctions have imposed severe hardship on the poorer parts of the population).

232. See Amor Report, *supra* note 17.

233. JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS 9 (2000).

by Louis Henkin in the late 1970's that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."²³⁴ The assumption underlying international and regional treaty regimes is that states have a general "propensity to comply" with international obligations. As we have seen, foreign ministers, diplomats, and governmental leaders in many states have devoted enormous time, energy, and resources to preparing, drafting, negotiating, and monitoring treaty obligations. Whether this results in legally binding obligations such as the ICCPR or ECHR, or soft law regimes such as the OSCE, the assumption is that state freedom of action is thereby limited and an expectation arises that other parties to these instruments will be similarly constrained.²³⁵ In the absence of an effective international police force or judicial system, states bind themselves to observe the law (and in this sense compliance is not voluntary) but their compliance is *induced* not *coerced*.²³⁶

The issue then is *why* states should comply with these norms and *how* outside actors can induce compliance. Chayes and Chayes have advanced the thesis that:

as a practical matter, coercive economic—let alone military—measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future. The attempt to devise and incorporate such sanctions in treaties is largely a waste of time.²³⁷

Chayes and Chayes further assert that the primary sources of non-compliance with treaties are not deliberate violations but rather factors such as the ambiguity and indeterminacy of treaty language, limitations on the capacities of parties to carry out their undertakings, and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.²³⁸ If this is correct, this should affect how resources and political will can most effectively be committed to improve compliance with international treaty

234. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979).

235. CHAYES & CHAYES, *supra* note 231, at 3.

236. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 45 (1997) (chapter entitled *Compliance with International Law in an Inter-State System*).

237. CHAYES AND CHAYES, *supra* note 231, at 2.

238. *Id.* at 17. In particular, the third factor helps to explain the divergence noted at the start of this Article between almost universal ratification of the major human rights conventions and continuing cases of widespread violations.

obligations. My argument here is that even though international and regional treaty regimes may rely on comparatively weaker mechanisms such as state reporting and individual communications, over time these procedures create a dialogic process by which the compliance-pull increases incrementally. The process is one of multilateral cooperation, objective external scrutiny, and ideally, as in the case of the ECHR, provision of legally binding remedies to individuals the subject of violations. If this path is pursued, then compliance becomes a question of measures designed to *persuade* (rather than coerce), such as ensuring transparency, providing dispute settlement mechanisms, and increasing capacity-building and technical assistance.²³⁹ As states participate in the regime, appear before treaty bodies, respond to requests, and submit reports, this leads inevitably to readjustments to domestic laws, policies, and practices. In this way a “justificatory discourse” becomes the principal method of inducing compliance with all states bound in a “tightly woven fabric of international agreements, organizations, and institutions that shape their relations with each other and penetrate deeply into their internal economics and politics.”²⁴⁰

The situation of minority religious and ethnic groups in Europe today bears out many of these ideas. In the context of minority disputes since the 1990’s, Ratner has argued that the roles of the OSCE High Commissioner on National Minorities (whom he terms a “normative intermediary”), the ICCPR, ECHR, and OSCE have eased tensions within states and helped to ensure that disputes are solved in a norm-based way. While “hard” law enforcement through domestic and international courts has been a key means by which to protect the rights of individuals, Ratner suggests that compliance with soft law instruments in the area of minority rights has been surprisingly effective.²⁴¹

This article will now briefly review Harold Koh’s theory on state compliance with international law since it is especially relevant and applicable to human rights in general and religious rights in particular. In Koh’s well-known work on transnational legal process, he identifies four historical strands of thinking: (1) an Austinian, positivistic *realist* strand that holds to the idea that nations never obey international law because “it is not really law;” (2) a Hobbesian utilitarian *rationalistic* strand that acknowledges that nations sometimes follow international law, but only when it serves their self-

239. *Id.* at 22–28.

240. *Id.* at 26.

241. Ratner, *supra* note 191, at 693–98.

interest to do so; (3) a *liberal* Kantian strand that assumes that nations generally obey international law guided by a sense of moral and ethical obligation derived from considerations of natural law and justice; and (4) a *process-based* strand that derives a nation's incentive to obey from the encouragement and prodding of other nations with whom it engaged in a discursive legal process.²⁴²

After critiquing various contemporary responses to the question of why nations obey international law,²⁴³ Koh advances what he sees as the modern, missing version of the fourth historical strand of compliance theory—the strand based on *transnational legal process*. Building on the Chayes' managerial approach and Thomas Franck's fairness approach,²⁴⁴ both of which suggest that the key to better compliance in a system without compulsory enforcement is more *internalized* compliance or *obedience*, Koh proceeds to explain how this process of norm-internalization occurs and how occasional compliance with global norms may be transformed into habitual obedience. This process is said to involve three phases in which at least one transnational actor: (1) provokes *interactions* with another, (2) forces an *interpretation* or enunciation of the applicable global norm, and (3) seeks not to coerce the other party, but to have the other party *internalize* the new interpretation of the international norm into its internal normative system.²⁴⁵

Koh suggests that this form of transnational legal process has particular importance in the human rights area where, as we have seen, treaty regimes are relatively weak and governments, for reasons of economics or *realpolitik*, are reluctant to hold other governments to account for abuses. In such cases, however, while enforcement mechanisms are weak, the core customary norms are clearly defined and often both *erga omnes* and *jus cogens*. In such situations, Koh argues that the best compliance strategies may not be solely

242. Koh, *supra* note 128, at 2611.

243. Koh notes that in the post-Cold War era, the compliance literature has followed three distinct pathways that have their origins in one of the historical roots of compliance theory: first, a rationalistic, instrumentalist strand (viewing international rules as instruments whereby states seek to attain their interests in wealth, power etc); second, a Kantian, liberal strand (dividing into two paths, one based on Thomas Franck's notion of rule-legitimacy and the other, exemplified by Anne Marie Slaughter's thesis of liberal international relations, focusing on the casual role of national identity); and the third, a constructivist strand (based broadly on notions of both identity-formation and international society). *Id.* at 2632–34.

244. That is, if a state must regularly justify its actions to treaty partners in terms of treaty norms, it is more likely that "voluntary" compliance will occur (Chayeses) and if a state internally perceives a rule to be fair and legitimate, it is more likely to obey it (Franck). *Id.* at 2645.

245. *Id.* at 2646.

“horizontal” regime management strategies based on the Chayes’ model, but rather vertical strategies of interaction, interpretation, and internalization. How these processes occur in practice is telling.

First, at the level of *interaction*, the key step is to empower more actors to participate, which means “expanding the role of intergovernmental organizations, nongovernmental organizations, private business entities, and ‘transnational moral entrepreneurs’”. Koh suggests that this requires us to ask:

How do these networks intersect with the ‘International Human Rights Regime,’ namely, the global system of rules and implementation procedures centered in and around the United Nations; regional regimes in Europe, the Americas, Africa, Asia, and the Middle East; single-issue human rights regimes regarding workers’ rights, racial discrimination, women’s rights; and ‘global prohibition regimes’ against slavery, torture, and the like? ²⁴⁶

Thus, the type of interaction posited by Koh at the transnational level involves a range of internal and external actors intersecting with multilateral human rights regimes as opposed to the narrower and one-sided forum created through unilateral sanctions.

In the area of religious freedom, this broader conception of interaction is vitally important. The range of internal actors able to interact with international human rights regimes and norms is extensive and may include religious leaders and organizations themselves. Indeed, there is a growing body of thought within the human rights movement itself that both the local and transnational activities of religious institutions are under-utilized in securing and promoting human rights and contributing to the prevention of religious conflict.²⁴⁷ There is evidence today of religious groups seeking to build bridges between factions in conflict.²⁴⁸ Furthermore,

246. *Id.* at 2656.

247. See, e.g., Donald W. Shriver, *Religion and Violence Prevention*, in CASES AND STRATEGIES FOR PREVENTIVE ACTION 169 (Barnett R. Rubin ed., 1998).

248. Note, for example, the Corrymeela Community in Northern Ireland and the permanent Inter-Religious Council in the former Yugoslavia (which has Muslim, Jewish, Serb, Orthodox and Roman Catholic members). The Inter-Religious Council, in particular, has attempted to promote religious cooperation in Bosnia Herzegovina by identifying and expressing common concerns independent of politics. See, CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT 114 (1997). See also UNITED STATES INSTITUTE OF PEACE, FAITH-BASED NGOS AND INTERNATIONAL PEACEBUILDING (Oct. 22, 2001), available at <http://www.usip.org/pubs/specialreports/sr76.pdf> (suggesting that faith-based NGOs are increasingly active and effective in international peacebuilding, especially in zones of religious conflict, and their activities range from high-level mediation to training and

inter-faith dialogue on key public policy issues is vital, especially when conducted in light of international human rights norms.²⁴⁹ The fact that religious groups are simultaneously local, national, and international entities provides them with access to unique transnational networks. Thus, finding more effective ways for religious groups to work with the international human rights community is an important aspect of protecting international religious freedom. As Michael Young has observed, religious communities have often mistrusted the strong secular and humanistic thrust of human rights advocates and have consequently eschewed either identification with or participation in the human rights movement.²⁵⁰ Under Koh's approach, one of the challenges for the future is for both communities to find modes and avenues for more systematic and institutionalized patterns of interaction, cooperation, and participation that will lead to a mutual strengthening of their respective agendas.²⁵¹

At the second level of *interpretation* of human rights norms, Koh points to the forums available for "norm-enunciation and elaboration both within and without existing human rights regimes" and suggests that if dedicated forums do not already exist, the relevant question is how to adapt existing forums for this purpose or to create new forums. It is difficult to see how the IRF Commission set up under the IRFA will generate greater consensus on the interpretation of religious freedom norms. The more likely result is the undercutting of those steps towards universality that have been achieved to date and the increasing danger of a perception of a "Western" or "U.S." interpretation of the norm.

Finally, at the crucial level of norm *internalization*, Koh distinguishes between *social*, *political*, and *legal* internationalization.

peacebuilding-through-development at grassroot levels).

249. For example, in the post-Vatican II era, the Catholic Church has established three bodies to deal with inter-religious dialogue: the Pontifical Council for Inter-Religious Dialogue, whose mandate covers all religious communities except for Jews and non-Catholic Christians; the Commission for Religious Relations with Jews; and the Pontifical Council for Promoting Christian Unity. The 1965 Declaration by the Vatican II Council on the Relation of the Church to Non-Christian Religions (*Nostra Aetate*) states that "[i]n our time, when day by day mankind is being drawn closer, and the ties between different peoples are becoming stronger, the Church examines more closely the relationship with non-Christian religions." See THE SECOND VATICAN COUNCIL, DECLARATION ON THE RELATIONSHIP OF THE CHURCH TO NON-CHRISTIAN RELIGIONS, NOSTA AETATE, No. 4 (Oct. 28 1965).

250. Michael K. Young, *Religious Liberties and Religious Tolerance: An Agenda for the Future*, 4 BYU L. REV. 973, 983 (1996).

251. See, e.g., Michelle Mack, *Religious Human Rights and the International Human Rights Community: Finding Common Ground—Without Compromise*, 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 455 (1999) (arguing for reconciliation and mutual support between religion and human rights despite their sometimes difficult and paradoxical relationship).

Social internalization occurs when a norm, such as that of global racial equality, acquires such a high degree of public legitimacy that there is widespread obedience to it. Political internalization occurs when political elites accept an international norm and adopt it as a matter of governmental policy. Lastly, legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.²⁵²

Each of the three processes requires repeated interaction with international actors and participation in multilateral regimes that are regarded by all states as legitimate and inclusive. If the culture of human rights and constitutionalism does not become part of the national ethos internalized within the psyche of its citizens, the jurisprudence and integrity of the courts will remain permanently vulnerable.²⁵³ Koh's theory of transnational legal process allows for the gradual internalization of human rights principles into different constitutional systems.

Of course, it may be possible to regard unilateral sanctions applied under mechanisms such as the IRFA as themselves a means by which to "internalize" international norms in other states. Envisaging a "multi-tiered enforcement structure for the global human rights regime," Cleveland has made such a case arguing that unilateral economic sanctions are an "important weapon in transnational efforts to promote respect for fundamental rights and can have substantial behavior-modifying potential."²⁵⁴ While drawing upon Harold Koh's work on transnational legal process, Cleveland misapplies Koh's theory. Cleveland suggests that unilateral sanctions can assist in the "international definition, promulgation, recognition and domestic internalization of human rights norms" provided they are "consistent with broader principles of the international community" and "positively contribute to the development of the global human rights system, rather than compete with or undermine the development of this system."²⁵⁵ She argues that "[t]he sanctions imposition, review, and removal processes formally provoke numerous interactions between the United States and foreign governments in which global norms are raised and clarified, and norm

252. Koh, *supra* note 128, at 2656–57.

253. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447 (1991). This point has also been forcefully made in the various Annual Reports on International Religious Freedom released by the State Department since 1999. See, e.g., 2001 Annual Report on International Religious Freedom, *supra* note 63, at 6–7.

254. Cleveland, *supra* note 21, at 5.

255. *Id.* at 6–7.

internalisation is promoted.”²⁵⁶ As mentioned above, however, the type of interaction posited by Koh at the transnational level involves a broader range of internal and external actors intersecting with multilateral human rights regimes as opposed to the narrower and one-sided forum created through unilateral sanctions. Cleveland further argues that the “‘bombardment’ of foreign states that results from United States and other unilateral efforts substantially increases the transnational interactions that ultimately yield the development and domestic and transnational internalization of global norms.”²⁵⁷ Such a “bombardment,” however, does not reflect the notion of domestic obedience to internalized global law through transnational legal process envisaged by Koh.

D. *Compliance and the Problem of “Rogue” or “Non-liberal” States*

Contemporary liberal international law and international relations scholars such as Anne-Marie Slaughter and Andrew Moravcsik have argued:

the determinative factor for whether nations obey can be found, not at a systemic level, but at the level of domestic structure. Under this view, compliance depends significantly on whether or not the state can be characterized as ‘liberal’ in identity, that is, having a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. Flipping the now-familiar Kantian maxim that ‘democracies don’t fight one another,’ these theorists posit that liberal democracies are more likely to ‘do law’ with one another, while relations between liberal and illiberal states will more likely transpire in a zone of politics.²⁵⁸

In line with the prevailing Washington consensus, this liberal view of international law supports the idea that U.S. foreign policy

256. *Id.* at 87.

257. *Id.*

258. Koh, *supra* note 128, at 2633. See, e.g., Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT’L L.J. 393 (1992); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 516–24 (1997).

ought to be directed at fostering conditions and institutions to spread democracy consistent with globalization trends.²⁵⁹ It also suggests that compliance with all forms of international legal obligations will fall along liberal and non-liberal lines and that legal institutions attempted by “mixed” groups of states will be relatively ineffective with non-liberal states preferring to settle their grievances by force.²⁶⁰ On this basis, religious freedom is more likely to be achieved in non-liberal states through the application of economic and political pressure rather than through participation in and pressure by a multilateral human rights regime.

This thesis has been subjected to criticism on various grounds. Koh has criticized it for being “essentialist” and for failing to recognize that states are not permanently liberal or non-liberal.²⁶¹ For critical legal scholars such as Susan Marks and David Kennedy, liberal theory is seen as reflecting an uncritical and superficial view of democracy and the voice of neo-liberal hegemony.²⁶² More importantly for present purposes, however, José Alvarez has doubted whether liberal theory accurately describes how both liberal and non-liberal states behave. In rejecting the imposition of an “iron curtain” between liberal and non-liberal states, Alvarez argues that:

Whether or not traditional international law has successfully embraced non-Western traditions and needs, there is a significant difference between its universalist aspirations and an attempt to brand certain

259. See Burley, *supra* note 258, at 393–94, 405 (expressing support for Franck’s notion of an emerging right to democracy). See also DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory Fox & Brad Roth eds., 2000).

260. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (contrasting the relative ineffectiveness of the International Court of Justice and the Human Rights Committee with the integrating success achieved by the European Court of Justice and the European Court of Human Rights). Slaughter further argues that liberal insights require the rejection of the concept of a universally applicable source of law, that courts in liberal states should use the act of state doctrine to repudiate the laws of non-liberal states and should impose a “badge of alienage” on these states. See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1912, 1990 (1992).

261. Koh, *supra* note 128, at 2650 (arguing that liberal theory treats a state’s identity as somehow exogenously or permanently given when in fact states make transitions back and forth from dictatorship to democracy, prodded by regimes and norms of international law).

262. See Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT’L L. 449 (1997) (arguing that Slaughter’s thesis is a less extreme version of “liberal millenarianism”); David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT’L L. 9 (1999) (suggesting that the new U.S. hegemony and the spread of deregulatory free trade are being rewritten as the triumph of a “Reaganized” form of political liberalism which has been cleansed of earlier substantive commitments and narrowed to focus on capitalist expansion and procedural democracy).

states as 'illegitimate' because outside the 'zone of law'. Some of the work propounded under the liberal label would exclude where traditional international law would attempt to persuade. Worse still, the liberals' 'badge of alienage', once imposed, tends to put the target beyond reach or leaves the question to be resolved outside the constraints of law. This kind of liberal theory shrinks, rather than expands, the domain of law.²⁶³

Rather than accepting liberal theory's assignment of non-liberal states to a realist world of power politics, Alvarez has demonstrated instead how vertical enforcement in bilateral investment treaties, for example, may evolve and be necessary precisely in cases where at least one of the parties is "non-liberal" and how deep forms of inter-state cooperation may fail precisely because the parties are "liberal."²⁶⁴ He also has pointed out the questionable assumption of viewing the United States as the pre-eminent example of a liberal state especially when considering the U.S. approach to treaty obligations.²⁶⁵

How then does Slaughter's liberal theory bear on the unilateral, sanctions-based approach of the IRFA? As suggested above, there is a remarkably close correspondence between the countries designated by the State Department as being of "particular concern" for religious freedom and those designated as state sponsors of terrorism or, in recent years, as "rogue states."²⁶⁶ The notion of a

263. José Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 240 (2001). See also Koh, *supra* note 128, at 2650 (arguing that the notion that only liberal states "do law" with one another can be empirically falsified, particularly in areas such as international commercial law, where states tend to abide fastidiously by international rules without regard whether they are representative democracies).

264. Alvarez, *supra* note 263, at 245-46. As examples, Alvarez notes that the United States is unwilling to ratify the Inter-American Convention on Human Rights or submit itself to the Inter-American Court's binding jurisdiction "regardless of the number of democracies in the hemisphere that do the same," and that the first compromissory clauses that committed the United States to settle treaty disputes before the International Court of Justice in Friendship, Commerce and Navigation treaties appeared not in the context of "ever deepening cooperation with a long-standing liberal ally but in the dubious case of nationalist China in 1946." *Id.* at 195.

265. *Id.* at 194-96 (noting that "it is demonstrably not true that US treaties with liberal treaty partners are characterized by 'deep' cooperation enforced via vertical, or at least horizontal, forms of dispute settlement or that, to the extent that the United States has accepted such obligations, it has done so primarily with fellow liberal democracies").

266. See *supra* note 76 and accompanying text. Under the Antiterrorism and Effective Death Penalty Act of 1996, civil suits may be brought by U.S. nationals for monetary damages against foreign states designated by the secretary of state as sponsors of terrorism.

“pariah” or “outlaw” state dates back to the 1970’s and later to the 1980’s when President Reagan branded Qaddafi an outlaw.²⁶⁷ The term “rogue state,” however, only came into vogue among U.S. policymakers in the last decade. Interestingly, during the final year of the Clinton administration the State Department officially abandoned the term and replaced it with the preferred term of “states of concern,” the same words that now appear in the IRFA.²⁶⁸

The term is traceable to a controversial 1994 article by Anthony Lake, then National Security Advisor, that elaborated the so-called dual containment policy toward Iran and Iraq (that is, containment and isolation) and that also addressed the more general issue of rogue nations. In addition to Iran and Iraq, Lake added Libya, North Korea, and Cuba as members of the rogue gallery. He argued that these states shared a “recalcitrant commitment to remain on the wrong side of history” and that the United States, as the sole superpower, has a special responsibility to develop a strategy to “neutralize, contain and through selective pressure, eventually transform these backlash states into constructive members of the international community.”²⁶⁹

For Lake, a state becomes a rogue if it has three key characteristics: it pursued weapons of mass destruction, it used terrorism as an instrument of state policy, and it comprised a regime or government that constituted a regional threat to important U.S. interests. In this sense, then, rogue status derived from realist criteria relating to states’ external behavior, not their domestic behavior in areas such as compliance with human rights norms. As Litwak comments, the “rogue state policy was essentially a political mobilization strategy that lumped together a disparate set of countries and demonized them.”²⁷⁰

28 U.S.C.A. §§ 1605(a)(7), 1610(a)(7). The Secretary of State has designated Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism. See 31 C.F.R. § 596.201 (2000). As under the IRFA, this list conspicuously excludes states such as Saudi Arabia, Pakistan and Egypt which have been linked closely with terrorist groups—most obviously following the events of September 11—but which are also strategic U.S. allies. Cf. Sean D. Murphy, *U.S. Judgments Against Terrorist States*, 95 AM. J. INT’L L. 132 (2001).

267. Robert Litwak, *What’s in a Name? The Changing Foreign Policy Lexicon*, 54 J. INT’L AFF. 375, 377 (2001).

268. In June 2000, Secretary Albright did not use the term “rogue states” but rather “states of concern” and identified Burma, China, Iran, Iraq, and Sudan. See Steven Mufson, *A ‘Rogue’ is a ‘Rogue’ is a ‘State of Concern,’* WASH. POST, 20 Jun. 2000, at A16.

269. Anthony Lake, *Confronting Backlash States*, 73 FOREIGN AFF. 45–6, 55 (1994).

270. Litwak, *supra* note 267, at 379 (noting that the main impetus for the policy came from U.S. interest groups lobbying for secondary sanctions including the Cuban émigré community which won passage of the Helms-Burton sanctions legislation on Cuba in March

In response to the threat posed by rogue states, U.S. foreign policy has pursued a strategy of imposing either unilateral or multilateral sanctions or both. This has been justified on the basis that American power should be used to enhance the credibility of U.S. diplomacy and because law and diplomacy alone, without the reinforcement of power, are unlikely to change the behavior of rogue dictators. This has led to four general policy responses: "1) sanctions and isolation to achieve containment of and to inflict economic damage on rogue states; 2) international courts and domestic prosecution to bring rogue criminals to justice [although this has specifically not included support for a permanent international criminal court to which the United States would also be subject]; 3) shows of strength and armed interventions to coerce or eliminate rogue regimes; and 4) support for opposition movements or covert operations to oust rogue figures."²⁷¹

This general policy of coercion rather than persuasion or inducement has been subjected to criticism that mirrors in large part the criticisms raised above regarding the imposition of unilateral sanctions under the IRFA. Litwak has argued that the rogue state policy is politically motivated and selectively and inconsistently applied. Why, for example, has Cuba, which has not been developing weapons of mass destruction or supporting terrorism, been labelled a rogue while Pakistan and Syria, which have been linked to terrorism, have not?²⁷² Litwak also has suggested that the rogue state policy limits strategic flexibility and has damaged U.S. relations with important allies.²⁷³

In conclusion, the danger of Slaughter's liberal theory of international law is that it plays directly into the U.S. foreign policy realist construction of rogue states. Countries viewed as non-liberal

1996 and the American-Israel Political Action Committee which was the driving force behind the Iran-Libya Sanctions Act).

271. THOMAS HENRIKSEN, USING POWER AND DIPLOMACY TO DEAL WITH ROGUE STATES 1-2 (Hoover Institution Essay in Public Policy, No. 94 1994), available at <http://www-hoover.Stanford.edu/publications/epp/94/94a.html>. See also Thomas Henriksen, *The Rise and Decline of Rogue States*, 54 J. INT'L AFF. 349 (2001).

272. Litwak suggests that Cuba has been designated a rogue because of the political influence of anti-Castro Cuban Americans while Syria and Pakistan have not because their support is needed to pursue America's other strategic interests in the Middle East and South Asia. See Litwak, *supra* note 267, at 380.

273. *Id.* at 381-83 (suggesting that (1) once a country is labeled a rogue, it is difficult to pursue any strategy other than comprehensive containment or isolation as has been the case in seeking limited engagement with North Korea and a political opening with Iran; and (2) unilateralism, especially unilateral sanctions imposed on Iran, Libya and Cuba have caused resentment between the United States and its allies in Europe, Asia, and the Western Hemisphere).

are easily equated with rogue states and, in either case, regarded as being outside the “zone of law.” Thus, rather than adopt a policy of respectful engagement on the basis of Koh’s thesis of domestic obedience to internalized global law through transnational legal process, the United States has resorted to unilateral economic sanctions on the questionable assumption that this is the only means to change states’ behavior. As a matter of compliance theory, therefore, the IRFA must be viewed as a species of either the rationalistic, instrumentalist strand or the new liberal international relations branch of the Kantian, liberal strand, or even a combination of both (perhaps inspired by liberal theory’s liberal/non-liberal distinction but subject to instrumental political manipulation in its application). In either case, and for the various reasons discussed above, I believe that this approach is flawed. In a “post-ontological age, characterized by the ‘new sovereignty,’” only full participation in and adherence to international human rights law and institutions in conjunction with transnational legal process “can provide the key to unlocking the ancient puzzle of why nations obey.”²⁷⁴

E. Barriers to Effective Multilateral Norm Enforcement

I have argued in favor of multilateral and regional mechanisms and against unilateral and bilateral measures. Of course, in reality these alternatives are not mutually exclusive. In those instances where political or economic actions are taken by the United States under the IRFA in a consistent and principled manner and where multilateral or regional mechanisms are either weak or unavailable, unilateral measures may indeed be better than nothing at all. In an ideal world, however, and for the various reasons already advanced, greater resources, support, and effort need to be allocated to avoid unilateral responses wherever possible and to develop more effective multilateral regimes.

What then are the main barriers to this objective? Apart from more obvious issues of lack of political will and persistent U.S. unilateralism, scholars have pointed to two areas as constituting continuing barriers to effective multilateral norm enforcement in relation to religious freedom: 1) limited agreement on international standards, especially regarding the rights of religious minorities and 2) the institutional and bureaucratic deficiencies of treaty supervisory bodies. In both areas further work and effort are required, but I would

274. Koh, *supra* note 128, at 2659.

suggest that these obstacles are manageable.

In relation to the first area, it has been suggested by some scholars that even before considering issues of institutional effectiveness and strategy a major shortcoming of U.N. monitoring mechanisms is the absence of agreement between states on the applicable international standards governing issues of freedom of religion or belief. In assessing these standards, Young has argued that:

International human rights documents such as the Covenant on Civil and Political Rights serve as useful starting points to agreement, but they are only starting points. Careful examination of the language and meaning of these documents reveals them to be both over- and under-inclusive. Monitoring religious liberties presents particularly difficult issues because religious liberties underlie culture, nation-building, history, and a whole range of things even more fundamental than other basic civil and human rights discussed in the international arena. Thus, developing some sort of consensus on monitoring religious liberties presents a considerable challenge.²⁷⁵

According to Young, one of the primary reasons for this lack of consensus is the absence of

any systematic, effective and universally legitimate method for developing a consensus among countries. This lack of consensus increases the possibility of power politics, including the use of powerful economic and geopolitical positions to define the debates that are otherwise undefinable. For example, to the extent countries are unwilling to engage in this debate or work in good faith to establish mechanisms to decide issues of this sort, some countries—the United States, for example—will take matters into their own hands and begin to pressure countries to adhere to a standard that is not necessarily universally recognized, but that is imposed by the most powerful.²⁷⁶

It is undeniably correct that there is no uniform agreement among states on international standards of religious freedom, or

275. Young, *supra* note 95, at 505–06.

276. *Id.* at 506.

indeed on the definition of the term “religion” itself.²⁷⁷ Furthermore, there remain marked points of disagreement among states as a matter of practice. For example, while the freedom to change one’s religion or belief is entrenched in international human rights standards, its acceptance by many states remains controversial.²⁷⁸ In many Muslim states, for example, it is considered a central tenet of Islam that there may be no coercion in matters of religion. Certain contemporary interpretations of Islam, however, do not accept the right of a person to abandon their religion or to convert to another, and it is a capital offence under Islamic law for a Muslim to repudiate his or her faith in Islam.²⁷⁹ Accordingly, many Islamic states do not formally accept the Human Rights Committee’s interpretation of the right to “have or adopt” a religion as meaning the right to replace one’s current religion or to adopt atheistic views.²⁸⁰ The result is that today a number of Islamic countries stand outside of international human rights standards.²⁸¹

This problem has been further exacerbated by the progressive dilution of the language in the International Bill of Rights²⁸² and subsequent documents. Article 18 of the UDHR speaks explicitly of the right “to change” one’s religion, whereas the corresponding article in the ICCPR, article 18, speaks only of the right “to have or adopt” a particular religion or belief.²⁸³ While this change in wording does not deny the right to change religions, it does signal the reluctance of

277. See, e.g., W. P. Alston, *Religion*, in 7 *ENCYCLOPEDIA OF PHILOSOPHY* 140, 140–41 (Paul Edwards ed., 1967) (“A survey of existing definitions of religion reveals many different interpretations,” most of which are one-sided and exclude polytheistic or non-theistic creeds.).

278. See J. A. Walkate, *The Right of Everyone to Change his Religion or Belief—Some Observations*, 30 *NETH. INT’L L. REV.* 146 (1983).

279. See Abdullahi An-Na’im, *The Islamic Law of Apostasy and its Modern Applicability: The Case from the Sudan*, 16 *RELIGION* 197 (1986).

280. See United Nations Human Rights Committee, General Comment No. 22 (48) (art. 18) para. 5, adopted by the U.N. Human Rights Committee on 20 July 1993, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), also contained in *RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS*, *supra* note 17, at 92–93. As Boyle has observed, a “serious question arises where the Islamic *shariah* is enforced, leading to the violation of other rights, for example by the use of the death penalty for apostasy and blasphemy.” *FREEDOM OF RELIGION AND BELIEF*, *supra* note 15, at 9.

281. See An-Na’im, *supra* note 279. Note also the position of non-Muslims or *Dhimmis* in some Islamic states. Under *shari’ah*, these minority groups may have a degree of security of the person, freedom to practise their religion and a degree of internal community autonomy, but they are often not allowed to participate in the public affairs of the Islamic state.

282. The UDHR, ICCPR, and ICESCR, *supra* note 2, are collectively referred to as the International Bill of Rights.

283. ICCPR, *supra* note 2, art. 18.

many states to openly confront the implicit consequences of this right.²⁸⁴ Likewise, proselytizing²⁸⁵ and conscientious objection²⁸⁶ continue to be issues that arouse controversy and dissent.

These uncertainties and disagreements are especially evident in the area of the rights of religious minorities. Article 27 of the ICCPR guarantees to religious minorities the right, in community with the other members of their group, to profess and practice their own religion. The formulation of Article 27, however, has raised a number of questions. First, there is disagreement as to what constitutes a "religious minority."²⁸⁷ Second, there is uncertainty regarding the relationship between Articles 27 and 18.²⁸⁸ In order for Article 27 to have any independent meaning, it must extend beyond the ambit of protection provided by Article 18. The issue then becomes the extent to which the purpose of Article 27 is to grant collective rights to the members of a religious minority *qua* a group,²⁸⁹ or merely to accord rights to individuals by devolving an obligation on states to adopt active measures aimed at the preservation of the minority group's identity in the areas of culture, language, and religion.²⁹⁰ This question is controversial and different

284. See K. J. Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 211 (Louis Henkin ed., 1981). See also Natan Lerner, *Proselytism, Change of Religion and International Human Rights*, 12 EMORY INT'L L. REV. 477, 507-08 (1998).

285. The international standards are not definitive on this issue. See, e.g., Stahnke, *supra* note 187, at 251 (discussing the 1993 European Court of Human Rights decision in *Kokkinakis v. Greece* which sought to draw a distinction between "proper" and "improper" proselytism).

286. The 1981 Declaration is silent on this issue. The Human Rights Committee has stated in its General Comment on Article 18 that it considers that such a right can be inferred from that article "inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief." See General Comment 22 (48), *supra* note 280, para. 11.

287. General Comment No. 23 (50) on article 27 of the ICCPR indicates that the existence of a religious minority is a question of fact, to be determined by objective criteria, and does not depend on any political or legal determination by the state. General Comment No. 23 (50), art. 27, para. 5.2, adopted by the U.N. Human Rights Committee on April 6 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994); reprinted in U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994); available in *RELIGION AND HUMAN RIGHTS*, *supra* note 17, at 98. See also Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.2/384/Rev I (1979), reprinted as U.N. Pub. E.78.XIV.1 (1979).

288. See ICCPR, arts. 18, 27, *supra* note 2. See also notes 171-73 and accompanying text.

289. This view is supported by J. G. Starke, *INTRODUCTION TO INTERNATIONAL LAW* 372 (10th ed. 1989). See also Dinstein, *supra* note 16, at 157.

290. This view is supported by Francesco Capotorti, *Minorities*, 8 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 385, 390 (1985). See also Francesco Capotorti, *Are Minorities Entitled to Collective International Rights?*, in *The Protection of Minorities and Human Rights*, ISRAEL YEARBOOK HUM. RTS. 505-11 (Yoram Dinstein & M. Tabory eds., 1992).

U.N. member states have adopted divergent viewpoints.²⁹¹

A closely related issue to that raised by Young regarding lack of consensus on international standards is the problem of harmonizing religious laws with international human rights standards. This has become a volatile and sensitive issue in international relations, particularly regarding the relationship between Islamic law (*shari'a*) and human rights. Kevin Boyle describes the issue as follows:

There is a clear challenge of explanation in arguing that the core of tolerance is to accept the reality of diversity of religions and belief in the world, while rejecting the thesis that the substance of this freedom may be different in different cultures. Thus some interpretations of *shariah* law pit Islam against the principle of the primacy of international law, and practices in other countries based on national law directly ignore the requirements of the right to freedom of conscience, religion and belief. The case of China comes to mind. All claims to universality of rights have a credibility problem when we contemplate the denial of full religious freedoms and other rights to the one fifth, or one quarter of the world's population who are Chinese. Nevertheless, the priority accorded to the core international law standards with respect to human rights cannot be answered as a matter of international law by claims of national sovereignty or the requirements of religious law or custom.²⁹²

It is the combination of these two factors—absence of consensus on mutually agreed standards and challenges to the universality of human rights—that Young suggests has led powerful states such as the United States to become impatient with multilateral mechanisms and to turn instead to unilateral approaches, thereby avoiding the need for obtaining consensus on the interpretation of the relevant norms.

Young's assessment is overly pessimistic, however, and ignores the progress that has in fact been made in defining and

291. United Nations Seminar, *supra* note 12, at 21.

292. FREEDOM OF RELIGION AND BELIEF, *supra* note 15, at 8. Boyle notes that controversy over the claim by Sudan of precedence for its internal law based on *shari'a* over international standards was rejected by the Human Rights Commission in 1994. *Id.* at 17 n.25. The resolution of the Commission called on Sudan to bring its national law into accordance with international standards to which it was a party. The vote was 35 for with 9 against (one of which was China) and 9 abstentions.

universalizing international standards since the birth of the U.N. Charter in 1945. Disagreement over the meaning of human rights norms is not restricted to freedom of religion or belief. While controversy will always exist over specific conceptions of religious freedom, I would argue that the relevant provisions of the UDHR, ICCPR, and the 1981 Declaration when viewed together, and in conjunction with the General Comments of the Human Rights Committee, provide a strong foundation for convergence on core minimum standards. There is, for example, growing overlapping consensus among states, albeit at a high level of abstraction, on the idea that freedom of religion or belief requires a rejection of "claims to a monopoly of truth."²⁹³

In this regard, the landmark Krishnaswami study has exerted a powerful influence and has assisted in the progressive development of international standards that are gradually becoming incorporated into constitutional and domestic legal systems through Koh's notion of transnational legal process.²⁹⁴ Scholars such as Donna Sullivan have argued that despite the "historical backdrop of civil strife, international warfare and ideological conflict fueled by religion, the [1981] Declaration stands as a milestone in the progressive development of human rights norms."²⁹⁵ In concluding her analysis of the 1981 Declaration, Sullivan thus cautions against new standard-setting efforts and movement towards a binding convention. While some of the Declaration's provisions undoubtedly make major concessions and are drafted in over-broad or vague language, the document nevertheless stands as a major advance in the development of international norms in this area. Given the complexity and sensitivity of the issues raised by the Declaration, efforts focused on improved implementation are arguably the better course at this time.²⁹⁶

293. M. S. McDougal, et al., *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination*, 74 MICH. L. REV. 865, 874 (1975).

294. Theo van Boven has stated that the Krishnaswami Study had "a substantial impact on the text and outlook" of the 1981 Declaration. See Theo van Boven, *Advances and Obstacles in Building Understanding and Respect Between People of Diverse Religions and Beliefs*, 13 HUM. RTS. Q. 437, 438-39 (1991) (originally delivered as the Arcot Krishnaswami Lecture).

295. Donna Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 488 (1988).

296. *Id.* at 520. See also R. S. Clark, *The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 31 CHITTY'S L.J. 23, 29 (1983) (suggesting that as more affected groups, NGOs and official organs invoke these standards, they will eventually become part of the fabric of international law and practice).

The second major obstacle to the effective international monitoring of religious freedom is the severe resource and bureaucratic constraints faced by international human rights treaty bodies and related institutions. Little has highlighted the two major deficiencies with the U.N. role in protecting and monitoring human rights. The first is financial—less than one percent of the overall U.N. budget is dedicated to the promulgation, promotion, and implementation of human rights.²⁹⁷ The second is structural—the main problem being the uncoordinated proliferation of U.N. human rights activities and bodies and the fact that

the United Nations is not an effective international authority, one capable of consistently enforcing international human rights. Therefore, even though human rights standards may be adequately articulated, and relatively well disseminated and affirmed (in theory), there are serious deficiencies regarding implementation. Instead of the impartial and reliable system of human rights adjudication and implementation that was originally envisioned, standards get applied sporadically and selectively, and in a way that is subject most decidedly to political influence.²⁹⁸

The effectiveness of U.N. human rights implementation is subject to internal constraints deriving from the “nature of the bureaucracy and the pressures placed on it by member states. These constraints have an impact on leadership, the quality and morale of staff, and on the availability of resources.”²⁹⁹ Both the Human Rights Commission and the recently created post of OHCHR are subject to the political manipulation and financial constraints imposed by member states.

On the issue of monitoring compliance by states with their international human rights obligations, Elizabeth Evatt has noted that at a period when the treaty bodies are seeking to make the monitoring system more effective and when the demands on them are increasing (with more parties, more reports, and more individual

297. David Little, *Protecting Human Rights During and After Conflict: The Role of the United Nations*, TULSA J. COMP. & INT'L. L. 87, 89 (1996).

298. For example, the Human Rights Commission lacks the ability to enforce its judgments regarding human rights violations in different countries. *Id.* at 89.

299. Stephen Marks, *The United Nations and Human Rights: The Promise of Multilateral Diplomacy and Action*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 303 (Burns H. Weston & Stephen P. Marks eds., 1999).

communications), the resources available to support their work seem to be diminishing.³⁰⁰ In this sense, the success of the treaty bodies in developing innovative monitoring techniques and in ensuring the participation of states and NGOs has ironically created a crisis that needs to be addressed if paralysis of the system is to be avoided.³⁰¹

VI. CONCLUSION

Despite these obstacles, I believe that the basic assumptions underlying international and regional human rights regimes remain sound. Effective compliance with international religious freedom norms depends most centrally on a broad conception of transnational legal process whereby internal and external actors are engaged in a process of repeated interaction in such a way that the relevant norms eventually become internalized in the constitutional, legal, and political systems of all states. In spite of severe financial and structural constraints, incremental normative influence of this kind can nevertheless be discerned in the laws and practice of many states. In a radically transformed post-Communist and post-Cold-War Europe, the implementation of human rights standards into domestic law, in conjunction with full participation in treaty regimes such as the ECHR and the ICCPR, continues to create a culture of rights and to encourage increased compliance by member states. The future success of these processes in Europe and beyond will be linked to the degree to which all civil society actors, especially NGOs and individuals whose rights have been violated, are able to obtain access to relevant mechanisms. Improved access must be combined with the distribution amongst participating groups of the tools, resources, and information necessary to make their participation meaningful. By progressively developing and coordinating the efforts of international organizations, regional bodies, and NGOs, it may be possible to forestall the premature action of impatient and powerful states such as the United States in employing unilateral and bilateral approaches, as characterized by the IRFA, to address global problems.

300. Elizabeth Evatt, *Ensuring Effective Supervisory Procedures: The Need for Resources*, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING, *supra* note 176, at 461.

301. Crawford notes, for example, the increasing problems of: the corrosive effects of the backlog in state reporting; resource constraints; procedural issues; problems with the communication procedures and composition of committees; and limited political support from states. James Crawford, *The U.N. Human Rights Treaty System: A System in Crisis?*, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING, *supra* note 176, at 4–11.

