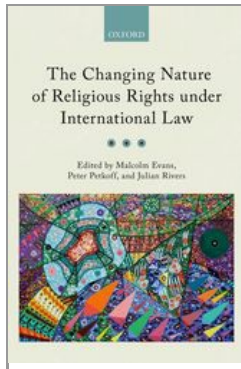


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Changing Nature of Religious Rights under International Law

Malcolm Evans, Peter Petkoff, and Julian Rivers

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Religious Exceptionalism, Religious Rights, and Public International Law

Peter Petkoff

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[–] Abstract and Keywords

The chapter explores the dynamics of the engagement of religious and non-religious legal cultures in the context of public international law by looking into three emerging models, represented by the engagement of the Holy See, the OIC, and the Russian Orthodox Church with international institutions and through the emergence of normative narratives which represent this engagement. While this engagement is important for identifying the positives and the shortcomings of such a dialogue between religious and non-religious legal cultures, such a dialogue should be seen as an opportunity to understand better these two legal cultures rather than as an opportunity to transform them in a completely different legal order. The challenges on each side are explored and it is proposed that any rapprochement would have to involve a realization that public international law may provide protection for freedom of religion or belief, but cannot turn international organizations into a missionary arena.

Keywords: OIC, Holy See, Russian Orthodox Church, Cairo Declaration, Defamation of religion, UN, Art 17

TFEU, Sharia

Emerging of Religious Legal Cultures within Public International Law since the 1981 Declaration

The presence and visibility of religious discourses in the international organizations is not new; at the same time something has changed radically since the 1981 Declaration, through the emergence of distinct religious perspectives on public international law articulated normatively and through the emergence of the notion of religious exceptionalism. The emergence of normative texts in Muslim as well as Christian contexts also represents a new level of engagement between religious and international organizations exploring the nature and purpose of international law, the scope and grammar of human rights, and the forms through which human rights can be protected.² This religious exceptionalism is articulated in different ways: from these different ways we can identify three models of religious exceptionalism, in this study represented by the Holy See, the Russian Orthodox Church (ROC), and the Organisation for Islamic Cooperation (OIC). The first is a sovereignty-driven religious exceptionalism of the Holy See, which is articulated through a very distinctive bilateralism and attracts plenty of critical attention due to the complex dual personality of the Holy See under public international law. The second model displays similar claims of exceptionalism, driven by close co-operation with the state in the case of the ROC and by their parallel foreign policy ambitions. The third model is driven by an appeal to greater Islamic political solidarity through protection of Islamic identity through an international organization (the OIC) and its activities within other international organizations. The three models outline an emergence of religious exceptionalism projected directly **(p.212)** (the Holy See), indirectly through the state (the ROC), and indirectly through an international organization (the OIC). The present chapter will examine the patterns of emergence of these three forms of religious exceptionalism, their impact on public international law, and how these patterns of religious exceptionalism could be interpreted from foreign policy perspectives.

The Grammar of Religious Exceptionalism in the Context of Public International Law

International relations scholars have raised awareness that their discipline, too fascinated with game theory, has lost its ability to engage with the impact of ideologies on international law and international relations.³ The unprecedented and until recently unthinkable emergence of religious exceptionalism in the context of international organizations, and the inability of international organizations to engage fully with these emerging trends, in many ways proves this point.

Exceptionalism is the idea that some states are not bound by the general unilateral imperative of public international law or by a particular aspect. A paradigm of exceptionalism has emerged by one strain of American foreign policy stemming from the notion that the 'US is not bound by international law, because as the only remaining superpower, with a powerful commitment to democracy and human rights, the US should not labour under many international legal restrictions that properly bind other, weaker and less benign states'.⁴

Such forms of exceptionalism are usually viewed by other states as largely hypocritical and

self-serving, but as Tasioulas reminds us, 'it would be an oversight to dismiss it out of hand as an important constraint on the legitimacy of public international law'.⁵

Tasioulas argues that it is conceivable to develop a legal theory that *some* states can properly claim an exemption without fragmenting international law with respect to *some* areas of international lawgiving, and gives as an example the question of whether democratic states, with a strong tradition of commitment to human rights, are bound by the international law of human rights;⁶ he also qualifies that any case for exceptionalism must reckon with at least the following three considerations:

- Human rights-related reasons that apply to a state are not only the reasons why it has to adhere to human rights morality itself, but also its reasons for promoting such adherence by other states. **(p.213)**
- Both bodies of international human rights law and domestic rights jurisprudence may enjoy legitimacy with regard to a given state.
- The state's extraterritorial record in addition to its domestic record.

In order to examine whether religious exceptionalism could be justified in terms of the elements identified by Tasioulas, this chapter will focus on parallel rights discourses which shape some of the most distinctive forms of religious exceptionalism justifications in terms of compliance with international law. The pluralism of ideas, beliefs, and values in an institutional context gradually emerges into a discourse about normative pluralism within international law and religious exceptionalism seems to have in some instances the ambition of reshaping customary international law and *jus cogens* and provides justifications for shaping and reshaping international law in terms of its general purpose and objectives. This is not a homogenous project and is represented by groups of states where the *raison d'être* of the political authority is deeply problematic from the point of view of the religious ideology which binds them together (OIC),⁷ states where religious and political authority supposedly justify each other's *raison d'être* (Russia), and states where political and religious authority are in some way two distinct functions of the same body (Holy See). What is normally argued in an attempt to justify political or religious exceptionalism is a complex assertion that there is a plurality of irreducibly distinct values; that these values can be ordered in different ways in the life of an individual or a community; and that sometimes there is no single ordering which is uniquely correct.⁸ Like other sceptical takes on international law, religious exceptionalism attends to the question whether international law embodies an ordering of values that is just one among a number of eligible orderings. In reality, religious exceptionalism's challenge is often clouded by a less productive way of giving substance to the repeated complaint that international law is 'parochial', specifically a western and increasingly secular set of ethical-political priorities. Religious exceptionalism in some sense makes a claim that there is a diversity of eligible ways of life, and that unless there are compelling reasons in particular cases for insisting on a legally established uniformity of standards, international law should not, without further justification, impose one of those ways of life, or elements of it, upon societies already committed to different ways of life. But religious exceptionalism also proposes that sometimes it might be necessary to exercise vigilance, embarking on the difficult task of distinguishing between the **(p.214)** particular and the universal *within* the domain of the objectively eligible in order to strengthen rather than fragment public

international law.⁹

Religious Exceptionalism in the Holy See's Engagement with Public International Law

Religious exceptionalism is represented par excellence by the engagement of the Holy See with human rights. This engagement is rather complex. On the one hand it represents a profound change in the thinking of the Church about the duties of the state to protect religious freedom;¹⁰ on the other it also highlights the reluctance of the Holy See to become a party to the International Covenant on Civil and Political Rights (ICCPR), ECHR, and other major human rights treaties.¹¹ At the same time, the human rights language dominates the Vatican–Israeli Fundamental Agreement and the right to private property (Article 10 of the concordat) powerfully asserted in the Universal Declaration of Human Rights (UDHR), and not so much in the ICCPR.¹² And yet the Holy See chooses to pursue this exceptionalist human rights engagement-based approach through concordats rather than through multilateralism. In this case the state does not sign a **(p.215)** multilateral treaty because multilateralism fails to fulfil an important function of the law and the role of a particular state in fulfilling particular duties.

The religious-political exceptionalism of the Holy See is driven by the purpose of protection: on the one hand, of the Vatican state from interference by the Italian state; on the other, of the Roman Catholic Church from any state interference. The Vatican City state, with no territory or population, was created precisely for this purpose—to protect the Church from the interference by the Italian state. This exceptionalism emerges with a reference to international law as a system which protects states from other states, and is driven by considerations of state security, rather than liberty and justice. This sovereignty-driven exceptionalism is guaranteed by the law of nations and a form of religious exceptionalism claims to fulfil commitments to justice and liberty through complex multilayered religious rules which bind the global Roman Catholic community and aim at arranging a religious exemption for the Roman Catholic Church from the national law through enforcement of the two Codes of Canon Law globally in the states with which the Holy See has signed bilateral treaties. On one level, these bilateral treaties protect *libertas ecclesiae* to exercise extraterritorial jurisdiction worldwide; on another, they highlight a point which makes the Holy See reluctant and yet capable of becoming a party to international law treaties: reluctant because the Holy See cannot technically exercise state duties in the absence of subjects and territory and because of the two-fold authority of the Holy See as a subject of international law, representing the Vatican City state before the international institutions on the one hand, and as the Supreme government of the Roman Catholic Church on the other.¹³ Because of these complex and obviously distinctive roles, the Holy See may be seen to adopt an exceptionalist position on human rights by endorsing human rights in the spirit of *Dignitatis Humanae* of Vatican II, and at the same time putting pressure on states rather than religions to fulfil their treaty-based state duties to protect them. The religious exceptionalism here represents two distinctive functions of the Holy See—a representative of a state without territory and population under international law, and a supreme government of a global church with its own concept of divine and positive law.

This is far from the only context and the only way in which the religious exceptionalism of the Holy See's engagement with public international law is projected in the context of the

international organizations.¹⁴ For the purposes of this **(p.216)** chapter I have chosen the concordatory legal approach to illustrate justification for such exceptionalism, combined with very contextual tailored terms of engagement with different cultures and different legal traditions.¹⁵

Religious Exceptionalism, Human Rights, and International Law: The Bills of Rights of the Russian Orthodox Church and the OIC

In addition to the human rights bilateralism of the Holy See, several 'rights talk' projects have recently attempted to develop new forms of religious exceptionalism.

These 'religious human rights bills' indicate a particular form of religious exceptionalism which seems to challenge/suggests challenges (to) the existing premises of public international law and international human rights as legal tools. Their manifestos usually present deeper and 'more cultured' human rights and appeals to reform the existing system and institutions of public international law.¹⁶ At the same time they also indicate a form of religious exceptionalism, which may be interpreted as a smokescreen, a way to justify non-compliance with international commitments by the states which endorse these emerging religious bills of rights.¹⁷ There is, however, despite the disingenuous rights scepticism, a genuine challenge to the international system for not taking into account the complexities of multiple, **(p.217)** often contested and co-existing, identities which demand different allegiances and which are not always easy to reconcile. New major players such as the Russian Orthodox Church have expanded their international impact through close collaboration with the Russian Ministry of Foreign Affairs in order to gain access to the international organizations, similar to that of the Holy See and OIC.¹⁸ The OIC, as an international organization organized along the lines of religious allegiances, has developed complex forms of engagement with international law and international organizations, which cannot simply be ignored but should be carefully studied as trends which can weaken but also strengthen the international human rights discourse. The most recent 'Orthodox Bill of Rights'¹⁹ developed by the Moscow Patriarchate and promoted by Russia's foreign delegations represents continuity from the Cairo Declaration of Human Rights in Islam (CDHRI)²⁰ and presents another challenge to the existing human rights' language and norms. And while we can brush aside such developments as inherently conservative projects which flag the limitations of the existing human rights language and engage with it as if international human rights are a competitive theology,²¹ one cannot simply deny the **(p.218)** impact of such projects on the development of new discourses within international law and the role such religious rights talk has in developing and sometimes legitimizing such discourses. Despite their irreconcilable theological divide, Christian and Muslim (both Shia and Sunni) organizations seem to be on the same page on a range of issues and represent a unified voice in the international arena. The areas in which this co-operation can be seen include defamation of religion;²² incitement to **(p.219)** religious hatred; Islamophobia, Christianophobia, and anti-Semitism; blasphemy; proselytism;²³ apostasy; gender and sexuality;²⁴ religious education;²⁵ and the rights of the child.²⁶ This is a very complex spectrum of voices, which sometimes speak in harmony and sometimes in dissonance in literary forms, making it different to identify the audience they are geared for. They engage with questions such as what it would mean from perspectives of a Sharia-driven cultural paradigm to engage with the idea of international law and human rights not simply through the lens of 'Islamic law' but as a broader complex and extremely fluid tradition within which

law and normativity are not all-embracing but play a particular part,²⁷ or whether Christian or Muslim engagement at a procedural level with concepts such as proportionality, subsidiarity, exceptionalism, and margin of appreciation should be welcomed as an opportunity to strengthen otherwise vague commitments to secular normative ideas. These are hard questions presented within the engagement between religious and secular perspectives on international law, driven by the idea that states have a freedom to decide for themselves regarding matters within the domain of human rights. And while it is plausible that, when it comes to at least some human rights matters, the ideas of a 'margin of appreciation', exceptionalism, or 'subsidiarity' can be defended in part in terms of the importance of communal self-determination, even if the cost of recognizing this discretion is an inferior **(p.220)** outcome with respect to conformity with human rights (depending on the nature of the human rights issue in question and the kind of authority claimed by international law) on the point at issue, such exceptionalism can only be justified if it strengthens rather than fragments the existing international law.²⁸

The following sections will explore some of the above paradigms of religious exceptionalism.

Sharia, Religious Exceptionalism, and Public International Law—the Cairo Declaration (CDHRI) and Beyond in the OIC Discourse

The key normative sources which illustrate the religious exceptionalism of Muslim normative engagement with the idea of public international law of OIC are the CDHRI²⁹, the Covenant on the Rights of the Child in Islam (CRCI),³⁰ and the Statute of the OIC IPHRC.³¹ It could be argued that OIC has made a step towards a regionalism driven by a context-sensitive affirmation and application of the legal tools for protection of universal human rights. Setting aside certain peculiarities of CRCI and provided that a coherent interpretation of the CRCI with the CRC and other international human rights instruments is sought systematically, it is conceivable that OIC member states would be able to achieve compliance with their international human rights obligations. In this context it is critical to develop approaches which could deliver the notion that regional and international instruments could be mutually supportive, and that clauses identified as problematic in the CRCI should be read in the light of provisions of international human rights treaties. In order to develop regionalization rather than fragmentation of international law, any religious exceptionalism construed on the back of the OIC texts could only be justified through a parallel reaffirmation of other treaty obligations.

Proposals by An-Na'im, statements by OIC delegations, and the jurisprudence of the African Commission of Human Rights³² show genuine attempts to deal with some of these issues. In particular, An-Na'im's approach seeks to explore the possibilities of cultural reinterpretation **(p.221)** and reconstruction through *internal cultural discourse and cross-cultural dialogue*, as a means to enhancing the universal legitimacy of human rights in order to forge universal cultural legitimacy and, through 'enlightened interpretations of cultural norms',³³ increase the extent to which existing and also emerging human rights standards are perceived to be justified, proper, and appropriate. Such approach is perceived as an opportunity to develop an improved protection of human rights in practice and a context where a discussion of Sharia law and human rights law is not reduced to the harmony–conflict dichotomy, but focuses on the potential for change.³⁴

'[B]ecause Shari'a is always the product of human interpretation of divine sources, any interpretation of it will reflect the human limitations of those who are interpreting it, despite the divinity of the sources they are working with. From this perspective Shari'a will always remain open to reinterpretation and evolution, in response to the constantly changing needs of Islamic societies and communities in different times and places.'³⁵

A number of OIC states are under considerable pressure to balance between their international commitments and particular constitutional dynamics which imply a particular religious-political establishment which is not necessarily public international law-compliant. OIC member states' statements often reflect both their international commitments and the difficulties in fulfilling them. Natan Lerner suggests that this explains the opposition to the language on change of religion that Saudi Arabia and other Muslim states proposed, particularly those states where Sharia was part of the positive law.³⁶

Most Islamic states have ratified the ICCPR, which contains the expression 'to adopt a religion' in Article 18.³⁷ The majority of these states have not entered reservations to this article even though this text has often been interpreted to imply a possibility to change religion.³⁸ This would suggest that there is perhaps not a unified and consistent position or no consistent practice of OIC member **(p.222)** states regarding freedom of religion or belief as far as treaty commitments are concerned.³⁹ Cismas argues that a systematic analysis of the reservations of Muslim states with regard to international human rights treaties, if read in association with treaty body reviews and dialogues with objecting states, reveals that the majority of OIC member states perceive Sharia as amendable and acknowledge that reform within the framework of Sharia is necessary if they are to comply fully with their international obligations.⁴⁰ The influence of the CDHRI on OIC membership, alongside the OIC's accountability and its obligation not to put obstacles to human rights compliance in the path of its member states, certainly sound promising. The substantive provisions of the CRCI focusing on its religious perspectives, as well as the stipulations that appear to strengthen human rights standards while responding to regional contexts, might be seen as potentially encouraging.⁴¹ An examination of the mandate, composition, and functioning of the OIC IPHRC suggests that this body could potentially influence positively the growth of human rights-compliant legal cultures in the OIC region.⁴² Those developments suggest that the CRCI and the OIC human rights body might create conditions in which the OIC could apply a form of regionalism that would make human rights more palatable in particular Islamic contexts, as long as this regionalism and the religious exceptionalism attached to it strengthens other international commitments and does not lead to debasement and to further fragmentation of international law.

If the OIC is to be seen as a kind of test case, we cannot deny that the development of Islamic perspectives on the rights of the child and a human rights commission are significant departures from the generality of the CDHRI, which would probably have been impossible without the CDHRI as a starting point. Deeply anchored to existing international commitments (sometimes more detailed than the existing international instruments), they could be seen as a complex process of Muslim soul-searching within the complex landscape of international law. And while there is virtually nothing in place in terms of monitoring mechanisms for the implementation of these Muslim rights instruments, there is an encouraging blueprint which is different from the simplistic approach of the CDHRI, which

proposes a religious exceptionalism justification in almost every area that could be seen as a departure from Sharia.⁴³ We cannot follow these developments with too much enthusiasm, but we must not lose hope that such developments may represent a potential for a religious regionalism which would contextualize and strengthen human rights rather than weaken them through religious exceptionalism.⁴⁴ Some developments are certainly cause for concern, but perhaps they are also **(p.223)** an opportunity to redress the shortcomings. Any resemblance to a monitoring mechanism within the OIC really focuses on Islamophobia towards the Muslim diaspora, and has not attempted to monitor OIC member states' compliance with OIC commitments.⁴⁵ A very strong commitment to non-violence expressed in the Cairo Declaration has not stopped killings on a mass scale in a number of OIC member states or, in the case of IS, by forces financially supported but completely out of control of the OIC member states. This example suggests that these projects may actually be developing regionalism and religious exceptionalism with a focus more on the security of the member states rather than the justice delivered to their subjects through rights protection. It seems to be a project that binds together very different Muslim countries, often with seemingly irreconcilable differences, to justify their departure from international commitments through exceptionalism, amplified as religious exceptionalism.

Russia's Commonwealth and the Russian Orthodox 'Bill of Rights'

A similar take on exceptionalism, though via a different route, is presented in the Russian Federation's take on human rights and international law. Viewing international law as a mix of cultural relativism and proceduralism, Russia has willingly endorsed the Orthodox Bill of Rights as a non-western construct which facilitates the articulation of Russia's role as a regional actor on the one hand and its role as a major international player through its membership of the UN Security Council on the other.

As a regional player, Russia has pursued a complex foreign policy towards extending its influence to the 'near abroad'—broadly speaking, the former Soviet bloc—and the Russian diaspora, and to the recreation of a Russian commonwealth (*Ruskij mir*). In this context the Orthodox 'Bill of Rights' is the element which binds together the Russian commonwealth along the lines of traditional communitarian values and a close relationship between religion and the state in the protection and furthering of such values. In relation to the global world, the Orthodox 'Bill of Rights'⁴⁶ presents an anti-western alternative to a *Kulturkampf* focused on 'more substantial' rights concepts and protected from destructive foreign influences. The Russian delegations do not simply support the Orthodox 'Bill **(p.224)** of Rights' in the international arena as a form of amusing entertainment representing a dialogue between civilizations: Orthodox culture is deeply embedded in the Russian doctrine of state sovereignty and there are several National Security Doctrines adopted by Putin and Medvedev which stipulate the protection of traditional spirituality and combating of foreign hostile forms of spirituality as part of the national security agenda of the Russian state.⁴⁷ This is, however, far from a simple reconstruction of Tsarist Russia and the symphony of powers. Through the Orthodox Bill of Rights Russia justifies its sceptical approach to human rights protection in terms of existing international commitments in order to assert and hammer out its evolving understanding of international law as a system which protects sovereign states from one another, rather than a system which champions globalization of democracy and human rights. In Russia's case the political exceptionalism asserted through its role on the Security Council is backed by a religious exceptionalism which promotes and protects rights,

but a different kind of rights.

It is not an exaggeration to compare this approach to a 'near abroad' resurrection of the League of Nations system within Russia's sphere of influence. If we follow very closely the role of religion in Russia's foreign policy we will notice that, at least until the annexation of Crimea, the Russian Orthodox Church has mirrored the foreign policy of the Russian state on almost every level, and has often built bridges which the Russian state was unable to build (for example with Georgia, Belarus, and Ukraine until 2013). It is interesting to ponder whether this collaboration will be sustainable after the Crimean annexation, with a Russian Orthodox Church potentially weakened by the potential loss of its canonical jurisdiction in Ukraine and possibly having to reconsider whether 'symphony' with Putin's Russia is such a good idea after all. In terms of a specific case study, the present co-operation certainly forges the idea of a *Kulturkampf* which operates differently from the rest of the world, and where human rights and international law are perceived through the lens of the forms of protection of this *Kulturkampf*.

In the context of this joint foreign policy project both state and ecclesiastical diplomacies work together to achieve a common purpose,⁴⁸ and this is reflected in the active engagement of the Moscow Patriarchate in bilateral engagements with the CIS countries within what is considered by the Putin administration to be Russia's Commonwealth, as well as in the context of the international organizations.⁴⁹ In this process the Moscow Patriarchate is often seen as a soft diplomatic power in areas within the Russian Commonwealth which the Russian state cannot yet pursue. In the context of the Middle East, Russia's hard diplomatic power often pursues agendas of less importance for the Russian state but of direct importance **(p.225)** for missionary expansion of the Russian Orthodox Church, which becomes effectively an arm of the state's foreign policy and builds bridges between the Christian Motherland and its Christian diasporas and acts almost as a Russian protectorate of Christian minorities worldwide.⁵⁰ The exercise of sovereignty is closely related with the protection of cultural and spiritual values, which are seen as the rock of the nation. The state both promotes these values and protects them from what might be considered an alien and, therefore, hostile culture and spirituality.

In terms of foreign policy and engagement with public international law, Russia has developed an exceptionalism based on a complex interplay between sovereignty, culture, and spirituality. On one level culture is seen not as plural but as foundational, shaping the points of rapprochement with a plurality of cultures. Like Russia's foreign policy, this rapprochement with other cultures is multi-vectorial, but Russia's culture and spirituality is not seen as plural. The protection of Russia's culture and identity is closely linked with Russia's interpretation of the *raison d'être* of public international law. In order to understand Russia's 'religious exceptionalism' through the endorsement of an Orthodox 'Bill of Rights' we need to take account of Russian perceptions of order at global, regional, and domestic state levels, and how these understandings of order interact. In pursuing the correlation between Russia's rights scepticism and its international law proceduralism, it might be argued that the roots of these trends could be identified at the point at which Russia, along with other major European powers, became alarmed by the expansion of the geographic scope of western military interventions. This reinforced Moscow's persistent inclination to take refuge in the UN Charter's legal framework and to highlight its constraints

on the use of force.⁵¹ This was a strategy aimed at presenting Russia as a stabilizing power within the context of weakening international institutions and in a volatile international environment. This stabilizing role in a global context also implied a novel, distinctively Russian, and distinctively non-western approach to human rights in particular and to international law in general, and has also reflected more fundamental differences about who establishes the normative agenda in the first place.⁵² Such an approach to public international law presents a fundamental tension between the northern and southern perspectives on order and justice in the international system. 'While the North is primarily interested in justice within states and order among them, the South is basically committed to order within states and justice among them.'⁵³ **(p.226)** Russia's approach to international law represents a departure from a human rights approach that views individuals as the subjects of international law and the role of international law as the protection of human rights. Such an approach foresees that international law essentially regulates the competition of states, constrains western power, and provides a discursive shield for the Russian state, and is not aimed primarily at the protection of human beings. In this context international legitimacy is conceived as conduct which complies with a legally structured constitutional order at the global level, as expressed through the UN Charter system. Compliance in this context requires a focus on procedural rules, rather than basic values.⁵⁴ This now also reflects the making of rights language which the Russian delegations in alliance with the Russian Orthodox Church feel empowered to develop in order to strengthen their sense of exceptionalism combined with an effort to sustain a dual normative order, regional and global. Russia's re-conceptualizing of international law through a discretionary—a pick-and-mix—approach has in general been unconvincing to other states. It has been seen as a form of a fragmentation of public international law and one of the main concerns about this approach has been that if expressed too frequently or blatantly by the Russian delegations it would undermine the normative and legal regulation on which Russia relies in the international system at large.⁵⁵

It is fair to say that, besides Russia, many other pluralist-minded states have prioritized their domestic political structure and, indeed, regime security. Russian diplomats are not the only ones to expose broader inconsistencies between western normative legal discourse and conduct. It is noteworthy that the salience of domestic political values has had particular influence on Chinese and American compliance with various international norms.⁵⁶ Mazower reminds us that even US scholars now provide explanations for why states may opt for multilateral rather than unilateral policies on the basis of 'preferences' among bargaining actors, rather than by analysing ideas or philosophies of multilateralism in their ideological or cultural contexts.⁵⁷ A political scientist appointed director of policy planning in the Obama administration State Department has suggested that transnational contacts across governments and NGOs—not the UN—constitute the real 'new world order', and even looks forward to a 'global rule of law without centralized global institutions'.⁵⁸

The 'war on terror' provided scope for more flexible interpretations of norms and international law and a substantial international friction over rules and rule-making largely driven by the exceptionalism in the global policy outlook **(p.227)** of the US. Russian discourse and policy displayed its own form of exceptionalism which made it easier for Russia to take refuge in legalistic claims in global diplomacy. Until the annexation of Crimea,

multilateral religious exceptionalism in the global arena was used by Russia to play down the exercise of political exceptionalism.

Religious Exceptionalism and Engagement with the Idea of the Rule of Law

The above developments present an evolving picture of religious rights under international law shaped by an intensified 'conversational' engagement between religious and secular legal cultures. The EU Guidelines on the promotion and protection of freedom of religion or belief, and a number of guidelines produced by the OSCE,⁵⁹ are also a positive development in religious and secular legal cultures' methods of interaction. One of the great culminations of this conversation in the context of EU law is the notion of horizontal subsidiarity embedded in Article 17 of Treaty on the Functioning of the European Union (TFEU), which endorses outright such conversation.⁶⁰ Let us not forget how long this has taken! There is an increased visibility of religious organizations in an international law context and a connecting of individual with corporate religious rights, described by some authors as religious actors,⁶¹ which is shaping in many new directions the ways in which international organizations speak about religion, religious rights, and freedom of religion or belief, as well as religion and foreign policy and religion and development. This emerging and evolving narrative does not always get things right and it is fair to say that this often applies to both sides of the conversation. This only shows that taking religious rights and the very notion of religion on board in terms of a political commitment is as challenging for the secular legal culture as it is for the emerging religious legal culture(s) narrative(s). The saga regarding 'defamation of religion' discourse within a UN context leading to (and to some extent including in this discourse) Resolution 1618 only proves the point that there is no wide international consensus about the importance, or at least about the scope, of the framework of conversation regarding freedom of religion (**p.228**) or belief and the impact it has on other areas of international law and foreign policy. The broader margin of appreciation in relation to Article 9 ECHR in the Strasbourg jurisprudence; the placing of freedom of religion or belief and religion and foreign policy as separate priorities of the EU External Action Service, the UK Foreign and Commonwealth Office, and the US State Department (but not the Canadian Foreign Ministry);⁶² the merging of state and ecclesiastical diplomacy in the Russian Ministry of Foreign Affairs and the Holy See only mark a trajectory of new trends in international law which are shaped through a very complex mosaic of interactions between diplomats, religious leaders, and international lawyers. In this context, religious perspectives on international law must not only be cause for concern that they will debase and weaken the existing legal instruments. In fact, engaging with the emergence of these parallel rights talks will help us identify our own limitations in terms of the ways in which we engage with and expect particular rights cultures to come to terms with the idea of international law and international human rights as overarching normative ideas.

This is not simply a problem of cultural diversity. All parallel rights talk projects present a similar challenge about rights talk itself, and without the articulation of these parallel rights talk projects the fundamental challenge would have been misconceived/misconstrued or disguised as a mere cultural peculiarity. What the emerging religious rights talk projects present is a profound failure (on the part of the 'religious exceptionalists') to address the central question of the relationship of religious organizations and their theology with the very idea of the rule of law promulgated by political communities and to political communities on both a national and international level. This relationship is not unproblematic, and ever

was, for many of the theologies emerging from within Christianity, Islam, and Judaism. It stems not from questions about particular qualities of particular laws but from unease about the legitimacy of any man-made law. And yet (perhaps ironically) all major brands of Judaism, Christianity, and Islam have had to find ways to engage with man-made laws as legal tools. The emerging religious 'rights talk' projects, in this sense, could be an opportunity to flag this challenge and enable religious voices in the international organizations to identify a central deficiency in their rights discourse: that they cannot isolate rights as a question of theology without addressing the question of the relationship between theology and law with which it co-exists and to which it correlates. Without doing so, religious 'rights talk' will continue to consist of selective, nondescript, and not particularly eventful narratives which are difficult to follow textually and without clearly defined audiences. Most importantly, such discourses will simply debase the message of the religious organizations which project them, and their well-intended message may simply become what many suspect this message to be in the first place—a veil which serves as a religious exceptionalist disguise for states not to fulfil their international obligations.

(p.229) Religious organizations experienced in engaging with international law and international organizations have already found out that in order to have an impact on the work of international organizations, they have to operate within the established channels, intellectual tools, and mechanisms. Esoteric language does not win support from international organizations. Engaging with the question of what their relationship with the idea of the rule of law is will enable religious legal cultures to challenge themselves to understand and connect with international law and international human rights as legal tools, with their purpose and their functions, without necessarily having to engage with them as competitive theology. In such a context, the presence or absence of a theological concept of the private sphere or the human person will help us understand why particular religious legal cultures struggle to calibrate their own normative machinery to accommodate a powerful assertion of individual human rights. Similarly, such rapprochement may help to understand why religious legal cultures with fairly complex rights language find legal rights talk a bit pedestrian, and sometimes commit to bilateral rather than solidarist approaches to international law. The very fact that the two legal cultures encounter one another is an extremely positive phenomenon, not because the two legal cultures know what to say to each other, but because they are talking to one another and getting accustomed to their different normative languages. What this conversation represents is the fact that both cultures become powerful factors in the international arena, so that we can no longer ignore it. Religious cultures can no longer ignore the existence of international law as something which could be dismissed as culturally irrelevant and must gradually learn to engage with it and use it. Secular legal systems can no longer ignore the prominence of religious legal cultures in a secular context. The emerging religious 'rights talk' often sounds incomprehensible, because it is exactly what it is—a cautious exploratory attempt to mimic 'rights talk' which tries to accommodate legal perspectives without compromising religious perspectives on a new stage and in front of a different audience. Similarly, one could raise eyebrows when one reads intellectually ugly resolutions, statements, and international commitments which are supposed to demonstrate a genuine commitment on behalf of the secular legal culture to the important place of religion and religious freedom and to the beauty of the dialogue between civilizations. This must not surprise us: the secular legal

discourse on religion shares a similar inexperience to that of religious discourse on international law. It is a cautious, exploratory exercise to become familiar with an unfamiliar grammar of ideas and to translate it within comfortable constructions of expression. Farr has captured this deficiency in his explorations of the reasons for diplomatic deficit in the area of religion and foreign policy, and relates it to the ways in which diplomats are trained by traditional schools of foreign policy.⁶³

The same statement may apply to the cautious religious voices which engage with questions of international law. Their rights critique is often trivial and disconnected from the nature and purpose of international law and human rights as legal tools. At the same time, any intelligent religious perspectives which present sceptical perspectives on international human rights and international law (without **(p.230)** undermining their status as legal tools)⁶⁴ are obscured by the barrage of forms of cultural relativism, anti-colonialism, anti-westernism, and pseudo-triumphalism.

And yet in this context there are signs that the apologetics of these religious–secular legal cultures do transform perceptions across the divide in more than one way. In terms of future directions, it will be interesting to see and to follow up on how a universal commitment to human rights develops in close correlation with concepts such as true regionalism, exceptionalism, subsidiarity, and a margin of appreciation in relation to context-specific perspectives on international law which try to balance religious and secular intellectual trends by strengthening rather than weakening religious endorsement of human rights. The development of a sophisticated concept of exceptionalism which is not simply self-referential could hopefully emerge as a dialogue across the legal cultural divide. After all, a concept such as that of subsidiarity emerged for the first time in the Papal encyclicals, and shaped the decision-making of the Roman Catholic Church while also influencing the legal culture of EU law.⁶⁵ An interesting project would be to examine how such concepts translate across the cultural legal divide and strengthen both religious and secular understanding and commitment to such concepts. Similarly, it will be extremely important to identify those concepts which were launched **(p.231)** and failed to translate across, and the reasons why. The increased visibility of religious and non-religious legal discourses and their increased engagement with one another serves to show that a monopoly on perceptions about international law no longer rests with the victors, and that the emergence of intelligible religious legal discourses may redeem public international law and its organizations from accusations of weakness, incoherence, and imperialism.

Jaeger's chapter on the Holy See gives us an example of how religious perspectives of religious freedom projected by a conservative global religious organization with its own system of divine and positive law may project the idea of religious freedom by endorsing it and by putting pressure on the states to pursue and implement it, since the states do not have the monopoly on the truth that religious organizations may have. This is one example which can serve as a model for many OIC states and organizations, such as the Russian Orthodox Church—organized religions cannot easily implement religious freedom as recognized by all international treaties, but states can and must do so.

The above examples indicate that while there might be some hope for the Holy See, there is very little at this stage in Russia's and the OIC's approaches to exceptionalism which could

live up to the taxonomy of Tasioulas, which could be used as a measure for justifying forms of exceptionalism in international law. Both approaches have a long way to go in order to achieve the kind of regionalism of international law exemplified by the Council of Europe (CoE), the African, or even the Inter-American systems. At the same time, we cannot remain intellectually insincere and pretend that the two cultures have not become more intertwined than we are prepared to admit. And just as the UDHR's time was right to channel the emerging energy into a groundbreaking text, and the 1981 Declaration produced an important transitional compromise, it is now becoming more critical than ever before to capture the momentum of intellectual engagement about international law, foreign policy, and freedom of religion or belief. We must not be too optimistic about the projects which emerge on either side in order to find such a narrative. They often sound either too politically correct or too self-referential—or too defensive, which is to be expected, at least to some extent. One of the great troubles with any discourse about different legal cultures is the distinction between religion and culture, which could be described as a wrong dichotomy. In fact, a discussion about a dialogue between notions of civilization and culture is far more appropriate in this instance. Rather than religion and culture or religious and secular cultures, a distinction between culture and civilization, between Rome and Athens, works better when we speak about the encounters between religious and secular legal cultures. This dichotomy within which we still operate represents the classical distinction between a cultivated humanity and a humanity bound by its civil legal boundaries. The former is bound together as a whole and fulfils itself in its togetherness through its location, political, religious, and cultural institutions. Like cultivated, fertile soil, it is very productive, but its ingredients cannot be deconstructed or taken apart without deconstructing the whole and reducing it to nothing. Hence, the stranger was nobody in Athens, and to be turned into a stranger in exile was considered to be one of the greatest **(p.232)** punishments. Unsurprisingly, the term for culture also comes from the verb *colo*, to cultivate the ground. This model is commonly compared and opposed to civilization: a civic project which probably begins with the legacy of Alexander the Great and finds its fulfilment in the Roman model of *civitas* which binds individuals and cultures through the framework of Roman law. This distinction between culture and civilization therefore becomes far more important, and the role religion plays in each model is simply different. The dilemma we have is actually not one of how we relate secular and religious legal cultures, but of how a civilization driven by the idea of the rule of law can be taken on board without absorbing cultures which are not driven by the idea of the rule of law, or rather cultures which do not view the rule of law in its positive dimension as a constitutive factor of what makes them a community of memory. Empirical scholars such as Simmons have already pursued the impact of majority rule of law-driven regimes; her research has argued that the participation of liberal democratic states in an international legal regime of human rights could be transformative and tends to foster compliance with human rights in other (non-liberal democratic) states.⁶⁶

What are the possible routes through which public international law could take on board the parallel voices of parallel legal culture without cancelling one or the other? There are already existing premises which indicate the terms that would enable secular and religious legal cultures to calibrate each other's expectations about the margins of religious exceptionalism. The most likely beneficiaries of exceptionalism are likely to be poor, underdeveloped, or in

some other way disadvantaged states because of the specially onerous burdens that conformity with international human rights law would entail for such states, which may include knowledge, capacity, grammar of political and legal consent, etc. This raises the possibility that societies with a very different cultural orientation and history may be so deeply mired in certain errors and misconceptions that they are seriously impaired in their capacity to grasp the legitimacy of much beyond perhaps a minimal core of international human rights law. This is not to deny that these societies are nonetheless bound by human rights commitments, although their historically induced misconceptions may generate some excuse (not justification) for non-compliance with international law. In such a context international human rights law may lack legitimacy with respect to these societies because of their historical experience of international law or of states claiming to act in its name. In these cases international law legitimacy will have to be gained or, where it has been lost, regained through engaging exchanges which would make these societies more committed to complex international legal frameworks. A more nuanced conception of exceptionalism emerging from the dialogue of religions and non-religious legal cultures and at the same time reaffirming the existing international legal **(p.233)** order may be the much needed narrative which would strengthen rather than weaken the human rights proliferation in a religious context and gain the much needed religious endorsement of human rights and international law, by making the religious voices in the context of the international organizations more coherent, less parochial, and less defensive.

It is conceivable to come to the conclusion that certain uncomfortable conclusions might have to be drawn when one speaks of legal and religious perspectives about international law and human rights. The longer one speaks about these through the lenses of two different normative orders, the clearer it is that these two normative orders are simply too different to reconcile except as parallel orders with very distinctive functions. Unless a conversation between these two distinct legal cultures happens, the awareness of their profound differences cannot be outlined in a way which would be robust enough to make each culture aware of these differences. Without such a dialogue, religious perspectives of international law and human rights may never acknowledge that their co-existence with the non-religious legal order is by default historically and conceptually anomalous. For example, too radical rapprochement with secular legal culture can make religious legal culture potentially un-eschatological and idolatrous in its excessive efforts to participate in any number of social engineering projects, and could debase theologies in the effort to fix a broken world through legal means. In this sense, an engagement with the system of international law from religious perspectives may have to come about through theology and mission and prayer for political authorities, and not through the translation of international law into theology and mission. It is conceivable that there could be different concepts of law, as Burnside and Jackson remind us in their reflection on the nature of Biblical law in comparison with our modern understanding of the rule of law.⁶⁷ It is possible that the emerging religious perspectives of international law are attempting to speak of concepts of law which are far less preoccupied with enforcement and far more preoccupied with speaking about law in the sense that Biblical law does—as a sacred landscape, a manifesto of normative community of memory through which this community delimits its cultural boundaries. This concept of law is very different from the concept of law represented by public international law. If this is so, it presents a challenge to the secular religious culture

not to put too much pressure on religious legal cultures to reinvent themselves, and to find ways to embrace an idea about the rule of law which is not and cannot be reconciled with the religious idea of rule of law. The projects involving modernization of canon law, Jewish law, or Islamic law may be miscalibrated: they may represent investment in efforts to make these laws into something they were never meant to be. The temptation to reconcile different normative cultures always carries the caveat that any such project effectively interprets culture *dia-bolically* instead of *sym-bolically*, by deconstructing the culture(s) it aims to reconcile. *Dia-bolical* (from Greek (**p.234**) *throwing apart*), in theological terms, means reconstructing cultural data wrongly by separating what belongs together. It is a divorce at ontological, philosophical, theological, and social levels. On the contrary, symbolical interpretation from the Greek word 'throwing together', attempts reconstruct cultural data rightly by putting together factors which at first seem incompatible.⁶⁸ There has been too much 'throwing apart' and very little 'putting together' in the process of constituting a dialogue between the secular and religious legal cultures. The sooner this is realized, the easier it will be for religious legal perspectives to embrace international law as a force for good without having to struggle to engage with it theologically. Similarly, non-religious legal cultures are likely to do less preaching about the human rights-compliant transformation of religious legal cultures if they come to the realization that religious perspectives are more likely to endorse human rights and international law not because they have to be theologically compatible, but rather because they provide the minimum safeguards for religious organizations to be able to pursue their mission without undue state interference.

Notes:

- (1) Lecturer in Media Law and Intellectual Property at Brunel Law School, Director of Religion, Law and International Relations Programme at the Centre for Christianity and Culture, Regent's Park College, Oxford and a Managing Editor of the Oxford Journal of Law and Religion.
- (2) For further discussion of pluralism, see J Tasioulas, 'Parochialism and the Legitimacy of International Law' in Mortimer NS Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press 2012).
- (3) Mark Mazower, *'No Enchanted Palace.' The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009).
- (4) Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005).
- (5) John Tasioulas, 'Human Rights, Legitimacy, and International Law' (2013) 58(1) Am J Jurisprudence 19.
- (6) Tasioulas (n 5) 23.
- (7) For example, while Shia political theology could construct a theologically coherent concept of political authority, the four schools of law and Sunni theology are divided about the theological justification of any political authority. See A O'Mahony, W Peterburs, and MA Shomali, *A Catholic-Shi'a Engagement: Faith and Reason in Theory and Practice* (Melisende

2011); A O'Mahony, W Peterburs, and MA Shomali, *Catholics and Shi'a in Dialogue: Studies in Theology and Spirituality* (Melisende 2011); A O'Mahony, TOSB Wright, and MA Shomali, *A Catholic-Shi'a Dialogue: Ethics in Today's Society* (Melisende 2011). See also how the theme of the possibility of a political idolatry in the context of Sunni Islam emerges through the Muslim-Christian engagement in PS Fiddes, 'The Root of Religious Freedom: Interpreting Some Muslim and Christian Sacred Texts' (2012) 1 OJLR 169.

(8) Tasioulas (n 5).

(9) Tasioulas (n 5) 20.

(10) For a detailed account of this change see D Jaeger's chapter in this book. See also WL Portier, 'Theology of Manners as Theology of Containment: John Courtney Murray and "Dignitatis Humanae" Forty Years After' (2006) US Catholic Historian 83; J Sweeney, 'Catholicism and Freedom: Dignitatis Humanae—the Text and its Reception' (2006) Reading Religion in Context 17; A de Dreuzy, "'Dignitatis Humanae" as an Encounter between Two "Towering Theologians": John Courtney Murray, SJ, and Yves Congar, OP' (2006) US Catholic Historian 33; TF Farr, 'Religious Realism in Foreign Policy: Lessons from Vatican II' 3(4) Rev Faith & Intl Affairs 25; KR Craycraft, *Religion as Moral Duty and Civic Right: Dignitatis Humanae on Religious Liberty* (Rowman & Littlefield 1995); TF Farr, 'Dignitatis Humanae and Religious Freedom in American Foreign Policy: A Practitioner's Perspective', in Kenneth D Whitehead (ed), *After 40 Years: Vatican Council II's Diverse Legacy* (St Augustine's Press 2007) 237; KJ Hasson, 'Religious Liberty and Human Dignity: A Tale of Two Declarations' (2003) 27 Harv JL & Pub Poly 81.

(11) The Convention of the Rights of the Child is in a way a good example of why this might be the case. The latest UN Committee Report pretty much proposes that the Holy See would have to rewrite the entire social teaching of the Catholic Church and the Code of Canon Law 1983 (but not the CCEO) in order to be Convention compliant. See 'UN Committee on the Rights of the Child. Concluding observations on the second periodic report of the Holy See', for example CRC/C/VAT/CO/2.

(12)

Article 1 § 1. The State of Israel, recalling its Declaration of Independence, affirms its continuing commitment to uphold and observe the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it is a party. § 2. The Holy See, recalling the Declaration on Religious Freedom of the Second Vatican Ecumenical Council, *Dignitatis humanae*, affirms the Catholic Church's commitment to uphold the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it is a party.

Conventio Inter Apostolicam Sedem Atque Israelis Statum Fundamental Agreement Between The Holy See And The State Of Israel:

<http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19931230_santa-sede-israele_en.html> accessed 5 November 2014.

(13) Y Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Columbia L Rev 1835; HE Cardinale, *The Holy See and the International Order* (Smythe 1976); HF Cumbo, 'The Holy See and International Law' (1948) Intl LQ 603; MN Bathon, 'The Atypical International Status of the Holy See' (2001) 34 Vand J Transnatl L 597; F Cammeo, G Dalla Torre, and A Sodano, *Ordinamento giuridico dello Stato della Città del Vaticano* (Libreria editrice vaticana 2002); W Hilgeman, G Corbellini, and Pontificia Universitas Lateranensis. Institutum utriusque iuris, *L'ordinamento giuridico dello Stato della Città del Vaticano: origine ed evoluzione* (Lateran University Press, 2012); A Sarais and F Coccopalmerio, *La cittadinanza vaticana* (Città del Vaticano: Libreria editrice vaticana 2012); Heribert Franz Köck, *Die völkerrechtliche Stellung des Heiligen Stuhls: dargestellt an seinen Beziehungen zu Staaten und internationalen Organisationen* (Duncker & Humblot 1975).

(14) P Petkoff, 'Legal Perspectives and Religious Perspectives of Religious Rights under International Law in the Vatican Concordats (1963–2004)' (2007) 158 Law & Just-Christian L Rev 30. A good overview of the Holy See's bilateralism can also be found in D Némec, *Concordat Agreements between the Holy See and the Post-Communist Countries (1990–2010)* (Peeters 2012).

(15) On the post-Vatican II Augustinian approach to concordats via the vision of the Church as a pilgrim on a journey see Petkoff (n 14).

(16) Compare the Preamble of the Cairo Declaration:

Reaffirming the civilizing and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization and ARTICLE 10: Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism with the *Orthodox 'Bill of Rights'*:

Every individual is endowed by God with dignity and freedom. The use of this freedom for evil purposes however will inevitably lead to the derogation of one's own dignity and humiliation of the dignity of others. A society should establish mechanisms restoring harmony between human dignity and freedom. In social life, the concept of human rights and morality can and must serve this purpose. At the same time these two notions are bound up at least by the fact that morality, that is, the ideas of sin and virtue, always precede law, which has actually arisen from these ideas. That is why any erosion of morality will ultimately lead to the erosion of legality. The concept of human rights has undergone a long historical evolution and precisely for this reason cannot be made absolute in their today's understanding. It is necessary to give a clear definition to Christian values with which human rights should be harmonized. III. Human rights in Christian worldview and in the life of society.

The Russian Orthodox Church's Basic Teaching on Human Dignity, Freedom and Rights:

<<https://mospat.ru/en/documents/dignity-freedom-rights/>> accessed 5 November 2014.

(17) See Article 24 of Cairo Declaration: 'All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah'. See also Article 25, which stipulates that '[t]he Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration', as well as the concluding section of III 5 of the Orthodox 'Bill of Rights':

From the point of view of the Orthodox Church the political and legal institution of human rights can promote the good goals of protecting human dignity and contribute to the spiritual and ethical development of the personality. To make it possible the implementation of human rights should not come into conflict with God-established moral norms and traditional morality based on them. One's human rights cannot be set against the values and interests of one's homeland, community and family. The exercise of human rights should not be used to justify any encroachment on religious holy symbols things, cultural values and the identity of a nation. Human rights cannot be used as a pretext for inflicting irretrievable damage on nature.

These texts do suggest a possibility of a derogation from any international commitments which may be perceived as contrary to the precepts of Islamic law or Orthodox theology. This appears to be a very different approach from *Dignitatis Humanae*, which seems to have achieved a breakthrough in the separation of the endorsement of human rights by the Roman Catholic Church and the placing of the responsibility to protect human rights on states rather than on organized religions. Both the Cairo Declaration and the Orthodox 'Bill of Rights' seem to do the opposite—they place a responsibility upon the states to protect doctrinal orthodoxy.

(18) According to Foreign Minister S Lavrov: Russia's MOFA maintains the closest ties with the Russian Orthodox Church, which is the church most Russians belong to. Our cooperation is one of the long-time traditions of domestic diplomacy. We value the influence Orthodoxy had on the formation of our statehood, the shaping of culture and molding of the consciousness of Russia's multi-ethnic people. We also commend the role played by the Russian Orthodox Church in the life of present-day Russia as one of the consolidating forces of Russian society.

Sergei Lavrov, 'Diplomacy Needs a Moral Foundation', *Diplomat*, September 2008, at 3–4.

(19) *The Russian Orthodox Church's Basic Teaching on Human Dignity, Freedom and Rights* (n 16). This document should be studied in connection with *The Russian Orthodox Church's Approach to Willful Public Blasphemy and Slander against the Church*:

<<https://mospat.ru/en/documents/otnoshenie-russkojj-pravoslavnoj-cerkvi-k-namerennomu-publicnomu-bogokhulstvu-i-klevete-v-adres-cerkvi/>> accessed 5 November 2014 and *The Basis of the Social Concept of the Russian Orthodox Church*: <<https://mospat.ru/en/documents/social-concepts/>> accessed 5 November 2014.

(20) 'The Cairo Declaration On Human Rights In Islam': <<http://www.oic-oci.org/english/article/human.htm>> accessed 5 November 2014.

(21) Compare particularly the CDHRI Preamble:

Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible—and the Ummah collectively responsible—for their safeguard

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and the Preamble of the Orthodox 'Bill of Rights':

In the world today there is a widespread conviction that the human rights institution in itself can promote in the best possible way the development of human personality and social organization. At the same time, human rights protection is often used as a plea to realize ideas which in essence radically disagree with Christian teaching. Christians have found themselves in a situation where public and social structures can force and often have already forced them to think and act contrary to God's commandments, thus obstructing their way towards the most important goal in human life, which is deliverance from sin and finding salvation...

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(this should be read in connection with chapter 16 of the Social Teaching of the Russian Orthodox Church, as well as in connection with chapter XVI. 4 of ROC's Social Doctrine):

The contemporary international legal system is based on the priority given to the interests of the earthly life of man and human communities over religious values (especially in those cases when the former and the latter come into conflict). This priority is sealed in the national legislation of many countries. It is often built in the principles regulating various activities of the governmental bodies, public educational system, etc. Many influential public mechanisms use the same principle in their open confrontation with faith and the Church, aimed to oust them from public life. These manifestations create a general picture of the secularisation of public and social life. While respecting the worldview of non-religious people and their right to influence social processes, the Church cannot favour a world order that puts in the centre of everything the human personality darkened by sin. This is why, invariably open to co-operation with people of non-religious convictions, the Church seeks to assert Christian values in the process of decision-making on the most important public issues both on national and international levels. She strives for the recognition of the legality of religious worldview as a basis for socially significant action (including those taken by state) and as an essential factor which should influence the development (amendment) of international law and the work of international organisations.

(22) For an overview of the evolution of defamation of religions debates see the Policy Focus of the USCIRF: <<http://www.uscirf.gov/issues/defamation-of-religions>> accessed 5

November 2014. ROC, the Holy See, and OIC frequently supported the concept of defamation of religion in the context of the international organizations. The ROC and OIC approaches can be traced through Article 22 CDHRI. The *ROC Approach to Blasphemy* can be found at <<https://mospat.ru/en/documents/otnoshenie-russkojj-pravoslavnoj-cerkvi-k-namerennomu-publicnomu-bogokhulstvu-i-klevete-v-adres-cerkvi/>> accessed 5 November 2014. A number of defamation of religion resolutions sponsored by OIC were sponsored before the UN and were adopted by the HRC Commission on Human Rights Res 2000/84, Defamation of Religions, 67th mtg, UN Doc E/CN4/RES/2000/84 (26 April 2000); Commission on Human Rights Res 2001/4, Combating Defamation of Religions as a Means to Promote Human Rights, Social Harmony and Religious and Cultural Diversity, 61st mtg, UN Doc E/CN4/Res/2001/4 (18 April 2001); Commission on Human Rights Res 2002/9, Combating Defamation of Religion, 39th mtg, UN Doc E/CN4/RES/2002/9 (15 April 2002); Commission on Human Rights Res 2003/4, Combating Defamation of Religions, 47th mtg, UN Doc E/CN4/Res/2003/4 (14 April 2003); Commission on Human Rights Res 2004/6, Combating Defamation of Religion, 45th mtg, UN Doc E/CN4/RES/2004/6 (13 April 2004); Commission on Human Rights Resolution 2005/3, Combating Defamation of Religions, 44th mtg, UN Doc E/CNr4/Res/2005/3 (12 April 2005); Human Rights Council [HRC] Resolution 4/9, 31st mtg, UN Doc A/HRC/RES/4/9 (30 March 2007); HRC Resolution 7/19, Combating Defamation of Religions, 40th mtg, UN Doc A/HRC/RES/7/19 (27 March 2008); HRC Res 10/22, Combating Defamation of Religions, 43rd mtg, UN Doc A/HRC/RES/10/22 (26 March 2009); HRC Res 13/16, Combating Defamation of Religions, 42nd mtg, UN Doc A/HRC/RES/13/16 (25 March 2010) and the UN General Assembly GA Res 60/150, UN Doc A/RES/60/150 (16 December 2005); GA Res 61/164, UN Doc A/RES/61/164 (19 December 2006); GA Res 62/154, UN Doc A/RES/62/154 (18 December 2007); GA Res 63/171, UN Doc A/RES/63/171 (18 December 2008); GA Res 64/156, UN Doc A/RES/64/156 (18 December 2009); GA Res 65/224, UN Doc A/RES/65/224 (21 December 2010). From 2011 onwards the UN moved away from the concept of 'defamation of religions'. In 2011, the HRC adopted a resolution entitled 'Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief' (HRC Resolution 16/18, 46th mtg, UN Doc A/HRC/RES/16/18 (24, 2011)) while the General Assembly adopted a resolution entitled 'United against Racism, Racial Discrimination, Xenophobia and Related Intolerance' in September 2011: GA Res 66/3, UN Doc A/RES/66/3 (22 September 2011). The General Assembly adopted a further resolution in December 2011 on combating intolerance, negative stereotyping, stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief (GA Res 66/167, UN Doc A/RES/66/167 (19 December 2011)).

(23) See for example Arts 10 and 22 CDHRI, ch 6, Basic Principles of Attitude to the Non-Orthodox: <<https://mospat.ru/en/documents/attitude-to-the-non-orthodox/vi/>> accessed 5 November 2014.

(24) Chapter 10 of the ROC Social Doctrine: <<https://mospat.ru/en/documents/social-concepts/kh/>> accessed 5 November 2014 and ch 2 of the ROC 'Bill of Rights': <<https://mospat.ru/en/documents/dignity-freedom-rights/ii/>> accessed 5 November 2014.

(25) Articles 7 and 9 CDHRI; IV.6 ROCHRB; ROCBSC X, 14.

(26) Article 7 CDHRI; CRCI, ROCBSC X, 14.

(27) 'The Shariah is never closed, for it is based not on a core of concepts, but rather on an ensemble of precepts which is at times general, at times precise, and which expands to include the totality of human acts through induction, analogy, extension, commentary, and interpretation.' O Roy and C Volk, *The Failure of Political Islam* (Harvard University Press 1994) 10.

(28) Tasioulas (n 5).

(29) Organization of the Islamic Conference (OIC), *Cairo Declaration on Human Rights in Islam*, 5 August 1990: <<http://www.refworld.org/docid/3ae6b3822c.html>> accessed 5 November 2014; Organization of the Islamic Conference (OIC), *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, 1 July 1999, Annex to Resolution No 59/26-P.

(30) Organization of the Islamic Conference (OIC), *Covenant on the Rights of the Child in Islam*, June 2005, OIC/9-IGGE/HRI/2004/Rep.Final, Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen, in June 2005.

(31) Statute of the IPHRC OIC/CFM-38/2011/LEG/RES/FINAL.

(32) An attempt to engage with a proportionality test in the application of Sharia is apparent in *Francis Doebbler v Sudan*, Communication No 236/2000 (2003) is decided by the AComHPR in 2003, where neither the legitimate aim of the punishment, nor the punishment per se was challenged, but its disproportionate character. The Commission however refused to engage in an interpretation of Sharia law or assess whether the punishment was or was not disproportionate to the offence sanctioned by the latter because there is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences: such a right would be tantamount to sanctioning state-sponsored torture under the Charter and contrary to the very nature of this human rights treaty. The above case presents a promising development because it creates a dialogue and engagement between sharia and regional human rights commitments and is prepared to explore the points at which Sharia and international law connect and disconnect.

(33) Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment', in An-Na'im (ed), *Human Rights in Cross-cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1995) 20; Marks and Clapham, *International Human Rights Lexicon* (Oxford University Press 2005) 394.

(34) AA An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1990) 11, at-33.

(35) AA An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press 2008) 282-3. For a discussion on orthodox vs reform/liberal scholarship and how these schools define Sharia, see Nicholas Aroney and Rex Ahdar, *The Topography of Shari'a in the Western Political Landscape* (Oxford University Press 2010) 4-6.

(36) Natan Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory Intl L Rev* 477.

(37) ICCPR, Article 18. The inclusion in the UDHR of the term 'to adopt a religion' rather than the term 'change' is said to have been 'a concession of the West' to Muslim states. RS Clark, 'The United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief' (1983) 31 *Chitty's LJ* 23, 37–8.

(38) Bahrain, the Maldives, and Mauritania have formulated explicit reservations to freedom of religion, limiting the application of Article 18 of the ICCPR and requiring compatibility with Islamic Sharia, and the Constitution of the Maldives stipulates Sharia as source of legislation. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 5 November 2014.

(39) See P Dumberry, 'Incoherent and Ineffective: the Concept of Persistent Objector Revisited' (2010) 59 *Int Comp Law Q* 3 779.

(40) I Cismas, *Religious Actors and International Law* (Oxford University Press 2014) 253.

(41) Cismas (n 40) 254.

(42) Cismas (n 40) 254.

(43) L Articles 24 and 25 CDHRI.

(44) In terms of the diplomacy of international human rights protection these groupings [...] are of major significance and comprise elements of what might be best termed as 'regionalism of ideas' rather than a regionalism based on geography and which is all the more potent for that. One might pause to ponder how elements of the international human rights community might react to the creation of an 'Islamic Court of Human Rights'. Such an entity would be a regional human rights court, after a fashion.

MD Evans 'The Future(s) of Regional Courts of Human Rights', in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 261, at 271. The OIC Charter provides for an Islamic International Court of Justice, which however is not functional: OIC Charter (2008) Article 14.

(45) On the work of the OIC Islamophobia observatory see <http://www.oic-oci.org/oicv2/page/?p_id=182&p_ref=61&lan=en> accessed 5 November 2014.

(46) *The Russian Orthodox Church's Basic Teaching on Human Dignity, Freedom and Rights* (n 16). These documents should be analysed in conjunction with *The Russian Orthodox Church's Approach to Wilful Public Blasphemy and Slander against the Church* (n 19); *The Basis of the Social Concept* (n 18).

(47) See for example *National Security Concept of the Russian Federation*, Ministry of Foreign Affairs of the Russian Federation, pt II (10 January 2000) <<http://www.mid.ru/bdomp/ns-0nsdocnsf/le5f0de28fe77fdcc32575d900298676/36aba64ac09f737fc32575d9002bbf%2031!>>

OpenDocument, accessed 5 November 2014.

(48) See A Curanovic, *The Religious Factor in Russia's Foreign Policy: Keeping God on Our Side* (Routledge 2012) 106–50.

(49) Curanovic (n 48) 141–50.

(50) See 'Vladimir Putin Vows to Defend Christianity Worldwide': <<http://www.christianpost.com/news/vladimir-putin-vows-to-defend-christianity-worldwide-69002/>> accessed 5 November 2014.

(51) The 12 July 2008 Foreign Policy Concept of the Russian Federation restated the Russian view that Article 51 of the UN Charter was viewed as an adequate legal basis, not subject to revision 'for the use of force in self-defence, including in the face of existing threats to peace and security such as international terrorism and proliferation of weapons of mass destruction': <<http://www.kremlin.ru/eng/text/docs/2008/07/204750.shtml>> accessed 5 November 2014.

(52) Roy Allison, *Russia, the West, and Military Intervention* (Oxford University Press 2013) 207. See also Christopher Browning, 'Reassessing Putin's Project: Reflections on IR Theory and the West' (September/October 2008) 55(5) *Problems of Post-Communism* 9–12.

(53) Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty' (Spring 2002) 6(1) *The International Journal of Human Rights* 99.

(54) Allison (n 52) 206–12.

(55) Allison (n 52) 216.

(56) Rosemary Foot and Andrew Walter, *China, the United States and Global Order* (Cambridge University Press 2010) 280–4.

(57) Mazower, *No Enchanted Palace* (n 3) 10.

(58) G John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton University Press 2001) and *Liberal Order and Imperial Ambition: Essays on American Power and International Order* (Polity 2006).

(59) *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* <<http://www.osce.org/odihr/29154>> accessed 5 November 2014; *Guidelines for Review of Legislation Pertaining to Religion or Belief* <<http://www.osce.org/odihr/13993>> accessed 5 November 2014.

(60)

(1.) The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

(2.) The Union equally respects the status under national law of philosophical and non-confessional organisations.

(3.) Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

(61) I Cismas, *Religious Actors and International Law* (Oxford University Press 2014); J Haynes and A Hennig, *Religious Actors in the Public Sphere: Means, Objectives & Effects* (Routledge 2011); J Haynes, *Religious Transnational Actors and Soft Power* (Ashgate 2012).

(62) Robert Joustra, 'Three Rival Versions Of Religious Freedom: What Canada's Office Of Religious Freedom Can Teach Us About Principled Pluralism' (2014) 12(3) *Review Faith & Intl Affairs* 41.

(63) TF Farr, 'Diplomacy in an Age of Faith: Religious Freedom and National Security' (2008) *Foreign Affairs* 110.

(64) See for example O O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge University Press 1996); O O'Donovan and JL O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (WB Eerdmans 2004); O O'Donovan, *The Ways of Judgment: The Bampton Lectures, 2003* (WB Eerdmans 2005); J Milbank, *Theology and Social Theory: Beyond Secular Reason* (2nd edn, Blackwell 2006); J Milbank, *The Future of Love: Essays in Political Theology* (SCM Press 2009).

(65) 'The "principle of subsidiarity" must be respected: "A community of a higher order should not interfere with the life of a community of a lower order, taking over its functions". In case of need it should, rather, support the smaller community and help to coordinate its activity with activities in the rest of society for the sake of the common good.' John Paul II (1991) 'Centesimus Annus' § 48: <http://www.vatican.va/edocs/ENG0214/_INDEX.HTM> accessed 5 November 2014: .

Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

Pius XI (1931) 'Quadragesimo Anno' § 79:

<http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html> accessed 5 November 2014:

The primary norm for determining the scope and limits of governmental intervention is the 'principle of subsidiarity' cited above. This principle states that, in order to protect basic justice, government should undertake only those initiatives which exceed the capacities of individuals or private groups acting independently. Government should not replace or destroy smaller communities and individual initiative. Rather it should help them contribute more effectively to social well-being and supplement their activity when the demands of justice exceed their capacities. This does not mean, however, that the government that

governs least, governs best. Rather it defines good government intervention as that which truly 'helps' other social groups contribute to the common good by directing, urging, restraining, and regulating economic activity as 'the occasion requires and necessity demands'.

US Catholic Bishops (1986) 'Economic Justice for All, Pastoral Letter on Catholic Social Teaching and the US Economy' 124: <<http://www.osjspm.org/cst/eja.htm>> accessed 5 November 2014.

(66) Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Oxford University Press 2009). Simmons' important work relates to the efficacy of international human rights treaties and she rightly cautions against extrapolating from these findings to other sources of international human rights law, such as customary international law, which are not based in the same way on an explicit law-like commitment.

(67) JP Burnside, *God, Justice, and Society: Aspects of Law and Legality in the Bible* (Oxford University Press 2011); BS Jackson, *Studies in the Semiotics of Biblical Law* (Sheffield Academic Press 2000).

(68) EG Farrugia, 'The Recurrent Crisis of Iconoclasm' in Farrugia, *Tradition and Transition: The Vitality of the Christian East* (Mar Thoma Yogam 1996) 16–17.



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