University of Chicago Law School
Chicago Unbound

International Immersion Program Papers | Student Papers

2017

Religious Freedom and International Law : the Protection of Religious Minorities in International Tribunals

Anagha Sundararajan

Follow this and additional works at: http://chicagounbound.uchicago.edu/international_immersion_program_papers

Recommended Citation
Sundararajan, Anagha, "Religious Freedom and International Law : the Protection of Religious Minorities in International Tribunals" (2017). *International Immersion Program Papers*. 67.
http://chicagounbound.uchicago.edu/international_immersion_program_papers/67

This Working Paper is brought to you for free and open access by the Student Papers at Chicago Unbound. It has been accepted for inclusion in International Immersion Program Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Anagha Sundararajan

IIP Netherlands

April 25, 2017

Religious Freedom and International Law:

The Protection of Religious Minorities in International Tribunals

TABLE OF CONTENTS

INTRODUCTION

Under American law, the right of an individual from a religious minority to worship freely is embodied in the First Amendment of the US Constitution, which says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...or the right of the people peaceably to assemble."[1] In doing so, the First Amendment protects not only an individual's freedom of conscience, it also protects the right of religious communities to worship communally and ensures that the government will be at least facially neutral with regard to religion. Though the protections offered by the First Amendment are occasionally in tension with one another, they all reflect a

[1] US Const, Amend I.

concern with "safeguard[ing] the freedom of conscience and belief" and ensuring that individuals are able to participate in public life regardless of religious beliefs.[2]

Today, most democratic systems guarantee (at least on paper) a government that is neutral with respect to religion. However, this guarantee takes several forms. In the United States, the Establishment Clause of the First Amendment has been interpreted to ensure that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[3] It also does not allow the government to "force []or influence a person to go to or to remain way from church against his will or force him to profess a belief or disbelief in any religion."[4] The government has limited rights, even on public land and in public schools, to prevent individuals from expressing their religious beliefs or to prohibit religious groups from engaging in the political process through lobbying. As such, religious groups play a key role in the American political system.[5]

In contrast, the system of Laïceté in France is ostensibly designed to satisfy the same ends as the religion clauses of the Constitution - to ensure that all citizens are free to participate in public life regardless of religion but takes a very different form. Unlike the American system, the Laïceté system prohibits religious groups from engaging directly in politics while preventing the government from recognizing any particular religion. Similarly, individuals are encouraged to be discrete about their religious beliefs, and the French government has gone so far as to ban

[2] See *McCreary County, Kentucky v ACLU of Kentucky*, 545 US 844, 881-82 (2005), O'Connor concurring.
[3] *Everson v Board of Education of Ewing Township*, 330 US 1, 15 (1947).
[4] Id.
[5] See generally, Julie Butters, *Why Americans Can't Separate Religion and Politics and what it means for the 2016 election*, *1 (College of Arts and Sciences at Boston University, 2015), archived at http://www.bu.edu/cas/magazine/fall15/america/.

the explicit and overt display of religious symbols by individuals in public spaces.[6] Other states have adopted different mechanisms to safeguard the same right.

However, international law has also taken steps to guarantee the broader right of freedom of religion. The Universal Declaration of Human Rights states that all individuals have "the right to freedom of thought, conscience and religion," including the "freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."[7] The same statement was incorporated into Article 18 of the International Covenant on Civil and Political Rights.[8]

Though not embodied explicitly in other areas of international law, this right to free exercise of religion has been incorporated by reference into both the Genocide Convention[9] and the Refugee Convention.[10] Both include religious minorities among the kinds of groups that are protected by the convention: the Genocide Convention criminalizes "acts committed with the intent to destroy, in whole or in part, a...religious group"[11] while the Refugee Convention includes in the definition of refugee anyone who "owing to a well-founded fear of being persecuted for reasons of...religion...is outside the country of his nationality...or...is unwilling to avail himself to the protection of that country."[12] While the Genocide and Refugee Convention

[6] For a more detailed discussion of the Laïceté system, see generally James A. Beckford, Laïceté, 'Dystopia,' and the Reaction to New Religious Movements in France, in James T. Richardson, ed, *Regulating Religion, Case Studies from Around the Globe*, 27 (Kluwer Academic 2004).
[7] *Universal Declaration of Human Rights*, Article 18, adopted by the United Nations General Assembly, 10 December 1948.
[8] *International Covenant on Civil and Political Rights*, Article 18.
[9] *Convention on the Prevention and Punishment of of the Crime of Genocide*, adopted by the United Nations General Assembly, 9 December 1948.
[10] *Convention and Protocol Relating to the Status of Refugees*, Resolution 2198 adopted by the United Nations General Assembly, 28 July 1951.
[11] *Genocide Convention*, Art. II, cited in note 9.
[12] *Refugee Convention*, Art. I(a)(2), cited in note 10.

protect minority groups, the 1970 UNESCO Convention protects religious property through the protection of cultural heritage.[13]

Though the right to freedom of religion is codified in international conventions, it is unclear how this obligation is enforced through international courts. This paper examines how four international courts - the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Court - address the question of the right to freedom of religion. It also compares this jurisprudence to the jurisprudence of the American Courts, particularly on the question of the free exercise of religion. Part I focuses on the American Supreme Court's conceptualization of the right to freedom of religion. Part II focuses on the PCIJ and the ICJ in the context of disputes between countries and Part III focuses on the ICTY and the ICC's jurisprudence in the criminal context.

I. RELIGIOUS FREEDOM IN AMERICAN LAW

The Supreme Court's jurisprudence governing the right to Free Exercise is relatively sparse, in part because cases arising under the Free Exercise Clause almost inevitably raise concerns about the establishment of religion or the right to due process of the law. The principle that the right to freedom of religion is essential to protect the right to freedom of conscience has been a part of the American legal system since the founding of the republic. However, the scope of this protection has remained unclear, in part because the First Amendment specifically protects religion, but not conscience.

[13] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, adopted by the United Nations General Assembly, 14 November 1970.

In the early years of the American republic, the right to freedom of religion was primary articulated through the writings of James Madison. In his *Memorial and Remonstrance Against Religious Assessments* to the Virginia Assembly, Madison argued that "[t]he [r]eligion…of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[14] A similar sentiment was expressed by Jefferson, in his *Letter to a Committee of the Danbury Baptist Association*, where he says clearly that "religion is a matter which lies solely between man and his God, and he owes account to none other for his faith or his worship, that the legislative powers reach actions only, not opinions."[15] Even those founders who pushed for greater integration between religion and public life emphasized the right to free exercise of religion as a way to preserve the integrity of religious belief.[16] In his letter to the Quakers, George Washington wrote that "it is [his] wish…that the laws may always be as extensively accommodated to [the conscientious scruples of all men], as a due regard for the protection and essential interests of the nation may justify and permit."[17]

Though the Founders regarded the right to free exercise of religion as central to the protections afforded to citizens by the Constitution, the religion clauses were the last protections offered by the First Amendment to be incorporated against the states.[18] The right to Free Exercise of religion was applied to the states in 1940, when the Court overturned the convictions

[14] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) in Michael M. McConnell et al, *Religion and the Constitution* 43 (Wolters Kluwer 4th ed, 2016).
[15] Thomas Jefferson, *Letter to a Committee of the Danbury Baptist Association* (1802) in Michael M. McConnell et al, *Religion and the Constitution* 36 (Wolters Kluwer 4th ed, 2016).
[16] See, for example, George Washington, *Farewell Address* (1796) in Michael M. McConnell et al, *Religion and the Constitution* 18 (Wolters Kluwer 4th ed, 2016), "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."
[17] George Washington, *Letter to the Religious Society Called Quakers* (1789) in Michael M. McConnell et al, *Religion and the Constitution* 36 (Wolters Kluwer 4th ed, 2016).
[18] By comparison, the right to free speech was incorporated in 1925 in *Gitlow v New York*, 268 US 652; the right to press in 1931 in *Near v Minnesota*, 283 US 697, the right to peacefully assemble and petition the government in 1937 in *DeJonge v Oregon*, 299 US 353, and the protection against an establishment of religion in 1947 in *Everson v Board of Education*, 330 US 1.

of three Jehovah's Witnesses who were charged with breaching the peace for distributing literature professing their religious beliefs.[19] The Court held that "[t]he fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment."[20] As such, the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact [laws respecting an establishment of religion or prohibiting the free exercise thereof]."[21] This means that states cannot compel "by law…the acceptance of any creed or the practice of any form of worship."[22] The Establishment Clause was incorporated against the states seven years later, in *Everson v Board of Education*,[23] where the Court held that the Establishment Clause "means at least this: [n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[24] This also means that the law cannot "force []or influence a person to go to or to remain way from church against his will or force him to profess a belief or disbelief in any religion."[25]

Because the Free Exercise Clause specifically protects against government action that hinders the free exercise of religion, it applies only to religious activity.[26] Historically, the Court has struggled with the question of what conduct is protected as part of the protection of the "free exercise of religion." When the Court incorporated the Establishment Clause against the states, it held that the state may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists,

[19] *Cantwell v Connecticut*, 310 US 296, 300 (1940).
[20] Id at 303.
[21] Id.
[22] Id.
[23] 330 US 1 (1947).
[24] *Everson v Board of Education of Ewing Township*, 330 US 1, 15 (1947).
[25] Id.
[26] In general, expressions of beliefs or principles that are not religious are protected by other First Amendment guarantees, particularly the right to freedom of speech and freedom of the press.

Jews, Methodists, non-believers, Presbyterians, or other members of any other faith, because of their faith, or lack of it."[27] Public involvement and access to public benefits therefore cannot be conditioned on a citizen's religious beliefs, since a state has to be "neutral in its relations with groups of religious believers and nonbelievers."[28] At the very least, then, the Constitution protects against intentional discrimination between religious groups or against religion in general.[29]

The Court has acknowledged that "the 'exercise of religion' often involves not only belief and profession, but the performance of (or abstention from) physical acts."[30] As such, "a person who is barred from engaging in religiously motivated conduct is [by definition] barred from freely exercising his religion."[31] The foundation of First Amendment protection is "relief from a burden imposed by the government on religious practices…whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that in effect make abandonment of one's own religion…the price of an equal place in the civil community."[32]

However, beyond this kind of broad protection of conscience and practice, the Court has struggled to define what constitutes the "free exercise" of religion. Unlike race, which is relatively easy to define or at least conceptualize,[33] the question of what constitutes the exercise

[27] *Everson v Board of Education*, 330 US 1, 16 (1947).
[28] Id at 18.
[29] *Sherbert v Verner*, 347 US 398, 403 (1963).
[30] *Employment Division v Smith*, 494 US 872, 877 (1990).
[31] Id at 892, O'Connor concurring.
[32] Id at 897.
[33] This does not mean that the boundaries of the term "race" have been uncontested. In *Korematsu*, the Court held that classifications based on national origin were treated in the same way as classifications based on race, essentially collapsing the legal distinction between the two terms in the context of equal protection. The Court has held that distinctions based on capacity to speak English do not constitute a distinction based on race (See *Hernandez v New York*, 500 US 352 (1992)) while classifications based on ancestry can qualify as classifications based on race (See *Rice v Cayetano*, 528 US 495 (2000)).

of religion has remained elusive. In *Wisconsin v Yoder*, the Court emphasized the fact that a particular tradition or lifestyle had been followed by adherents to the faith for several hundreds of years.[34] However, while the Court put weight on the longevity of a particular tradition, it said nothing about whether this kind of longevity is either necessary or sufficient for something to merit protection. Similarly, the Court has held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit…protection."[35] It also need not be consistent with the beliefs articulated by the majority of the followers of the faith itself, as long as it conforms with the individual's "understanding of her religion's requirements."[36] As such, the right to free exercise is understood to be a deeply personal one, and courts will rarely inquire into the validity of an individual's belief. This belief also does not need to stem from a belief in God, especially since several belief systems, such as Buddhism and Taoism, which are clearly protected, do not articulate a belief in God as part of their doctrine.[37]

Given this broad understanding of religious belief, the Court has deferred almost entirely to the litigants to define religious belief and, as such, have conceptualized religious freedom in the free exercise context as a wholly personal right. In most cases, the question is not whether an individual's religious belief is sincere or whether a given course of conduct is part of the individual's exercise of his religion but rather whether a statute "burdens" the exercise of that religion such that it is unconstitutional.

[34] *Wisconsin v Yoder*, 406 US 205, 227-28 (1972).
[35] *Church of Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520, 531 (1993).
[36] *EEOC v Abercrombie and Fitch Stores, Inc*, 135 S Ct 2028, 2031 (2015).
[37] *Torcaso v Watkins*, 367 US 488, 495, n 11 (1961).

II. RELIGIOUS FREEDOM AND DISPUTES BETWEEN COUNTRIES

Unlike the United States Supreme Court, which has adjudicated dozens of cases related to the scope of religious freedom, the right of individuals and communities to freely exercise their religion has been considered only six times by either the Permanent Court of International Justice or its successor, the International Court of Justice. Both the PCIJ and the ICJ were established to adjudicate disputes between countries arising under international law and, as a result, have rarely had the opportunity to questions of religious freedom. In part, this is because the vast majority of issues related to religious freedom arise in the context of disputes between factions within a state's borders and therefore, fall outside the jurisdiction of the ICJ. Of the few instances where disputes related to religious freedom involve multiple countries, the two countries are rarely in a position to consent to the jurisdiction of the ICJ. As a result, three out of the six issues before either the PCIJ or the ICJ related to the right to freedom of religion were advisory opinions rather than judgments. Like the United States Supreme Court, both the PCIJ and the ICJ understood the right to freedom of religion as a personal one. However, unlike US domestic law, the right is articulated in the international context as a collective one, and both courts have protected the right to freedom of religion by protecting the right of communities to participate in the political process. Part II.A focuses on cases heard by the PCIJ between 1928 and 1935. Part II.B focuses on the ICJ's cases since 1999.

A. The Permanent Court of International Justice

The Permanent Court of International Justice dealt with the question of minority rights three times, in the *Case Concerning the Rights of Minorities in Upper Silesia* in 1928, in the advisory opinion concerning *Greco-Bulgarian Communities* in 1930 and in the court's advisory opinion concerning *Minority Schools in Albania*, issued in 1935. In all three cases, the PCIJ

established the obligation of countries to ensure de facto equality for minority communities. This de facto right included the right of a community to maintain its cultural identity, language, and religion and to educate its children in its own schools.[38]

In the *Case Concerning the Rights of Minorities in Upper Silesia* in 1928, the PCIJ was called upon to adjudicate a dispute between Poland and Germany arising out of a provision in the German-Polish convention which allowed minority communities in both countries to choose the language of instruction for their children.[39] The convention specifically applied to religious and linguistic minorities in Upper Silesia, a piece of territory divided between the two countries. The dispute arose because Polish authorities had decided that around 7,000 children who had been enrolled in German-language schools in Upper Silesia were invalidly registered as religious or linguistic minorities and therefore had no right to attend schools established for German students under the convention.

The PCIJ evaluated this case under the Geneva Convention, which guaranteed every person the right to declare his affiliation to a linguistic or religious group. Because the individual, had the right to declare (or not) his affiliation to a minority religious or linguistic group, his government did not have the right to either review this declaration.[40] This standard was not designed to allow anyone to claim affiliation with any group solely to get a benefit. Instead, the question of whether an individual belonged to a minority community and therefore, is entitled to a benefit under law, is a question of fact, not intention.[41] While a government may

[38] See Eleni Polymenopoulou, *Cultural Rights in the Case Law of the International Court of Justice*, 27 Leiden J Intl L 447 (2014).
[39] See Case Concerning Rights of Minorities in Upper Silesia (*Germany v Poland*), PCIJ A-No. 15 (1928).
[40] Id at 19.
[41] Id at 32.

require an individual to provide some kind of proof of his stated affiliation, a government may not decide for itself which community an individual belongs to.

The PCIJ applied this standard to Polish government's actions, saying that the protections of the Geneva Conventions were designed to avoid any kind of internal discrepancies within a government about the identification and classification of an individual. The concern was that this kind of discrepancy would lead to an individual being deprived of a benefit that he was entitled to as a member of a minority group.[42] While this prohibition may lead to some individuals unjustly benefiting from a system designed to protect minorities, this is a risk that a government has to bear.[43] By reviewing and questioning the decisions made by individual parents to enroll their children in a minority school, the Polish government violated the Geneva Convention's mandate.

In reaching this decision, the PCIJ treated religion as both a personal and collective right. Under the PCIJ's reasoning, religious minorities have the right to educate their children as they see fit. As such, minority communities have the right to establish institutions like schools and places of worship and this right is a collective one. In contrast, the right to freedom of religion is a personal one, since individuals have the right to decide which group they belong to. The individual, not the community or the government, has the right to identify as a member of a minority community and to choose where and how his children are educated. In this case and subsequent ones, the PCIJ adopted a hybrid conceptualization of the right to freedom of religion.

The court upheld this model of minority rights in 1930, in its advisory opinion concerning the rights of minority groups in Green and Bulgaria. There, the court considered the obligations imposed by the two states by a bilateral reciprocal emigration treaty. As part of its

[42] Id at 34.
[43] *Germany v Poland*, PCIJ Series A, No.15, 35.

decision, the court held that, as part of this communal right to religion, minority communities had the right to maintain their traditions and way of life.[44]

The right was reaffirmed in the court's advisory opinion about Minority Schools in Albania five years later, in 1935. There, the Court was called upon to advise the government of Albania on its duties and obligations to citizens within its borders who belonged to racial, religious, or linguistic minority groups under a Treaty and Decision by the League of Nations to which it was a party.[45] The Court stated that individuals who belonged to minority communities were entitled to same rights and protections both in law and in fact as all other citizens. In practice, this meant both that racial and religious minorities were entitled to the same rights as majority communities, but this equality had to functional rather than formal.[46] Since the goal of the convention and other legal documents was both to ensure equality and to preserve the identity of the minority group, equality in fact under the Convention may require something more than purely neutral policies.[47] Instead, a government was obligated to consider the special needs of a community and incorporate these needs into its legal system, even if this meant that communities received differential treatment.[48]

In reaching this conclusion, the Court conceptualizes religious rights as communal ones. It focused solely on the fact that minority communities had the right, by virtue of this communal identity, to have their traditions respected and protected by the laws of their state. Rather than examining an individual's right to freely exercise his faith, the Court focused on the right of the group to carry on their way of life and enjoy the same rights as the majority community.

[44] Eleni Polymenopoulou, 27 Leiden J Intl L 447 (2014).
[45] *Minority Schools in Albania*, Advisory Opinion, Series A/B, No 64 (1935).
[46] Id at 15.
[47] Id at 17.
[48] Id.

Ultimately, this communal right is as important, if not more so, than the individual one because the individual right to worship freely is dependent on a state honoring the community.

B. The International Court of Justice

Unlike the PCIJ, the International Court of Justice has no explicit mandate to consider and adjudicate questions related to minority treaties or treaties related to cultural rights. As a result, the ICJ has seen three cases that could be considered related to cultural rights and only one of the three explicitly relates to the rights of minority groups.

The ICJ's most prominent decision relating to cultural rights and cultural property is the *Case Concerning the Temple Preah Vihear*, between Cambodia and Thailand.[49] This case arose after an armed occupation of the Temple of Preah Vihear, a religious site on the border between Cambodia and Thailand, resulted in large-scale looting. The Court held that, because the temple was situated on Cambodia's territory, the temple and its religious artifacts belonged to Cambodia, regardless of the significance of the temple to religious groups in Thailand.[50] Though this case concerned religious property, the Court said nothing about the rights of religious minorities in either state.

The Court first considered the rights of religious minorities in 2004, when the Security Counsel certified the question of the legality of a wall constructed by Israel on Palestinian territory to the Court.[51] In its advisory opinion, the Court held that the right to freedom of movement included the right to access the holy sites that were central to one's religious beliefs.[52] Because Israel was a state party to the International Convention on Civil and Political Rights (ICCPR), it was obligated under this Convention to ensure that Christians, Jews, and Muslims

[49] *Case Concerning the Temple Preah Vihear* (Cambodia v Thailand), 1962 ICJ 6 (1962).
[50] See generally, id.
[51] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136.
[52] Id at ¶ 129.

living within its territory had access to their holy sites in Jerusalem. This obligation extended to Palestinians living in the West Bank and, more importantly, did not operate only during armed conflict.[53] As such, Israel had the obligation to ensure that Muslim Palestinians and Jewish Israelis could continue to access Islamic holy sites, even during peace-time.

By tying the right to access to holy sites to the right to movement under the ICCPR, the ICJ cabined the right to make it a purely individual one. Rather than address the right of the Muslim population at large to worship or conduct ceremonies, the Court focused on the right of any individual Muslim to access his holy sites. More importantly, because the opinion was purely advisory and focused only on the wall, rather than the larger concern about the conflict between Israel and Palestine, the opinion has little effect. It also provides little guidance about how the Court will consider broader questions about the rights of religious minorities in the future.

The only other case in which the Court explicitly considered the rights of minorities was in 2007, when the Court applied the Genocide Convention to the massacre at Srebrenica and other atrocities committed during the Bosnian war in the 1990s.[54] There, the Court held that, in order to be a crime of genocide, a particular act had to be committed with the intent to destroy a particular group.[55] This includes acts committed with the intent to kill a particular religious groups because of their religious beliefs.[56] Based on this criteria, the Court held that the massacre of thousands of Bosnian Muslims in Srebrenica was a crime of genocide.

[53] Id at ¶ 103.
[54] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), 2007 ICJ 43.
[55] Id at 190.
[56] Id at 191.

The Court also considered whether the intentional destruction of Islamic and Catholic religious sites constituted a crime under the Genocide Convention. Though the Genocide Convention only criminalized intentional violence against populations, the Court held that the deliberate destruction of historical, cultural, or religious sites was evidence of the requisite intent to destroy a particular social group under the Convention.[57] However, the destruction of cultural property itself was not a form of genocide, though it was a violation of the laws and customs of war. In focusing on genocide, the Court again considered religion as a collective or communal right, since religion served to define a protected population for the purposes of the Genocide Convention.

Though the ICJ and the PCIJ have only considered the rights of minority religious groups in a handful of contexts, both courts have suggested that the right to freedom of religion is both an individual right based on an individual's conscience and a communal right, honored as a way to protect a population's traditions and way of life. However, unlike its predecessor, the ICJ's rulings on this question have been narrower. As such, the ICJ's jurisprudence has provided little actual protection to minority religious groups around the world, including those in states which may be subject to the ICJ's jurisdiction. Litigation centered on protecting the cultural and religious rights of minority populations has largely taken place in domestic courts, meaning minority populations remain vulnerable legally.

III. Religious Rights in International Criminal Law

Unlike the cases before the PCIJ and the ICJ, cases before international criminal tribunals which touch on the rights of religious minorities focus almost exclusively on the rights of minority communities to their religious cultural symbols, rather than than the rights of the

[57] Id at 344.

individual members of these minority communities. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) have both focused exclusively on the destruction of religious property and sacred sites during armed conflicts. In part, this focus is driven by the jurisdiction of the two tribunals: both tribunals assign criminal penalties to individuals who violate the laws of war and commit crimes of genocide or crimes against humanity. As such, cases before these bodies focus almost exclusively on acts committed by an individual or group of individuals against a group. Part III.A focuses on the judgements by the International Criminal Tribunal for the Former Yugoslavia that focused on attacks against Bosnian Muslim communities. III.B examines the Al Mahdi decision by the International Criminal Court, which is the first, and currently only, decision by that body to focus on cultural rights under the Rome Statute.

A. The International Criminal Tribunal for the Former Yugoslavia

The cases before the International Criminal Tribunal for the Former Yugoslavia that relate to the rights of religious minority communities have focused almost exclusively on allegations of plunder and excessive destruction of property, in violation of the laws and customs of war and the Geneva Conventions.

One of the earliest cases decided by ICTY (and one of the first cases since Nuremberg determining individual guilt in relation to violations of international humanitarian law) focused specifically on military action against a religious minority in northwest Bosnia. Dusko Tadić, a Bosnian Serb military leader, was charged in connection with acts committed during the Bosnian Serb army's attack on the town of Kozarac, in northwest Bosnia.[58] As part of this military campaign, Tadić was found guilty of specifically targeting, persecuting, and forcibly moving

[58] See generally, *Judgment of the Trial Chamber in the Tadić Case*, Summary of the Verdict, ICTY, Judgment of 7 May 1997.

Bosnian Muslim communities from their homes. In particular, Tadić was accused and found guilty of beating Muslim prisoners in the Omarska camp and forcibly removing Muslim men and boys from several villages.[59] The tribunal specifically held that, by separating the population based on religion and subjecting the Muslim population of northwest Bosnia to deportation and torture, Tadić engaged in religious persecution in violation of the laws and customs of war.[60] Because the charges against the defendant were based on the Geneva Conventions and the laws of war, the tribunal's focus was on the defendant's actions and intent with respect to a community, though the charges themselves were formulated based on the defendant's actions toward an individual.[61]

The tribunal adopted a the same approach in the case against Dario Kordić and Mario Čerkez. Kordić, a political leader, and Čerkez, a military commander, were jointly prosecuted for crimes against humanity for military action which targeted and sought to destroy Bosnian Muslim communities in central Bosnia.[62] The two defendants allegedly deliberately targeted mosques and other religious institutions as part of a common plan to destroy the Bosnian Muslim community and ethnically cleanse the region.[63] Like the ICJ, the tribunal held that the intentional destruction of religious monuments functioned as evidence of a systematic campaign against a particular religious groups and violated the laws and customs of war under the Geneva Conventions.[64]

In particular, this case is notable for two reasons. Unlike the Tadić case, this case focused on both the inhumane treatment of members of a minority religious group *and* the destruction of

[59] Id.
[60] Id.
[61] Id.
[62] See generally, *Judgement of the Trial Chamber in the Kordić and Čerkez Case*, Summary of the Verdict, ICTY, Judgment of 26 February 2001.
[63] Id.
[64] Id.

religious property, including mosques and schools. It treats both as violations of the rules of war and, again, focuses on the rights of a group to establish religious institutions and have access to the symbols of their religious beliefs though the lens of individual acts committed by the defendants. In other words, the case holds that the rules of war prevent the wanton destruction of religious institutions and monuments, implying that the rules of war are designed to preserve as much as possible the rights of religious minorities to practice their religion and access places of worship. Second, the case is notable because it is one of the first cases before a modern criminal tribunal to hold a political leader accountable for inciting crimes against a minority community.[65]

More recently, ICTY has heard two cases that implicate cultural rights in some way. In 2004, the tribunal sentenced Miodrag Jokić to seven years imprisonment for crimes committed during the siege of the city of Dubrovnik, despite ongoing negotiations for a cease fire.[66] Because Jokić pled guilty to violating the laws and customs of war by attacking civilian populations and cultural sites, the tribunal did not consider evidence related to these charges.[67] The Appeals Chamber ultimately affirmed the conviction, but modified the sentence to reflect only those instances where the defendant was responsible as a superior officer for instructing his men to destroy religious sites.[68] As such, though the intentional destruction of religious and cultural landmarks was considered a war crime and a violation of the rights of the civilian populations living in the area, only those officers who were in a supervisory role at the time of the destruction were liable personally for these crimes. The Trial Chamber reached the same conclusion in 2011, when it found Ante Gotovina, Ivan Čermak, and Mladen Markač liable for a

[65] Id.
[66] *Judgment of the Trial Chamber in the Jokić case,* Summary of the Sentence, ICTY, Judgment of 18 March 2004.
[67] Id.
[68] *Judgment of the Appeals Chamber in the Jokić case*, Summary of the Judgment, ICTY, Judgment of 30 August 2005.

joint criminal enterprise with the goal of removing civilians from minority populations from Croatia through force or the threat of force.[69] Part of the joint criminal enterprise was the attack and plunder of civilian targets, including areas of cultural importance.

Because of ICTY's role in prosecuting autocracies committed during armed conflict in the Balkans in the 1990s, the cases heard by the tribunal relating to minority rights focused primarily on the destruction of cultural and religious property.However, by saying that the intentional destruction of religious property constituted a violation of the laws and customs of war, the tribunal also articulated a version of minority rights based on the rights f a community to access houses of worship and its sacred shrines. This right is identical to the one articulated by the ICJ in its advisory opinion relating to the Wall on Palestinian Territory.[70] ICTY's jurisprudence, combined with this advisory opinion from the ICJ, suggest that while the right of a minority group to worship freely during peace time is rarely protected by international law, the rights of a minority population to preserve and access their sacred sites is protected through the protection of the sites themselves.

B. The International Criminal Court

Like ICTY, the International Criminal Court has only considered minority rights in the context of the prohibition against the intentional destruction of cultural and religious property. The ICC has considered this issue once, in the *Case of the Prosecutor v Ahmad al Faqi al Mahdi*.[71] There, the Court considered charges against Al Mahdi, an Islamic cleric who worked with Al Qaeda of the Islamic Maghreb (AQIM) in Mali to specifically target religious practices

[69] *Judgment of the Trial Chamber in the Gotovina, et al case*, Summary of the Judgment, ICTY, Judgment of 15 April 2011.
[70] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136.
[71] *Case of the Prosecutor v Ahmad al Faqi al Mahdi*, ICC-01/12/-01/15 (Judgment of 27 September 2016).

deemed contrary to the teachings of AQIM. As part of this campaign, Al Mahdi and others targeted and destroyed religious sites of cultural and historic importance around Mali, including mausoleums and shrines.[72] The Court held that this destruction constituted a war crime under Article 8(2)(e)(ii) of the Rome Statute, which prohibits attacks against civilian targets during armed conflict. The Court also held that the attacks violated both the Geneva Convention and the Second Protocol to the Hague Convention, and as such, constituted a criminal act within the Court's jurisdiction.[73]

The Court ultimately sentenced Al Mahdi to nine years in prison for the destruction of these monuments, holding that these crimes were committed with the intent to impose a specific religion on the population of Timbuktu through armed conflict.[74] The religious sites targeted were specifically protected by the UNESCO Convention and they were destroyed because of their cultural significance to the local population. As such, Al Mahdi not only intended to traumatize the local population through a campaign of terror, he also intended to rob the population of religious and cultural symbols vital to its identity.[75]

Though the ICC's holding in the Al Mahdi case, like cases heard by ICTY, is limited specifically to the destruction of religious monuments during wartime, the Court's rhetoric in the case suggests a broader conception of the protection of religious rights. Like ICTY, the Court focuses specifically on the right of a population to its cultural and historic sites, especially to shrines that have been part of the area's tradition and history for generations. However, the Court also suggests that these acts become more serious when committed as part of a systematic

[72] Id at ¶ 34.
[73] Id at ¶ 11.
[74] Id at ¶ 109.
[75] *Case of Ahmad al Faqi al Mahdi*, ¶¶ 70, 81.

program of imposing religious beliefs on a population.[76] This raises the possibility that, in the future, the Court will be more willing to look into a country's practices relating to its treatment of minority religious groups.

However, the ICC's holding in the Al Mahdi case is limited in a few important ways, which again suggest that the vast majority of protections afforded to religious minorities come from domestic, rather than international law. First, the Al Mahdi case rests on Article 8(2)(e) of the Rome Statute, which defines war crimes, meaning its holding is limited to the context of armed conflict. Therefore, the Al Mahdi case cannot be used to target practices by world leaders during peace time. Second, the ICC's jurisdiction itself is limited by the Rome Statute, and by the fact that it has a limited enforcement mechanism, so even if the ICC chooses to inquire more deeply into a state's policies with respect to its minority groups, it is unclear whether this inquiry will actually be meaningful or function as a way to protect minority populations. Finally, the Al Mahdi case is currently the only case in which the ICC has charged and convicted someone for the destruction of cultural property, and it is unclear how (and if) the ICC's jurisprudence in this area will evolve in the future.

CONCLUSION

Though the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights articulate the right to freedom of religion as a deeply personal one, international tribunals, including the ICJ, the ICC, and ICTY have all conceptualized this right primarily as a communal one. Unlike the jurisprudence of the American Supreme Court, which has protected the freedom of religion by protecting individuals, international tribunals have overwhelmingly opted to protect freedom of religion by protecting the rights of minority

[76] See id at ¶ 81.

communities to educate their children and maintain access to their sacred sites. As a result, international law does very little work toward protecting the right to free exercise of religion for minority communities outside the context of an armed conflict.

In part, this is due to the jurisdictional constraints placed on international tribunals. It is rare for a question concerning free exercise of religion to be heard by a body like the ICC or the ICJ outside of the context of armed conflict, or at least hostility. This lack of protection is also driven by the conceptualization of religion as a communal right, since it requires only that a community be allowed to exist, not that the individual members of the community be able to participate fully and freely in the political process. As a result, international law is fundamentally weak in the area of protecting and enforcing the ICCPR's mandate that every individual have the right to freedom of conscience.