

RELIGIOUS FREEDOM AND FOREIGN POLICY

The U.S. International Religious Freedom Act of 1998

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Two Puritans on a ship approaching the New World:
Religious freedom is my immediate goal...
..But my long-range objective is to go into real estate.
—Cartoon quoted by Professor Lawrence Tribe

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INTRODUCTION

Freedom of religion is a Universal Human Right. Foreign Policy is a fully secular activity. If considered in isolation, these two simple and general assertions would not raise any debate. However, if the two are crossed, the picture looks totally different.

The relationship between the two are not obvious. The customary and legal interpretation of separation of church and state in the U.S., as well as in France and more generally in the international organizations, puts them at odds. The question is not whether general secular foreign policy should be guided by ethical, including sectarian, considerations¹. Foreign policy is truly about national interests. However it might also be about ideals or values, in as much as they can be reconciled. There should be no difficulty in promoting protection of freedom of religion worldwide, it being an internationally recognized human right. So where does the problem come from ?

Religion and freedom of religion are theoretically two different things. You do not need to be a believer to argue in favor of freedom of belief. As a matter of fact, the difficulty is usually for believers to accept freedom for different, supposedly erroneous beliefs. Many religions have only recently and reluctantly agreed to the concept of freedom of conscience and religion. The matter of religious freedom should then be more familiar to disciples of Enlightenment and secular humanism, not as a religious right but as a neutral aspect of freedom of thought and conscience².

The Virginia statute for religious freedom (1785) was the first instance when a state went explicitly beyond the concept of toleration in religious matters. As a political expedient, this concept had been internationally embodied in the treaties of Westphalia (1648) in order to achieve peace after the worst wars of religion within Europe. It adopted the motto *Cujus regio ejus religio*: The people will follow the religion of their ruler. Those who dissented had the right to emigrate. Altogether it marked the formal end of Christendom and the secularization of international law against the previous "international authority of the papacy"³.

With the Charter of the United Nations and the 1948 Universal Declaration of Human Rights (hereafter UDHR) three hundred years after Westphalia, the new concept of religious freedom was brought on the international scene and incorporated in international law. The Catholic Church acknowledged this trend at Council Vatican II in 1965, just one year before the United Nations adopted the International Covenant on

¹ Leo Ribuffo, "Religion and American foreign policy," *The National Interest*, 52, Summer 1998, pp.36-51

² Michael Ignatieff, *Whose Universal Values? The Crisis in Human Rights*, Praemium Erasmianum Essay 1999, The Hague;

³ The Pope condemned the peace of Westphalia in *Zel Domus* (November 26, 1648). See Leo Gross, "The peace of Westphalia 1648-1948," *American Journal of International Law* 1948, 42, 20-41. Lucien Bely ed. *L'Europe des Traités de Westphalie, Esprit de la Diplomatie et Diplomatie de l'Esprit*, PUF, Paris 2000 (Acts of the symposium on the 350th anniversary of the treaties). From 1648 to 1929 (Latran treaty with Italy), the Papacy would not be part of any international conference (including the peace conference of Versailles at the end of World War I).

For a parallel between the 350th anniversary of the Westphalian Treaties and the 50th anniversary of the Universal Declaration of Human Rights in the same year, and the new American legislation (IRFA), see Stephen Rickard (director of Amnesty International USA), "Religion and global affairs: repression and response," *SAIS Review*, special issue, Summer-Fall 1998, pp.52ff

Civil and Political Rights (hereafter ICCPR) which allows -- if being ratified to this effect under a special protocol -- for the direct implementation of these standards to the citizens of any member-state.

It can then be argued that religious freedom was historically one of the first if not THE first liberty from which all the other universal human rights have derived. This is simply because the society, both internally and internationally, was of a religious character. Secularization, a concept that was popularized in 1967⁴, deprived religious freedom of its special character. It was not any more the first liberty, as in the first amendment to the American constitution, but article 18 of ICCPR. If pursued, this evolution might have as well reduced the scope of religious freedom. A narrow definition is seen by some people in the U.S. as already prevailing in the following Supreme Court cases. Religion is seen as being legally marginalized in the West at the same time as it is again becoming a major world factor.

In the last decade, a two-pronged strategy was launched in the U.S. to put religion back in the public square⁵. On the legal side, to block what someone termed the Supreme Court's "peregrinations"⁶; on the political side, to bring religious preoccupations to the core of the policy-making process (for example pro-life campaigns against abortion rights). The International Religious Freedom Act of 1998 (hereafter IRFA) was one of the most striking achievements of this strategy, but also one of the most puzzling for the international community.

IRFA is a U.S. piece of legislation. It creates obligations to act for the executive branch of government and provide some means to do so, including new official positions. It so defines a U.S. policy. In every country abroad, the U.S. government, through the U.S. embassies and international consultations, will see, through a series of negative as well as positive measures, that the international standards on religious freedom are universally applied.

Legally speaking, international law supersedes in the matter of religion or belief any contrary national law, defining what in a world of state entities could still be termed as a regime of extraterritoriality. However, no authority is given under international Covenants to a government in particular, as was the case in the past with international treaties named "Capitulations"⁷. The U.S. in that matter is acting unilaterally, which of

⁴ Peter L. Berger: *The Sacred Canopy, Elements of a Sociological Theory of Religion*, Doubleday, 1967; Secularization from the peace of Westphalia denotes the removal of territory or property from the control of ecclesiastical authorities. Similarly, in sociological terms, he meant "the process by which sectors of society and culture are removed from the domination of religious institutions and symbols", pp.106-7. Later he became an exponent of "the desecularization of the world, a global overview, in *The Desecularization of the World*, Peter L. Berger ed., Ethics and Public Policy Center, Washington D.C., 1999. Secularity is now the puzzling phenomenon to be explained, not religion. "The University of Chicago is a more interesting topic for the sociology of religion than the Islamic schools of Qom", p.12. I thank Pr. Berger for his insights as director of the new center on Religion and Global Affairs at Boston University.

⁵ The main work by Richard Neuhaus (a Lutheran, later a Catholic priest), *The Naked Public Square: Religion and Democracy in America*, Eerdmans, 1984.

⁶ Elliot Abrams, "Living in Christendom: Jews and modern democracy," in Luis E.Lugo ed., *Religion, Pluralism and Public Life: Abraham Kuyper's legacy for the twenty-first century*, Eerdmans, 2000, p.290. Mr. Abrams is presently chairman of the U.S. Commission on international religious freedom. Cf. further, part II. On Kuyper, cf. further note

⁷ France was entrusted under international Treaties with the protection of Catholic missionary personnel and properties, whatever their nationalities, as well as of the national converts, within the two main world empires: the Ottoman empire under the system of Capitulations dated from the XVIth and XVIIth centuries and confirmed by the Treaties of Paris (1856) and of Berlin (1878); the Chinese empire since the Treaties of 1844 (Whampoa), 1858 (Tientsin) and 1860 (Convention of Peking)⁷. The Capitulations initially intended for the protection of trade and merchants in harbours were in the case of France extended to religion as soon as the 1673 Treaty with the Sultan. The Capitulations later signed with the U.S. did not include this special proviso, except for their own nationals. In China religious proviso were part of the Treaties from the start of the foreign presence ("Scramble for China") as there were many Protestant as well as Catholic missionaries. The Tsar of Russia for one was the protector of Orthodox Churches.

Under Capitulations, the persons under foreign protection, including nationals, were not liable to the jurisdiction of the land. The foreign Consuls were entrusted with police and judicial powers relating to them. The initial justification for this

course it has a right to do. But to what effect or, otherwise, for which purpose ? If not a legal issue, as claimed by the "internationalists", it then clearly is a U.S. policy.

Politically speaking, it will then depend on the customary categories of foreign policy. The promotion of religious freedom may be an ultimate aim for some "religionists". It may also be, for more "sceptics", a reasonable means among others, alongside the traditional view of subsidiarity of religious organizations to the state, for a classically realist approach⁸. A varied series of intermediate formulas lie in between extreme forms of instrumentalization of the state by religion or of religion by the state. As such, religious freedom is but one of many factors influencing international relations. Somewhere stands the boundary, the line or the wall, between church and state, religion and government. From an American perspective, IRFA did not cross it, though in some aspects it borders it.

From a more secularized western European perspective, the question of the constitutionality of such a policy is being raised. Some states have reacted defensively to the American initiatives following IRFA's recommendations, but so far not much thought has been given to the global perspective addressed by IRFA: the internationalization at the same time as the juridiciarization of religious freedom. Some countries, France, Germany, Belgium, Austria, have started to look at the issue from the other end: the perspective of deviant movements ("cults"). They have not developed a comprehensive theory in the sense that, on the basis of IRFA, the American institutions related to its implementation are starting to expand upon.

This paper is intended to raise consciousness of the issue at stake and expose the shortcomings of the American experiment. It calls for an inter-European democratic debate and a transatlantic conversation.

I shall look at IRFA from its two aspects: first, of pronouncement on violations of religious freedom, as a kind of substitute for an international court. Second, of diplomatic action.

From a legal perspective, I shall compare American and international standards on religious freedom, to find proponents of IRFA taking advantage of both, whatever the discrepancies between them.

Then I shall consider the political mechanism devised by Congress and its practicalities from the first two years' experience, to restore it within the framework of the general U.S. foreign policy, which IRFA occasionally serves but is structurally incapable of inspiring. In conclusion, IRFA went a long way to meet

system was not religion as such. The two Empires were in essence despotic and arbitrary. They did not pay respect to due process of law. The turning point would be 1900 for China (The Boxers' Uprising) and about the same time in the Ottoman Empire, when a kind of Islamic revival began, including enactment of Shari'a law.

Turkey denounced the Capitulations in 1914 but these were officially abolished by the Treaty of Lausanne article 28 (July 24, 1923). At the same time the Califate was abolished and a secular Republic created under Kemal Ataturk. In Palestine, the British Mandate allowed them to persist (article 8 of the Mandate, 1920) - including the U.S. -situation which prevailed until the U.N. resolution of November 29, 1947, on the creation of two States, Jewish and Arab, "invited" the Powers to renounce them which they did.

However several privileges subsided, among them tax and customs exemptions, as well as the respect of the status quo for Christian Holy Places. The author, as French deputy Consul general in Jerusalem (1982-6), was in charge of the protection of these religious freedoms.

⁸ Bruce Nichols, *The Uneasy Alliance. Religion, Refugee Work and US Foreign Policy*, Oxford U. Press, 1988. Like at home, the religious organizations abroad are providing a large part of the relief services due to their better connections in countries where people would trust Church volunteers more than governmental officials. The Church would complement the State where it can better fulfil the task. It supposed harmony between both overviews of the world and of foreign policy. It also privileged some most effective organizations over others though not in a discriminatory way. The "three faiths policy" (Protestant, Catholic, Jewish) termed after President Roosevelt's appeal in favor of a "closer cooperation between those in every part of the world—those in religion and those in government who have a common purpose" (letter December 23, 1939, on the issue of war refugees) was a major feature of the Cold War especially under PL 480 (1954 Food for Peace Act) and 1961 Foreign Assistance Act. As an "alliance", it broke in the 1980s over the Central American policy.

religious activists' expectations, too long a way, according to different standards both at home and abroad, without being able to deliver. It is self-delusory.

I- The U.S. International Religious Freedom Act's dilemma

The difficult-to-understand phenomenon is not Iranian mullahs but American university professors.
—Peter L. Berger⁹

On October 27, 1998, President Clinton signed Public Law 105-292, called International Religious Freedom Act (IRFA)¹⁰ which had been unanimously passed by the Congress (Senate on October 9, House the following day).

One of the first remarks was for a commentator to wonder how this law would fare in the U.S. itself¹¹. Being an "international religious freedom" law, it does not apply to U.S. citizens but provides rules for American foreign conduct. Other Acts like D'Amato (1995)& Helms-Burton (1996) (Economic sanctions against trade with or investment in Cuba or Iraq) unilaterally extended American regulations to foreign countries and their relations to other countries. In this case, IRFA conditions American conduct of relations with foreign countries to their application of International Human Rights Conventions to their own citizens. As far as I am aware, it is a first.

Why in this case would Congress prefer international statutes to American law and even its Constitution ? And why then is the U.S. exempt from this legislation ?

Theoretically, the law which would be applied in Kenya should also be the standard for Kansas, and reciprocally. To sum it up, are the international Covenants ratified by the U.S. and incorporated in IRFA coherent with the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof"? Either we say that international law is superior to the law of the land, or that separation of church and state, or non-establishment, applies abroad as well as at home. In brief, is American foreign policy in this regard separated from the internal rule of law and legal practice¹², and if so, is it because it abides to truly international standards which would be at least partially ignored internally or on the contrary is it that it obeys to locally partisan motivations which try to interpret or amend the international practices and policies to fit their own ends ? In other words, "will the U.S. apply a higher standard than [its own] "rational basis" [standard] to foreign states that seek to regulate the religious behavior of its citizens ?"¹³ If so, is it a campaign to overturn internal constraints under separation of church and state, and to put further pressure for a change in U.S. Supreme Court jurisprudence away from separationism to a greater accommodation of religion ?

⁹ *The Desecularization of The World*, p.2. Religion being the natural state of Humanity, non-religion, or secularity, is the problem. I would take this quote in a little different sense: religion is lived. In a sense, we know it when we see it, as Justice Powell said of pornography. When it is theorized, it may be very different from the real thing.

¹⁰ 112 STAT.2787

¹¹ Pr. Winnifred Fallers Sullivan, in *Religious Persecution as a U.S. Policy Issue: Proceedings of a Consultation*, Trinity College, Hartford (CT), ed. by Rosalind I. J. Hackett, Mark Silk and Dennis Hoover, Center for the Study of Religion in Public Life, Hartford, 2000

¹² John Mansfield, "The religion clauses of the first amendment and foreign relations," 36 *DePaul Law Review* 1,1986, is the only comprehensive analysis of its kind. His conclusion seems today incredibly modest: "There should be found implicit in the Constitution recognition of the importance of respect for the ways of foreign nations...For the answers we have for ourselves are not so certainly correct that we can afford to be without the light that comes from other very different ways." p.39

¹³ Christy C. McCormick, "Exporting the First Amendment: America's response to religious persecution abroad," *Journal of International Legal Studies*, Summer 1998, 4, 2, 291. The question is not answered as it is "political".

We may never get any legal answer on the constitutionality of IRFA as such. Section 410 of IRFA precludes any judicial review: "No court shall have jurisdiction to review any Presidential determination or agency action under this Act or any amendment made by this Act". However, it can still be challenged under constitutional standing rules.

The same question might of course be raised of any other country: would their internal laws be in accordance with international standards, or should they be adapted especially in respect of international religious freedom ?¹⁴

In part I-1 we will trace at least three fields where IRFA could be in contradiction with the U.S. judicial interpretation of the First Amendment: the scope of the free exercise of religion between general limitations and accommodations, and two non establishment-related cases: support of religious organizations for a religious purpose and religious activities on public premises. However from part I-2 we will conclude that a definition of religion grounded in the American experiment underlies the whole process construed from IRFA.

I-1 "Out of the First Amendment" ?

The Neocalvinist lawyer and philosopher Bernard Zylstra argued in the 1980s that the U.S. Constitution is itself confusing and does not adequately protect religious freedom. "There is a major example of juridical reflection that better covers this area than the U.S. Constitution: the Charter and the Universal Declaration of Human Rights of December 10, 1948." He did not have any illusions on the possibility of constitutional amendments which would bypass the interpretation of the First Amendment. He advised a new construction of the jurisprudence which would take the judges themselves "out of the First Amendment"¹⁵.

The wall of separation which President Thomas Jefferson saw inscribed in the First Amendment as "the expression of the supreme will of the nation on behalf of the rights of conscience" (letter of January 1, 1802 to the Danbury Baptist Association)¹⁶ was incorporated into the Fourteenth Amendment and made enforceable against the states in 1947 in the words of Justice Hugo Black (former Alabama Senator and staunch anti-papist) in *Everson v. Board of Education*¹⁷: a wall "high and impregnable", at that time mostly designed against newcomers, especially Catholics. A series of decisions from the sixties, built on the no

¹⁴ We may wonder for instance how the 1905 French law of separation of Church and State would fare regarding international standards as understood by the U.S. Congress. The next issue discussed by scholars is registration: Should religious associations been registered? For France, it would mean the abolition of the dual system of associations (1901 for non-religious; 1905 for religious, that imply a more favourable fiscal regime).

¹⁵ "Using the Constitution to defend religious rights," in Lynn R. Buzzard ed., *Freedom And Faith. The Impact of Law on Religious Liberty*, Crossway books, Christian Legal Society, IL, 1982, pp.106-7. His successor as the head of the Institute of Christian Studies of Toronto had already given the same advice to the Canadian legislators in 1982. Paul Marshall expressed his views on "liberalism, pluralism and Christianity"¹⁵, against the first and in favour of the second, in Jonathan Chaplin & Paul Marshall ed., *Political Theory and Christian Vision, Essays in Memory of Bernard Zylstra (1934-1986)*, University Press of America, 1994. He was again to play a major role in the lobbying for IRFA with a major book on international religious freedom in 1996.

See part II. The same line of analysis was followed by the Catholic Church under Pope John Paul II. Paul Ladriere, "La vision europeenne du Pape Jean-Paul II", 5 'Les Droits de l'Homme catholicises', in Rene Luneau ed., *Le Reve de Compostelle, Vers la Restauration d'une Europe Chretienne ?*, Centurion, 1989, pp.173-8. It implied a revision of the ideas of the American Catholics who had been reconciled after some difficulty with the First Amendment. See note 51.

¹⁶ Daniel Dreisbach, "Sowing useful truths and principles": the Danbury Baptists, Thomas Jefferson and the wall of separation", *Journal of Church and State*, 39, 3, summer 1997, p.455 f f

¹⁷ 330 U.S.1 (1947)

establishment clause, appeared to constrain the free exercise of religion to an extent that constitutional amendments were proposed, but to no avail. Legislations were either defeated or declared unconstitutional.

The latest example was the follow-up of the controversial *Employment Division of Oregon v. Smith* (1990)¹⁸. The quasi-unanimous outpour among lawyers and politicians gave rise to the unanimously passed act P.L.103-41 signed on November 16, 1993 under the title "Religious Freedom Restoration Act" (RFRA). Apparently, religious freedom had been injured, as it had to be restored. The Supreme Court in 1997 (*City of Boerne v. Flores*¹⁹) decided this law to be unconstitutional, as it stipulated for states as well as for the federal level. New sets of laws are presently under consideration in several state legislatures as well as in Congress.

This history was paralleled in the framing of IRFA discussed during the 105th Congress. Though no overt relation could be established between the debates on the two pieces of legislation, it is clear that the strategy was designed along the same line. Constitutional amendments or legislations failing, only on the basis of international law could five Justices be beaten.

IRFA begins by three "findings" that explicitly set the stage:

"Finding 1) the right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They have established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion".

Some scholars have contested the historical accuracy of the pretence²⁰. However, it should be noted that the finding and the law itself do not explicitly refer to the First Amendment. On the contrary, it quotes the precisely pertinent articles of the international Covenants in findings 2 and 3.

Finding 2 enumerates six international instruments: the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political rights (ICCPR) of 1966 (ratified by the U.S. only in 1992 with fifteen pages of reservations and a declaration of non self-execution), the Helsinki accords of 1975 (for Europe and North America), the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 (approved only by the General Assembly and not legally binding²¹), the U.N. Charter of 1945 (chronologically in the wrong place) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (of the Council of Europe, of which the U.S. is not a part).

One main instrument is missing: the International Covenant on Economic, Social and Cultural Rights of 1966, in force since 1976, signed but never ratified by the U.S.

Finding 3 quotes two articles: article 18 of UDHR and article 18 (1) of the Covenant of 1966 without the other pertaining articles or sub-articles, especially without the legal restrictions of this right (article 18 (3)

¹⁸ 494 U.S.872 (1990): the use of peyote, a hallucinogenic substance, was not to be excused only by a native Indian religious ritual

¹⁹ 521 U.S.507 (1997)

²⁰ For instance, Winnifred Sullivan. The "Founders" is a word usually applied to the drafters of the Constitution: they were not fleeing religious persecution. The Puritans who had been fleeing persecution one and a half centuries before founded a rather coercive system of religious membership.

²¹ As such, it could not be made into a Convention except under more restrictive terms. Nathan Lerner, *Religion, Beliefs, and International Human Rights*, Orbis books, Maryknoll, 2000. Bahiyyih Tahzib, *Freedom of Religion or Belief, Ensuring Effective Legal Protection*, Martines Nijhoff Publ., The Hague, 1995

and outside the whole framework underwhich the rights might be understood. The isolation of one article from a whole Declaration, out of context, is certainly highly questionable.

The two articles quoted are almost identical (the differences in the 1966 version are in the parentheses below):

"Everyone has (shall have) the right to freedom of thought, conscience and religion; this right includes (shall include) freedom to change his religion or belief (to have or to adopt a religion or belief of his choice), and freedom, either alone (individually) or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance (worship, observance, practice and teaching)".

So far the intention of the legislation is clearly not to export the first amendment but to refer to international rights as being superior to any national juridical interpretation. Why ? For two reasons:

- the limitations extended by the Supreme Court's Smith decision were still in the legislators' minds
- the international documents were misquoted, without any of the limitations attached to them.

I-1-1 free exercise clause: limitations

No other explanation of the meaning of religious freedom and its legal framework is given in the Act. The international conventions are probably seen as self-evident, as no international court is established to interpret them. The U.N.H.R.'s Committee has an interpretative role; it not referred to in IRFA. Characterization of violations and actions to be taken in retaliation are left entirely to the administration under scrutiny of Congress duly informed by a special Commission of experts appointed by the President and both leaders of the two Houses of Congress.

But here is the interaction between internal and international fields. How are we to appreciate the interference of state and church abroad ? Do we have a common yardstick short of judicial or quasi-judicial institutions ? Though there is no reference to it in IRFA, the international instruments clearly reserve limitations. Article 18 of the international Covenant of 1966 states in its paragraph 3), absent from finding 3 quoted above :

"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

The Universal Declaration of 1948 also has a general penultimate article which allows limitations to all the previous rights "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society"(Article 29 (2).

How are the limitations to be interpreted ? Is there any international consensus ?

On this very point, American jurisprudence has developed the concept of a "compelling state interest": No restriction of religious freedom could be allowed unless the State could prove a "compelling interest" to do so. The Smith decision was precisely a (partial) reversal of this previous jurisprudence. Justice Scalia, speaking for the majority, stated that general laws could not be exempted by an individual as a rule unless he could prove an intentional prohibition of free exercise of religion under the First Amendment. He thus reverts the burden of proof: the Courts could once again limit the number of religious exemptions. He argued that unlimited exemptions for each and every one, especially in a situation of multi-denominations,

would mean "anarchy". Many critics understood that what can be limited in the instance of peyote for a native religion could as well be limited for any ritual of any religion, even the most established ones. Peyote was even compared to the wine of the Eucharist, which was termed as "alcohol consumption" !²²

The argument of the majority of the Court went on: there had to be general rules; every right implied duties; no country could indefinitely extend the definition of religion far beyond the request of non-establishment and agree indifferently to any special accommodation with the general laws, especially criminal ones. With the proliferation of sects, a large number of individuals could then oppose whatever dictate of conscience and render any general law ineffective.

Not everything is religion. But how to define religion ? The Court, Congress and the administration wisely and rightly avoid venturing into this question. Religion, however alleged, should not excuse everything, any behavior contrary to general law. The question is therefore not in the exemptions but in the drafting of general laws. The majority of the Supreme Court, following Justice Scalia, did not think it was a matter to be resolved by the Courts but by the legislature. Justice Scalia anticipated the objections. He wrote: "Leaving accommodation of religion to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs"²³.

I-1-2 International religious freedom: accommodations

On the international level, what universal standards should be adopted and what cultural accommodations should be allowed ? Criminal law regarding narcotic consumption may, for instance, vary from one country to another.

What was particularly interesting in the Smith case from an international perspective is that it concerned a native religion among quasi-sovereign "nations" holding to international treaties signed by the government of the U.S. in respect to Indian tribes.

This question was not raised during the case. But a campaign was immediately launched in order to extend the legislation pertaining to the rights of Indians. The Religious Freedom Restoration Act, reverting the Smith decision on principles, was passed first in 1993 but the Indians had joined the lobbying on condition that the religious organizations will then support the new Indian legislation which passed in 1994 (PL 103-

²² A special exemption had been made for the Eucharist's wine during Prohibition in the 1920s (Volstead Act). It is considered to have been imposed by the Low Church against the High Church. Again, the present comparison is significant as the Catholic doctrine of Transubstantiation (adhered to by the Protestant High Church) is commonly mocked by Evangelicals as a form of cannibalism.

²³ p. 1605. A few scholars only approved of Justice Scalia: especially Mary Ann Glendon for circumstantial reasons (narcotics), but others more on principles: William P. Marshall, "In defense of Smith and free exercise revisionism," *University of Chicago Law Review* 58, 308, 1991; Michael Perry, *Religion in Politics: Constitutional and Moral Perspectives*, Oxford University Press 1997; Mark Tushnet, "The rhetoric of free exercise discourse," *Brigham Young University Law Review*, 1993, 1, 117 and *Taking the Constitution away from the Courts*, Princeton University Press, 2000. The whole issue of *Brigham Young University Law Review* above is devoted to the acts of a symposium held in January 1993: "New directions in religious liberty". Most comments are hostile to the Smith decision. In the background, references are made to the contemporary international actuality of Bosnia.

As an extreme example of criticism relating the decision with international religious freedom: "Neutral, generally applicable laws like Sharia not expressly intended to discriminate against religious minorities, but nonetheless imposing serious repercussions (including death) on them, would now be upheld by the U.S. Supreme Court following its decision in the employment division of *Oregon v. Smith*, Nathan A. Adams IV, "A Human Right imperative: extending religious liberty beyond the border," *Cornell International Law Journal*, 2000, 33, 1, 63.

344). The interesting part is that under this legislation, only Indians can exempt themselves. A non-Indian would not be allowed to ingest peyote on this ground. It is then less a case of religious freedom than of sovereign status of a nation within the state. As an Indian, Alfred Smith could only be exempted under certain fixed circumstances tied with the definition of Indian rights. In the special case, he would still not be found exempt. But this would not have been a case of religious freedom, but of the scope of Indian rights²⁴.

What had increased the confusion was that the request was made out of religion, "a church" and a "sacrament", though in these terms reconstructed on the model of the Catholic Church and the Holy Communion. Justice Scalia was utterly criticized for not having given due consideration to the religious allegation. Instead he chose to ignore it, which was actually the best thing to do. Otherwise, the Supreme Court would have had to examine whether this or that was or was not a church and a sacrament and make theological appreciations and even discriminate, unless it accepts as fact what the plaintiff said about his own belief. The consequence of the latter as advocated by libertarians is that any "thing" stated as religion or belief should be recognised as such, as long as it structures a group or community, distinct from the rest of the society. This would extend to the appellation of "New Religious Movements" (NRM), whether "cults" or whatever else.

The irony is that the French sociologist Emile Durckheim was criticized for defining religion from the model of Australian Aborigines²⁵, which is exactly what critics of the Smith decision wanted to do from native Indians. The Supreme Court was wise not to decide from the point of view of the subject and of religion but of the General Will or the Public Good, ie from Reason enacted into Law. The general laws of the land should be applied irrespective of religious doctrines on matters of public safety, order, health or --what is more risky -- morals. As a result a practice like polygamy was condemned in court and finally abandoned as religious dogma by the Mormons, or Church of Jesus Christ of Latter-Saints Day²⁶. We can understand it as an example of the sectarian "asperities" which Jefferson hoped could be resolved²⁷. A return to a kind of communitarianism would reverse this evolution. The case for polygamy might then be reopened.

Most legal commentators, religious organizations and politicians in 1990 disagreed with the Supreme Court decision. The "compelling interest" was restored by Congress, though later invalidated by the Supreme Court²⁸. IRFA could be regarded as a continuation of RFRA in that respect and as a way to internationalize

Winnifred F. Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States*, Harvard University Press, 1994, sees in Scalia's confidence in the majority rule "perhaps a further indication of the coming of age of the American Catholic community", note 38 p.125. Justice Anthony Scalia, one of the three Catholics on the bench out of nine, is the most conservative. Stephen Carter had made a similar point, that a strong religion will have the power to influence the drafting of law and so would not be in need of exemptions. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, New York: Basic Books, 1993.

This goes back to the suspicion —which Fr Murray thought he got rid of at Vatican II (see later note 50)—that the Catholic Church will behave differently when it is in the majority as when it is in the minority.

²⁴ *Montana Law Review* is specially concerned by this aspect. See 56,1, Winter 1995 (special issue on Religious Freedom Restoration Act) Rodney K. Smith, "Sovereignty and the Sacred: the establishment clause in Indian country," 295. In note 29 p. 306 he suggests: "Establishment or separationist concerns do not have much impact on the designation of foreign aid. As quasi-sovereign, tribes may well be due similar defense on political grounds as well". See later I-1-2 for the first assertion.

Huston Smith and Reuben Snake ed., *One Nation under God: The Triumph of the Native American Church*, Santa Fe, 1996.

²⁵ *The Elementary Forms of the Religious Life*, 1912. A secular Jew, son of a Rabbi, Durckheim, writing at the time of separation of Church and State in France, may have been more influenced by his immediate environment. See later note 59

²⁶ Justice Scalia expressly referred to *Reynolds v U.S.*, 98 U.S. 145 (1879) when Utah was still a federal territory.

²⁷ Letter to James Madison: "By bringing the sects together...we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason and morality".

²⁸ Section 3: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability (unless) it demonstrate that application of the burden to the person

it²⁹. Its proponents think that the introduction of an international perspective would do more than a simple piece of national legislation.

I-1-3 No establishment clause: definition of purpose

The main thrust of IRFA's proponents, apart from freeing themselves of some of the juridical internal constraints on the exercise of religious freedom, was to compel the executive to act upon violations of religious freedom abroad. Section 401 (a) (1) (A) defines a double response: "It shall be the policy of the United States (i) to oppose violations of religious freedom that are or have been engaged in or tolerated by the governments of foreign countries; and (ii) to promote the right to freedom of religion in those countries through the actions described in subsection (b)".

Fifteen actions are listed in section 405, ranging from "a private demarche" to prohibition of any contract, going through cancellations of exchanges, or visits; withdrawal, limitation or suspension of development assistance; and prohibition of any loan or credit, including multilateral ones³⁰.

The strategy has been criticized as mainly negative. Sanctions are to be exerted on foreign countries who do not protect religious freedom as defined by the U.S. Congress. It seems difficult to reach both goals set in the first subsection only through sanctions: to oppose but also to promote. Are these two sides of the same coin, like non-establishment and free exercise, or is there more to it? If there is more, the policy also has to be twofold: to engage as well as to punish.

Accordingly, a provision was introduced in the Act (section 501) to the effect of allowing allocation of funds under the Foreign Assistance Act of 1961 for the purpose of promoting and developing "the right to free religious belief and practice". Note that again the Act did not state "free belief and religious practice" but specified "free religious belief and practice", mixing conscience and religion. A similar provision in section 106 applies to programs and the allocation of funds by U.S. missions abroad.

The point - "promote not punish" - has been made at the end of Robert A. Seiple's term of office as the first Ambassador-at-Large entrusted with this mission under section 101. Seiple served from August 1998, first as Special Adviser to the President and Secretary of State and in May 1999 was sworn in as Ambassador-at-Large until he resigned in September 2000. Before joining the State Department, Seiple had for 11 years been the President of an Evangelical non-denominational relief and international development agency, World Vision U.S. He had also been president of a Baptist college and theological seminary.

Here again we find juridical constraints under U.S. law: if you are going to engage, which means to help promote religious freedom, so called religious activities or activities in favour of religious freedom, then you

1) is in furtherance of a compelling government interest

2) is the least restrictive means of furthering that compelling government interest".

²⁹ Nathan Adams IV suggests that the compelling government interest to be internationalized (only for freedom of speech, assembly and education; belief and worship should be totally free), pp.62-63

³⁰ Nobody seemed to have suggested coercive actions: "No one has suggested emulating Oliver Cromwell, who as Lord Protector of England at least once threatened war against a continental principality unless its government quit picking on its Protestant minority." "Religious freedom abroad", *Salt Lake Tribune*, October 13, 2000.

The precedent of the international expedition against the Boxers (under German command and with American participation) is in all the memories. See harsh criticisms in the U.S. by Mark Twain and in France by George Clemenceau. However, financial support to groups favoring religious freedom might be extended to support of armed opposition groups. The issue raised for Afghan or Bosnian Muslims before the Act is now openly discussed regarding South Sudan, *New York Times*, February 25, 2001.

have to abide by *Lemon v Kurtzman*³¹. The Supreme Court set three rules for a statute involving religion: first it must serve a secular purpose; second, its primary effect must be one that neither advances nor inhibits religion; third, it must not foster an excessive entanglement between church and state. For instance, World Vision as a faith-based organization was refused access to public funding in 1962 and 1977 before solving the problem in creating World Vision Int. as a secular branch later evolving into a more sophisticated approach to faith in its activities³². A policy of engagement on the basis of IRFA would clearly have to come under the constitutional test set by the Supreme Court in the *Lemon* case³³. This could explain the exclusive policy of sanctions. Not to engage does not amount to the same standard as engage: this may be one of IRFA's worst effects.

The answer would be different if the *Lemon* test did not apply abroad. Judicial cases, though rare, are positive: it applies³⁴. However, it may be one of the underlying goals of IRFA to press for a reversal of this jurisprudence much criticized among legal scholars³⁵. The latest statements by Senator Jesse Helms in favor of channeling U.S. aid abroad through charities go in the same direction, parallel to the new "Charitable Choice" policy for social programs at home.³⁶

Still the support for religious freedom would go far beyond social work, as it would promote international standards of "worship, observance, practice and teaching" of religion as such.

I-1-4 Religious activities in public premises

In a breathtaking development, the Act in section 107 provides "equal access to U.S. missions abroad for conducting religious activities". "The Secretary of State shall permit, on terms no less favorable than that accorded other nongovernmental activities unrelated to the conduct of the diplomatic mission, access to the premises of any U.S. diplomatic mission or consular post by any U.S. citizen seeking to conduct an activity for religious purposes". Subsection c) allows for foreign nationals to enjoy equal access for this purpose.

³¹ 403 U.S. 602 (1971) Bruce Nichols, *The Uneasy Alliance. Religion, Refugee Work and US Foreign Policy*, Oxford Un. Press, 1988.

³² World Vision founded in 1950 to help children in the Korean war, engaged in development substantially in the 1970s and 1980s. Under the presidency of Bob Seiple (1987-1998), it aligned with the major development international agencies. The link between development and evangelization has become more subtle: see Bryant L. Myers (one of the vice-presidents), *Walking with the Poor, Principles and Practices of Transformational Development*, Orbis Books Maryknoll, and World Vision, 2000. With an annual budget of 400 million dollars, it is the fourth U.S. largest international faith-based charity (after Lutherans, Jewish and Catholics); 16% of its budget come from the government against 62% for Catholic Relief Services

³³ The U.S. Commission on International Religious Freedom complains that the State Department report does not include any "description of the nature and magnitude of programs funded by the U.S. Government that touch on the promotion of religious freedom", December 8, 2000; But what might these programs be if not religious activities newly launched by minority religious groups to compete with the majoritarian ones ?

³⁴ I owe to Pr. Mansfield a decision of the U.S. Court of Appeals, 2nd Circ. *Lamond v. Woods* 1991, Woods was the director of U.S.A.I.D. The decision was clearly in favor of the application of the *Lemon* test to financing religious schools abroad under the Foreign Assistance Act of 1961, the one which was amended by IRFA. 948 F.2d 825.

³⁵ Dr. Jeremy Gunn pointed out that international standards allow public financing of religious schools or salaries of teachers in those schools, all what is forbidden under American jurisprudence, statement in "IRFA: Two Years After", forum by the American Academy of Religion, Nashville (Tennessee), November 18-21, 2000 (recording). My thanks to the organizer of the forum, Pr. Rosalind Hackett. National legislations in Western Europe allow this type of public financing even under French Separation of Church and State.

³⁶ *New York Times*, January 12, 2001. At home, the new administration announced a policy of governmental support to faith-based initiatives as allowed by an amendment to the Welfare Act of 1996 (from the now Attorney-General John Ashcroft). At the same time, President Bush cancelled any support to organizations advocating the right to freedom of abortion in foreign aid.

Here the case was raised regarding Saudi Arabia, especially during and after the Gulf war. No Christian worship had ever been allowed in the country, whose whole territory is considered a holy place, nor could it take place in a U.S. mission³⁷. The question was brought up in Congress; hence this section, which can be viewed at best as an extension of the Defense forces arrangements (with appointed chaplains).

However the subsection extending access to the embassy to foreign nationals can hardly be justified on these premises. The argument then might be based on reciprocity. The first proposal for the bill was grounded in asylum and refugee assistance: the immigration laws had come under severe stress during the Central American wars in the 80s. A "sanctuary" movement developed among American churches, providing assistance to illegal immigrants fleeing civil wars³⁸. The pressure was then put on immigration services from the religious left (Salvador) as well as the religious right (Nicaragua) to soften enforcement for religious purposes.

Title VI of IRFA, devoted to this subject, provides for a special protection for foreign immigrants which were denied religious freedom in their country of origin.

I-2 "Exporting the First Amendment" ?

From the critique of internal legal codes from an international perspective, we come to a critique and a reassessment of international standards to suit national ones. Various legal issues are still pending on the international level, which U.S. history and philosophical concepts (ie American religious exceptionalism) could influence.

We can see three main characteristics of a particular American view of religion through the discussion and implementation of IRFA: religion as

- natural (The first liberty I-2-1),
- personal (Church and Sect I-2-2),
- and global (Proselytization 1-2-3)³⁹.

Professor Winnifred Sullivan altogether detected in IRFA what she called "an underlying theology": it tends, she said, "to set up as protected a religion that is individual, chosen, private and believed. This would be the classic, evangelical Protestant understanding of what religion is, an understanding that is in some ways a product of disestablishment. In many places in the world, and indeed in parts of America, religion is communal. It's given...It's public...And it's enacted, embedded in the culture"⁴⁰.

³⁷ It usually took place either in the British Embassy or in private corporate compounds (and occasionally in the French Ambassador's residence—the author was DHM in the French embassy in Riyadh (1993-4).

³⁸ Hilary Cunningham, "Sanctuary and Sovereignty: Church and State along the U.S.-Mexico border," *Journal of Church and State*, 40, 2, Spring 1998, p.371ff

³⁹ My characterization is intended to be as objective as possible. The issue is not whether these characters describe what is a "true" or a "pure" or a "genuine" religion, but that there are (different) people who could see religion as unnatural, institutional, and local, each term taken one by one or together. The issue is then whether there is and should be a subtext in IRFA.

⁴⁰ In "Religious persecution as a U.S. policy issue", p.48; also "Exporting religion", *Commonweal*, February 26, 1999, and a statement in Nashville conference, November 2000. Pr. Michael Sandel, Harvard professor of philosophy, had made the point in "Freedom of conscience or freedom of choice," as early as 1988, in *Articles of faith, articles of peace: the religious liberty clauses and the American public philosophy*, and in *Utah Law Review*, 1989, 597, reprinted in *Democracy's Discontent: America in Search of a Public Philosophy*, Harvard University Press, 1996, chap.3, p.55ff. He quoted Justice Stevens in *Wallace v Jaffree* (472 US 105 (1985)): "Religious beliefs worthy of respect are the product of

I-2-1 "The First Liberty"

The U.S. Department of State, through its mandatory annual reports on international religious freedom according to section 102 of IRFA, is actually creating a record for each foreign country as well as a general interpretation of its own object.⁴¹ For 1999, Ambassador Seiple developed a quasi-religious theory of the dignity of the Human Person. In 2000, the Department of State, the Ambassador having resigned, marked a notable evolution in presenting religious freedom as a "cornerstone of democracy".

Taking occasion of the 50th anniversary of the Universal Declaration of Human Rights, Ambassador Seiple, reporting on his first year of mandate, saw that religious freedom under article 18 (which he conceded "includes the right not to believe") was, like all Human rights, based on article 1 and the notion of human dignity: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

The drafting of the Declaration, and specially of the first article, was due to a French secular Jew, Professor René Cassin, legal adviser to General de Gaulle during World War II⁴². But then Ambassador Seiple had to reconcile this notion with the American experiment (Finding 1) "in which religious liberty is the "first freedom" of the Constitution". How ? Simply by arguing that religious freedom "directly addresses the foundation of human dignity". If religion is already included in article 1 in "reason and conscience", understanding those two words and especially conscience as synonymous with religion⁴³, it is the first of all rights and the very condition of others⁴⁴.

I quote Ambassador Seiple's introduction to the 1999 report of the Department of State:

"When the concept of human dignity is understood as grounded in religion, it becomes a bridge for people of all faiths. It roots the concern for human rights in metaphysical soil and guards against its exploitation for more transient ends. Indeed, when so defined, human dignity becomes more than a human idea. It becomes a reality, a part of the natural order of things. So understood, all human rights - as expressed in international

free and voluntary choice by the faithful". Pr.Sandel's conclusion is that the protection of the First Amendment is not any more for religion as such but for the "Self unencumbered by convictions antecedent to choice".

⁴¹ U.S.Department of State. "Annual report on International Religious Freedom for 1999," released September 9, 1999; for 2000, released September 5, 2000.

⁴² Johannes Morsink, *Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, 1999 . Mary Ann Glendon, *A World Made New, Eleanor Roosevelt and the UDHR*, Random Press New York 2001. Liberty, equality and brotherhood derived from the French republican motto. Dignity is a direct consequence of the Nazi extermination policy.

⁴³ On how "infringement of the rights of conscience" as proposed by James Madison was dropped in the Senate, see John T.Noonan, *The Lustre of Our Country, The American Experience of Religious Freedom*, University of California Press, 1998. Philip Hammond, *The Dynamics of Religious Organizations, The Extravasation of The Sacred*, Oxford 2000, chapter twelve, "Church, State and the dilemma of Conscience," and chapter thirteen, "Conscience and the establishment clause."

⁴⁴ Pope John Paul II has himself stated this very opinion several times: cf speeches in the U.N. October 2,1979, September 1987, October 5, 1995. See Brian Hehir, "Religious freedom and U.S. Foreign policy: categories and choices," paper presented to Ethics and Public Policy Center, Washington D.C. forthcoming. Personal communication, January 2001. The most recent statement in the Pope's addressed to the Diplomatic Corps, January 13, 2001: "The Catholic Church is determined to defend the dignity, the rights and the transcendent dimension of the human person. Even if some are reluctant to refer to the religious dimension of human beings and human history, even if others want to consign religion to the private sphere, even if believing communities are persecuted, Christians will still proclaim that religious experience is part of human experience. It is a vital element in shaping the person and the society to which people belong. This is why the Holy See has always been vigorous in defending freedom of conscience and religious liberty, at both individual and social levels." *Origins*, 30, 3é, January 25, 2001, p.518.

covenants - take on a more profound meaning. When people do evil to others, it is not simply a practical rule that is being violated, but the nature of the world itself."

The primacy of religious freedom is founded in the belief in a natural order, in a natural not to say divine law, as he ventured to write it in the official report. As such it could hardly be an official statement by the president or the Department of State, which is why the State Department did not repeat these assertions in the introduction of its 2000 report.

This last report, released September 5, 2000, unambiguously starts from the American experiment without trying to reconcile it with a previous international legal framework. From the third line, the expression "freedom of conscience" makes a spectacular comeback and is constantly associated with freedom of religion. Professor Michael Perry had as early as 1996 pointed out the contradiction between international and U.S. laws (RFRA at the time): "It might be ideal if the Constitutional law of the U.S. were revised to protect acts of secular conscience on a par with acts of religious conscience (A utopian suggestion ? The international law already protects not only acts of religious conscience but acts of conscience in general)."⁴⁵

So, extended to conscience, religious freedom could again restore its primacy as the "first liberty". The 2000 report :

"The Founders understood that no government was likely to protect the other core rights if it did not honor the sanctum sanctorum of human conscience - the inherent and inviolable right of every human being to pursue ultimate truth and to believe and worship, or not, as part of that pursuit."

I leave out of this paper the historical discussion as to whether it was the exact intention of "the Founders" collectively and individually⁴⁶. The definition of the freedom of conscience in the document refers to a statement of a Lutheran theologian, Paul Tillich, which was once undertaken by Justice Clark in *U.S.v Seeger*⁴⁷ to extend the protection of the first amendment to Vietnam War conscientious objectors. "In these cases, the Court expanded religious exemptions from military service to include those whose moral and philosophical beliefs served for them the same function as the belief in God did for traditional religious believers"⁴⁸. The exact reference was to Tillich's concept of "ultimate concern". The U.S. State Department jumped to "ultimate meaning and truth".

As it stands, "the freedom of religion and conscience" is still the first liberty, not as a "natural law" as in the 1999 report, but as a "cornerstone of democracy". Noting that the number of democracies doubled during

⁴⁵ "Religion, Politics and the Constitution," *Journal of Contemporary Legal Issues*, Fall 1996, 7, 2, p.434 and his subsequent book, *Religion and Politics: Constitutional and Moral Perspectives*, Oxford University Press, 1997. Also *The idea of Human Rights*, Oxford University Press, 1998 and chapter one: "Is the idea of Human Rights ineliminably religious ?"

⁴⁶ A large debate was opened by Michael W. McConnell, the origins and historical understanding of free exercise of religion, *Harvard Law Review* 1409, 103,7, May 1990 (contemporary of the Smith decision) who re-emphasized the Evangelical influence on James Madison at the expense of Thomas Jefferson's republican ideals.

⁴⁷ 380 U.S. 163 (1965)

⁴⁸ Bette Novit Evans, *Interpreting the Free Exercise of Religion, The Constitution and American Pluralism*, University of North Carolina, 1997, p.57. James Mc Bride, 'Paul Tillich and the Supreme Court. Tillich's ultimate concern as a standard in judicial interpretation', *Journal of Church and State*, 9, 30, 1988. A post-Kantian German theologian, refugee in the U.S., Tillich tried to find a language acceptable for all. Religion was "the depth of your life, the source of your being, or your ultimate concern, or what you take most seriously, without reservation", in *The Shaking of the Foundations*, 1948. See Alasdair MacIntyre and Paul Ricoeur, *The Religious Significance of Atheism*, 1966.

the decade of the 1990s, the report acknowledged the role of religious freedom in this process⁴⁹ but remains cautious: "Sometimes,...democratic majorities are tied to a particular religious tradition, or to a tradition of religious skepticism, and are resistant to new and unfamiliar religions". Europe would fit in the latter picture. Consequently the report reverts the relation between the two phenomenon to conclude on this point that, "while democratic states are the most likely guarantors of religious freedom, so too is religious freedom an essential component of democracy". If we can trace here a return to Tocqueville's *Democracy in America*, the argument clearly runs across majority rule turned into "majoritarian tyranny"⁵⁰.

The report acknowledges that "each religious tradition has a moral code, a way of understanding who we are and how we ought to order our lives together. The articulation of these understandings in the public square is not something to be feared by democracies. Rather it makes a vital contribution to the development of public policy."

The debate has for a longtime been an ongoing one in academia as well as politics. The link between American democracy and freedom of religion had already been made in the early sixties by Father John Courtney Murray but, in his own terms, the constitutional clauses were not to be taken as "articles of faith" but as "articles of peace" in a pluralistic society⁵¹. It happened that the 2000 report was issued

⁴⁹ Samuel Huntington, *The third wave: democratization in the late twentieth century*, University of Oklahoma Press, 1991, stressed the role of religion in this wave. However the Churches, in Poland or Philippines, which have played this role most effectively are mostly national, majoritarian, hierarchical, and not pluralistic, minority ones.

⁵⁰ Special issue of the *Journal of Democracy*, Freedom House, January 2000, 11, 1: Democracy in the world, Tocqueville revisited. "The revival of Tocqueville coincided with discrediting and fall of Marx like eclipse of Tocqueville coincided with the rise of Marx: we are all Tocquevillians now". The editors. The link between religion and democracy has been specially emphasized in various contributions and a special chapter, "Does Democracy Need Religion ?", by Hillel Fradkin. *Social Compass* had already a special issue on "Tocqueville et la religion" 38 (3), 1991, among which Philip E. Hammond, "Is America experiencing another religious revival: what would Tocqueville say ?" Sanford Kessler, *Tocqueville's Civil Religion. American Society And The Prospects For Freedom*, State University of New York, 1994. James Sloat, "The subtle significance of sincere belief: Tocqueville's account of religious belief and democratic stability" *Journal of Church and State*, autumn 2000, 42, 4, 759.

Tocqueville, visiting in 1831, almost ignores the Evangelical religious revival called "the Second Awakening" of 1830 which he termed as madness or insanity (vol 2, chap 12). He erred in thinking that Protestantism will unify in a kind of reasonable Christianity (unitarianism). However valid his conclusions on the harmony between religion and democracy, they are therefore based on two false assumptions.

⁵¹ James D. Hunter and Oz Guinnes ed., *Articles Of Faith, Articles Of Peace: The Religious Clauses And The American Public Philosophy* Brookings Institute Washington D.C; (Acts of a symposium by the Williamsburg Charter Foundation, April 1988), where we already find the question: is it a set of arrangements to be exported ?

John Courtney Murray, S.J. "The problem of pluralism in America," *Thought*, 24, Summer 1954, in *We Hold These Truths, Catholic Reflections on the American Proposition*, Sheed and Ward, 1988. Fr. Murray (1904-1967) is one of the main drafters of the declaration on religious freedom at Council Vatican II. *Dignitatis Humanae Personae* (Human Dignity) was promulgated on December 7, 1965; the English text is in "Religion and Human Rights: Basic Documents" Center for the Study of Human Rights Columbia University, Tad Stahnke and J.Paul Martin ed., 1998, pp.210-219.

Dominique Gonnet, S.J., *La liberté religieuse à Vatican II, la contribution de John Courtney Murray*, Cerf, 1994. French bishops during the debates on religious liberty objected to the American inspiration of the document. The purpose was not to oppose freedom as such but to base it on a sound theology of Human rights and not as the American Jesuit had suggested, on the only constitutional and historical issue of Church and State as inscribed in the first amendment of the U.S. Constitution. The works of Murray since 1945 had been directed at the inclusion of the Catholic Church within the American religious establishment, or consensus. His aim was to reconcile the Catholic teaching with the first amendment. To achieve it, Murray had to twist both wrists: the Vatican doctrinal corpus was one. Note that he used UDHR of 1948 with the support of then Cardinal Wojtyla. But he had also to develop a personal interpretation of the U.S. Constitution itself. The interpretation of the American experiment by Fr. Murray has been criticized by William Lee Miller, *The First Liberty, Religion and the American Republic*, N.Y. 1986. Thomas Hughson, S.J., "From James Madison to William Lee Miller: 'John Courtney Murray and the Baptist theory of the first amendment,'" *Journal of Church and State*, 37, 1, 1995, p.15ff. New criticism has arisen from theological points of view, linking Fr. Murray with "Americanism", a version of "modernism" condemned by Pope Leo XIII in 1899: Glenn Olsen, "The Quest For A Public Philosophy In XX Th Century American Political Thought," *Communio*, Summer 2000, p.357. Michael Baxter (Notre Dame University). David L. Schindler, *Heart Of The World, Center Of The Church*, Eerdmans, 1996, chapter I- "Religious Freedom, Truth and Anglo-

simultaneously with statements made to the same effect by Senator Joe Lieberman, on his selection as the Democratic nominee for vice-president.

The report affirms that "history teaches that the habit of democracy is grounded in and transmitted by the prior institutions of society, especially the family and religious institutions". Again a Tocquevillian phrase, which may not be shared by everyone in principle or in historical terms.

Finally, in the end of Part II, history is called again to "demonstrate" that "new and unfamiliar religions do not threaten democracy; they enrich it. It is a lesson that must be learned and relearned for the ongoing, global democratic experiment to succeed".

One cannot but be surprised to read such "theological" statements in the introduction to a report from the Department of State (Bureau of Democracy, Human Rights and Labor) on foreign countries. Let us reconsider the questions of democracy and pluralism. From a legal perspective, it raises a difficult point of contradiction between the status of institutions and individual rights; it also focusses on the freedom to proselytise ("new and unfamiliar religions"), which is a major source of international conflict.

I-2-2 Church and Sect

Various legal commentators in America have argued that the U.S. Supreme Court has followed a too individualistic approach "ignoring the fact that religious freedom has associational and institutional aspects". So far the jurisprudence has been based, according to Professor Mary Ann Glendon, more on John Stuart Mill's nineteenth century liberalism than on the eighteenth century spirit of the Founders.⁵²

Case law is built upon individual plaintiffs. A church or an organized body can only put a case through an individual member of the community. Freedom of religion is a privilege of the individual. The organization, in itself being considered as the voluntary and free grouping of the faithful, has no existence above or outside them and consequently has no proper rights of its own as a structure independent of its members⁵³. The only exceptions were made for survival purposes of specific communities, a matter more of a nation's identity than of a religious kind (the ultratraditionalist Old Amish community in *Wisconsin v Yoder*⁵⁴, in a way similar to Native Americans).

American Liberalism: another look at John Courtney Murray," p.43ff.; also Stanley Hauerwas, "Not late enough, the divided mind of *Dignitatis Humanae Personae*," in *A Better Hope, Resources For A Church Confronting Capitalism, Democracy And Postmodernity*, Brazos Press 2000, p. 109ff

⁵² Mary Ann Glendon, *Rights Talk: The Impoverishment Of Political Discourse*, 1991. "Structural free exercise", *Michigan Law Review*, 90, 3, December 1991, 477. Personal communication, January 2001. Pr.Glendon, from Harvard Law School, is an advisor to the Vatican and a member of the Council of Lay People. She led the delegation of the Holy See to the U.N.Conference on Women in Beijing, 1994.

⁵³ Presented as an undifferentiated model of religion, it deliberately ignores the distinction of Church and Sect which had been a feature of Max Weber's classic *The Protestant Ethic And The Spirit Of Capitalism* (1904-5): the Church is where you are born in, ie, a religious tradition but also an "institution" of Salvation by itself. It administers Grace for the Just as well as the Unjust. A Sect is where you have decided of your free choice, that you have "elected" and being admitted to, where you have been "regenerated" (Methodist revival) or "reborn": "born again" in the Baptist tradition. It is a way of "sanctification". This is typically theologic. But as a sociological and possibly a legal distinction, it is the individual versus the institutional rights. President Thomas Jefferson pushed the logic to its extreme when he said: "I am a sect myself". Unless maybe the word Church has to be altogether removed as antinomic to religion, religion being purely personal, synonymous of conscience.

⁵⁴ 406 U.S. 205 (1972) exemption of compulsory education in order not to be exposed to ideas contrary to the values of the community. Old Amish, Anabaptist dissidents, are behaving more as a community than as a religion as such. However compatibility with the Smith decision is open to discussion.

In that sense, again, it might seem easier to make one's case from the UDHR and subsequent international Covenants, as these post-World War II documents include collective rights alongside with individual ones. This trend was encouraged by Socialist countries at the time, but not only them. The social teachings - based whether on Catholic subsidiarity or Calvinism's two spheres of sovereignty - were also very much in favor in Western democracies influenced by Social-Democratic as well as Christian-Democratic movements (Catholic as well as Lutheran and Calvinist)⁵⁵. Family rights, freedom of education, corporate and labor unions, and so on are much more precise in international documents than in more ancient national ones (compare the preamble of France's 1946 Constitution).

However the present trend with IRFA is not so much to incorporate these institutional rights in order to circumscribe a prevailing national jurisprudence than to try to push international Covenants on the same basis of individualism and liberalism.

This might be the reason why finding (2) did not include, as we remarked earlier, the International Covenant on Economic, Social and Cultural Rights of 1966. Professor Glendon has been tirelessly arguing that the Universal Declaration is indivisible, that every part can only be interpreted in relation to the others and as part of the whole. If you force one right at the expense of the others, you create an imbalance that will be detrimental to all, including the one you want to defend first. This is in fact what is happening with the special treatment of religious freedom in IRFA.

The idea might be to put religious freedom in a closet, unrelated to the rest of the other societal needs and obligations: in sum, to separate and put it in the sphere of the Self, even if it is not limited to private experience⁵⁶; to make it self-sufficient, as in a voluntary ghetto, denying the outside world. This was the first idea of a wall of separation between the garden of the Church and the wilderness of the World⁵⁷, religion being a society to itself. The separationists on both sides, secular and sectarian, have now rejoined one another.

The confusion seems again to come from the assimilation of conscience to religion. If you clearly distinguish between the two, you are not obliged to see religion only through individual right but as a collective right of its own, entitled to a corporate personality⁵⁸.

⁵⁵ Bernard Zylstra (and Paul Marshall) was representative of the Dutch Reform anti-revolutionary movement of Abraham Kuyper (1832-1920), Dutch Prime Minister at the beginning of the XXth century, and Herman Dooyeweerd (1894-1977) and the theory of spheres of sovereignty. Also Pr. Johan Van der Vyver, introduction to *Religious Human Rights In Global Perspective: Legal Perspectives*, Johan Van der Vyver and John Witte Jr. ed., The Hague, 1996. However the main theologian in this field is a Lutheran, a friend of Max Weber, Ernst Troeltsch (1865-1923), who theorized the distinction between Church and Sect in his *Social Teachings of Christian Churches and Movements* (1912).

⁵⁶ The volume more influential than any other else in the XXth century in shaping the educated classes' notion of religion in the U.S. was *The Varieties Of Religious Experience* (1902) by William James from Harvard (brother of the famous novelist Henry James). His definition as of a psychologist was: "the feelings, acts and experiences of individual men in solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine. Since the relation may be either moral, physical or ritual, it is evident that out of religion in the sense in which we take it, theologies, philosophies and ecclesiastical organizations may secondarily grow". Religion here is clearly in the place of conscience ("Solitary"). Church is the last of the "secondary" consequence of religious experience.

⁵⁷ Mark DeWolfe Howe, *The Garden And The Wilderness: Religion And Government In American Constitutional History*, Chicago, 1965. The quote is from Roger Williams, Baptist dissident from the Massachusetts Puritan establishment, in a letter to John Cotton in 1644.

⁵⁸ James Wood & Derek Davis, *The Role Of Government In Monitoring And Regulating Religion In Public Life*, 1992. Frederick Mark Gedicks, *The Rhetoric Of Church And State: A Critical Analysis Of Religion Clause Jurisprudence*, Duke University Press, 1993 (oppose religious communitarianism and secular individualism, favor a "constitutional jurisprudence of religious groups rights").

We may recall here Durckheim's definition of religion as "a unified system of beliefs and practices relating to sacred things, things set apart and forbidden, beliefs and practices which unite into a single moral community called a church all

For instance, religious freedom does not preclude establishment. Religious patterns overseas do not conform to one Western ideal model, itself a constructed social reality. This is true of the religions of the immigrants as well as those of their countries of origin with which foreign policy has increasingly to relate. The general concept of separation of church and state has slowly emerged through centuries of Christendom and is still a matter of theological discussion within the Eastern Churches, Judaism and Islam. It is vain and superfluous, and in the end uselessly controversial, to address the issue of separation universally as an indispensable condition for democracy or as an absolute attribute of civilization⁵⁹. Not only do truly democratic Western societies still recognize an established Church, as in England or Denmark, but the national framework under which separation is supposed to operate is itself brought into question by the wave of globalization of religion.

I-2-3 Proselytization

Proselytism -- the promotion of new "ultimate truths", sometimes or most of the times intolerant of others, incitement to change denomination or religion and invention of new ones under the cover of pluralism -- is a major cause of international conflict. This is one of the most ambiguous parts of the International Religious Freedom Act. At the same time, it is stressed by the U.S. Commission on International Religious Freedom as "the cornerstone of religious freedom"⁶⁰

First the "change of religion" is itself an international issue. The two articles 18, as we have seen, differ essentially on this one point. Religious freedom included in 1948's UDHR freedom to change religion. In 1966's ICCPR, the word "change" disappeared. Religious freedom was defined as the "freedom to have or to adopt" a religion or belief. The amendment was made under the growing influence of recently decolonized Third World countries that had not taken part in the 1948 U.N. Assembly. Though the substance still includes a freedom to change, it is clear that the intention was to put freedom to "maintain" (to have) on the same level as to "change" (to adopt). In fact both are at risk through proselytization.

However, American legal scholars seem to stick to "change of religion" as a major issue. In fact the American experiment relies on "change of religion" in a way which is unknown elsewhere. Citing the diversity of religions in the U.S. (see above), the Advisory Committee presented it as a model: "the proliferation of new religious movements has added further richness to the American religious scene...It is evident that America's concern for the right to religious freedom globally does not derive from the experience of any one religion, but from the accumulated experience of Americans of many different religions..."

The argument has both a political and a religious origin. Politically, the Founders of the Constitution saw that the more the factions, the more secure and informed the public consensus, which applied to religious

those who adhere to them". Note that the French law on separation of church and state respected the ecclesiastical structures of the Catholic church (dioceses) against those who wanted to recognize only voluntary associations of individuals.

I leave out of this paper the issue of individual rights within the religious structure as matters of internal organization, for instance regulations of Christian churches or Jewish synagogues "seen as discriminatory against women or gays.

⁵⁹ Alfred Stepan, Religion, "Democracy and the 'Twin Tolerations'", *Journal of Democracy*, 11,4, October 2000. Objecting to Samuel P. Huntington's *The Clash Of Civilizations And The Remaking Of World Order*, Simon and Schuster, 1996, featuring separation of Church and State as a characteristic of Western civilization. "State religious tolerance" was already used by the theologian Stanley Hauerwas to describe the present situation in the U.S., *After Christendom*, note 27 p.179.

⁶⁰ Report May 1, 2001, pp.27. with a special analysis: point N. The Freedoms to Change Religion and Engage in Public Religious Expression and Persuasion.

denominations⁶¹. Religiously, 40% of the Americans are supposed to have changed denomination at least once in their lifetime. Change is valued as a proof of a revival of the faith, the search for a faith which "works" better⁶².

Secondly, the ways and means allowed for proselytization are unclear under international law. Freedom of religion or belief includes freedom to manifest it, to express it, to communicate it. However, there is no definite consensus on the extent of this right in international Human Rights documents⁶³.

U.S. history and jurisprudence have been shaped by several cases issued by the Jehovah's Witnesses between 1937 and 1953, given to-day in example for similar cases pending before the European Court of Justice⁶⁴. The development of missions abroad, which brought up the first case with the famous controversy of Salamanque on the existence of soul of native Indians (Caribbeans), has also brought back a rich reflection on the respect of Human Rights in native contexts (mainly Melanesians and Native Indians in Latin America)⁶⁵. The evolution seems again contradictory: at the same time that traditional missions increase respect for other religions, a new wave of evangelization or gospelization has been given legal encouragement. Promotion of pluralism is understood by some theologians as world religions partaking in the "ultimate truth" as opposed to proselytism for the sake of one only truth exclusive of others. The contradictions arising from this state of things are certainly puzzling⁶⁶.

Again the present trends cross denominations. The two trends coexist among Catholic enterprises. Pope John Paul II and Vatican documents have always tried to reconcile both, from "Redemptoris missio" (1990) to "Dominus Iesus" (2000)⁶⁷. Belgium Jesuit Father Jacques Dupuis is best known for a new theology of religious pluralism in that sense.⁶⁸ The same is true in Protestantism which distinguishes between "World

⁶¹ James Madison, *The Federalist* n°10 and 51

⁶² The success of Cardinal John Newman's concept of development of doctrine in American Catholic Church might be seen as a counterargument: the inner content of religious doctrine is always in process, which allows room for change through deepening of faith within the tradition of the Church instead of having to leave it in order to find a new meaning. Most recent revivals in Islam or Judaism, but also within Christianity, are seen as "returns" to tradition. Will religious freedom include internal movements within a same religion, religious discipline etc. ?

⁶³ Natan Lerner, chapter 4, *Proselytism and Change Of Religion*. Tad Stahnke (present Research director for the IRFA's Commission), "Proselytism and the Freedom to Change Religion in International Human Rights Law," *Brigham Young Law Review* 1999, 1, 251. Proselytization as a "neutral" "factual" process, is of Pr.J-Paul Martin. One could even stick to the word "dissemination" of religion or belief put forward by Arcot Krishnaswami in his famous study of Discrimination in the Matter of Religious Rights and Practices. (1960 when other issues of "non-dissemination" were at stake. The word appears again in article 6 (d) of the UN Declaration on the elimination of all forms and intolerance and discrimination based on religion or belief, 1981), reprinted in Tad Stahnke and J-Paul Martin, *Basic Documents*. Close to non-dissemination was non-proliferation. Religious bodies use the terms "Commission" or "Witness".

⁶⁴ Cases annexed to Tad Stahnke's article. See Jeremy Gunn, "Adjudicating rights of conscience under the European Convention on Human Rights" (critique of Kokkinakis v Greece, European Court of Human Rights, May 23, 1993; prohibition of proselytism under Greek Constitution was not found as such contrary to the Convention but only that the present case did not constitute a case of proselytism), in Johan Van der Vyver and John Witte Jr,

⁶⁵ "Missionaries, Anthropologists and Human Rights," special issue of *Missiology*, XXIV, 2, April 1996. And the discussion of an International Declaration on the Rights of Indigenous Peoples (1994). Anthropologists are criticized by Paul Marshall: "Religious freedom is threatened not only by persecution but by trivialization. One of the most pernicious forms is treating religion merely as an aspect of "culture", *Their Blood Cries Out*, 1995, and Appendix E. Spreading the Faith: "Any attempt to freeze religion in place is not only nonsense but a form of cultural imperialism".

⁶⁶ A good account of the present situation in Cecil M.Robeck Jr., "Mission and the Issue of Proselytism," *International Bulletin of Missionary Research*, January 1996, 2.

⁶⁷ *Redemptoris Missio* is a Papal encyclical (*Acta Apostolicae Sedis* 83 (1991) 249. *Dominus Iesus*, which refers to the previous one, is a declaration by the Congregation for the Doctrine of the Faith, August 6, 2000. Origins, 30, 14, September 14, 2000.

⁶⁸ *Towards a Christian Theology of Religious Pluralism*, Orbis Books, Maryknoll 1997. The congregation for the doctrine of the Faith issued a "Notification" on February 27th, 2001 after more than two years of debate, clarifying but short of condemning.

Mission" and "World Evangelization" (The Evangelical Declaration of Lausanne in 1974 reaffirming the necessity of faith proselytism against the conclusions of the WCC convention of Uppsala 1968, reenacting the divide in American Mission Boards in the thirties)⁶⁹. It is as well an issue within Islam (Jihād v Da'wa).

Proselytism may lead to new intolerances or renewed hatreds. The final report of the Advisory Committee reveals its awareness of this possible setback: "The Committee encourages those who engage in missionary activity to exemplify the same spirit of toleration and openness towards others that they seek from governments and local populations wherethey work. The Committee urges those who engage in missionary activity to bear in mind that religious freedom is a goal that all faith communities must strive for out of their common interest"⁷⁰. Though its effect is actually to promote pluralism, it is not its first and ultimate motivation but the reverse, which is conversion to only one truth.

Proselytism is absent from other religions, where religion is communal: Indigenous religions, Chamaïsm, Judaïsm, Shintoïsm, Taoïsm, Brahmanism, Buddhism until recently, but also Eastern Orthodox Christian churches. Most of the native religions (African, Indian-Americans) had long been considered as subjects of anthropology more than proper religions. For the latter category altogether, religious freedom could only be defensive. Would they then be eligible to different standards ? Could limitations of "active" proselytism from outside be traded against the possibility for members of their communities to leave freely even if - or unless - survival of the group is at stake (Indian reserves in Canada, Amish cf above) ? ⁷¹

From a legal perspective, the whole issue of proselytism cannot be restrained to deregulation: free marketing of Bibles and access to the media⁷². Proselytism is not pure propaganda of cultural goods. Its religious character, which differentiates it from similar marketing activities or secular speech, is what makes it the more pervasive to the whole social setting: charitable work, social advocacy, witnessing. The missionaries, or more generally the faithful, are then drawn into economic, social and even political controversies where general Human Rights are at stake. Will violations then be addressed as religious or secular ? Which is most worthy of protection: Sundayschools and distribution of Bibles, or vaccinations and marches for living wages ? Apart from some individual elites, massive conversions are more likely to happen among the most vulnerable: the poor, the outcast⁷³, the enslaved, the outsider (tribes). How can we distinguish the religious approach from the social or sometimes the national issues ? Again, religion cannot be isolated from the whole framework of Human Rights.

The source of proselytism is as important as the target (to keep to the terminology of Tad Stanhke). Do foreign missionaries enjoy the same protection as nationals ? In the 1980s, the case was only about restrictions put on American nationals engaged abroad in religious activities considered as contrary to American interests (Central America). On the reverse, can IRFA's call to provide renewed support to American-based religious missions and non-governmental organizations abroad be indiscriminate ?

⁶⁹ The decrease in numbers of missionaries from the mainline Churches was more than compensated by increases from Evangelical denominations (about two-thirds of 35.000 full-time American Protestant missionaries). American Catholic missionaries decreased from 9 to 5.000.

⁷⁰ p.22

⁷¹ Makau Wa Mutua, "Limitations on religious rights: problematizing religious freedom in the African context," in Johan Van der Vyver and John Witte Jr., *Religious Human Rights in Global Perspectives: Legal Perspectives*, 1996, pp.417ff

⁷² Roger Finke, "Religious deregulation: origins and consequences," *Journal of Church and State*, 32, 3, summer 1990, 609. The economic approaches of issues of religious freedom have been very influential in sociology of religions since Peter Berger himself in 1967 (market situation) to the 90s (rediscovery of Adam Smith and Stuart Mill's economics of religion; rational choice theories). Introduced in law schools by Michael McConnell and Richard Posner, "An economic approach to issues of religious freedom," *University of Chicago Law Review* 56, Winter 1989, 1.

In political science, an example in Gill, Anthony J. Gill, *Rendering Unto Caesar, The Catholic Church and The State in Latin America*, University of Chicago Press, 1998 (economic model applied to relationships between Church and State).

⁷³ Sixty percent of Christians in India are Dalits (Untouchables).

It becomes more difficult to set juridical standards as far as proselytization is concerned. The legal perspective may be less appropriate. Tad Stahnke explains "the silence or the reluctance of international bodies to deal with proselytism issues" by "the wide range of state practices". How can the proselytizer and the proselytized legally be put on the same level ? Is it at all a legitimate goal ? These questions are political. They are about power relations and competing claims. This situation renders new kinds of mediation in order for "regulation to be effective in an orderly and peaceful manner"⁷⁴ only more necessary. Though accountable according to international standards, the state remains the final arbitrer.

⁷⁴ Abdullahi Ahmed An-Na'im, introduction to *Proselytization and Communal Self-Determination in Africa*, An'Na'im ed., Orbis books, Maryknoll, 1999. Pr. An-Na'im's reservations on IRFA have been stated in "Religious persecution as a U.S. policy issue", Hartford, p.26.

The authors refer to historical links between mission and colonialism or imperialism. See Arthur Schlesinger Jr., "The Missionary Enterprise and Theories of Imperialism," in Fairbanks ed., 336 ff

II- Foreign policy's agenda: a new frontier ?

"It is hard to be against freedom of religion"
Stanley Hauerwas⁷⁵.

IRFA was adopted by a unanimous vote in the U.S. Congress and approved by the president. Almost simultaneously the French Parliament and government also unanimously passed measures against so-called sects or cults⁷⁶. Both moves are expressions of a national consensus deeply grounded in cultural concepts. What we see in these pieces of legislation is but the tip of the iceberg. The question then is: Why is this particular expression of the philosophical or cultural national consensus the least common denominator ? In both countries, all other societal issues are divisive, like abortion or gay rights. But protection of international religious freedom is not, either in America or in Europe. However it is still an issue between both sides of the Atlantic as the understanding is different: free choice of religion versus freedom of thought and conscience.

The inner determinants are prevailing. The objectives of the legislators, in spite of the term "international", seem to be aimed at their local constituencies. They can be seen as pieces of internal politics. However the trigger is foreign. Like always in church and state matters, and more so with globalization, the legislators reacted against what they perceived as foreign threats, interferences from outside, and more generally what contradicts the national cultural consensus.

Religious orders yesterday, as "cults" to-day, were and are regarded in France as suspect in as much as a foreign source or influence is detected in them, whether Roman, Spanish, Anglo-Saxon or Eastern, as well as an absolute claim, a "fundamentalistic" pretence opposed to reason and conscience.

In the United States, the already largely pluralistic society regards restrictions to any kind of faith or belief across the world as a possible threat to its own freedom inside America. The first trigger was the asylum and refugee treatment of immigrants alleging religious persecution or discrimination in their countries of origin, a point addressed in title VI of the Act. In the wake of the Jews from USSR, and beyond the "sanctuary movement" for (Christian) victims of the Central American wars, strong lobbying was made in favour of Baha'is or Zoroastrians from Iran, Buddhists from Tibet, Ahmadis from Pakistan, native Africans from Sudan, Tibetans and Fa-lun-gong from China. Nothing about the Christians ? Their fate seemed to be ignored like at the darkest hours of Communism. The "Silent Church" still ? After the end of Communism, when all hardships should have vanished, some "activists" decided to go vocal.

The most surprising achievement represented by the passage of IRFA may have been the consensus it was able to build first among religious communities and a notable group of academics then in Congress. It is not that the most active were the historically more repressed (Mormons with 15 members in Congress and academics from Brigham Young University in Salt Lake City, Utah, were in the first line of advocacy), nor

⁷⁵ I just point out the treatment of this issue by the theologian Stanley Hauerwas, *After Christendom ? How the Church is to Behave if Freedom, Justice and a Christian Nation Are Bad Ideas*, Abingdon press, Nashville, 1991 and chapter three: 'The Politics of Freedom. Why freedom of religion is a subtle temptation', p.69

⁷⁶ Commission of Inquiry created by the French National Assembly in July 1995, report adopted in December 1995. Decree creating an intergovernmental Commission for monitoring of cults (Mission Interministerielle de Lutte contre les Sectes MILS) in Prime Minister's Office, October 7, 1998. Annual reports for 1999 and 2000 published in January of the following year.

that the so-called religious right came out in favour of it⁷⁷, but that influential Catholics and Jews - and liberal academics and scholars - were active from the beginning and that the main institutions all rallied in the end⁷⁸.

I will first explain this internal piece of politics (II-1) before drawing its consequences for foreign policy as such (II-2).

II-1 A new constituency

The mobilization of the entire religious constituency around the Smith case and the Restoration of Freedom of Religion Act (RFRA) should not make us think that religious freedom could be at stake in Oregon as it is in Sudan, or in Toledo (Ohio) as in Lhasa (Tibet). Some nevertheless thought that nothing was ever done by the administration to stop persecutions in southern Sudan because nobody either cared about the sacredness of Indian worshipping in Oregon or about mosques in Toledo (one of the largest concentrations of Moslems in America). In the same way people could fear that lack of protection of peyote use would undermine the Eucharist, lobbyists started to draw lessons from the Holocaust to present situations in Sudan or from the silence of the Church in World War II to ignorance of housechurches in China.

However, there is a world of difference between a peyote ingester getting fired from his job (in an anti-narcotic bureau) and a Christian Sudanese being crucified on his farm or burnt in his local church, or between the denial of tax-exemption for a sophisticated Eastern therapy and the rape of nuns by soldiers. In IRFA's terms, the former may be considered a "violation" of religious freedom; the latter, a "severe violation".

From persecution of Christians (II-1-1) to multireligious freedom (II-1-2) and Human Rights in general (II-1-3), the coalition had to be built up from reminiscences of Christendom to the actual practice of subsidiarity in order to finally reach a public debate conducted in reason according to the rules of political liberalism.

II-1-1 Definitions of violations

IRFA makes a distinction between "violations of religious freedom" (section 401) and "particularly severe violations of religious freedom" (section 402). "Severe violations" are defined in section 3(11) as " (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons."

Apart from these, "violations" as defined in section 3 (13) will also include "arbitrary prohibitions on, restrictions of, or punishment for (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (ii) speaking freely about one's religious beliefs; (iii) changing one's religious beliefs and affiliation; (iv) possession or distribution of religious literature, including Bibles; or (v) raising one's children in the religious teachings and practices of one's choice".

All of these would definitely be Human Rights violations under any other secular item.

⁷⁷ William Martin, "The Christian Right and American foreign policy", *Foreign Policy*, 114, Spring 1999, 66ff

⁷⁸ Reciprocally, American Catholics are surprised that the Catholic Church in France and Western Europe supports the monitoring of "cults".

Only in the case of "severe violations" are countries officially designated, the Congress notified and economic sanctions applied (actions ranging from 9 to 15, section 405).

This distinction is the result of a reframing of the first version of the bill introduced in May 20, 1997 under the title "Freedom from Religious Persecution Act", commonly known as the Wolf-Specter bill after its cosponsors Rep. Frank Wolf (R.-Va) and Sen. Arlen Specter (R.-Penn)⁷⁹. The bill was not adopted by the House International Relations Committee until March 25, 1998, only to be superseded the following day by a new bill introduced in the Senate by Sen. Don Nickles (R.-Okla) cosponsored by Sen. Joe Lieberman (D.-Conn) under the IRFA title. The outcome of the bill was still in doubt until the final vote at the end of October, just before Congress recessed.

"Persecution" in Wolf-Specter's terms included "abduction, enslavement, killing, imprisonment, forced mass relocation, rape, crucifixion or other forms of torture, and the imposition of systematic fines or penalties that have a confiscatory purpose or effect." It was clear that this definition only fitted the situation described in southern Sudan for the first part, and for the last part responded to tax penalties endured by Jehovah's Witnesses and the Church of Scientology in parts of Europe. Some of the terms still subsist in section 3 (13) (B) of IRFA as "violations": namely "any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder and execution".

The merging of the two bills is responsible for these concurring lists of violations, the attention having been focused during the discussions not on the definitions but on the executive responses: the president shall resort to the gravest sanctions only after completing procedures specified for the "particularly severe violations".

II-1-2 From Christian persecution to multireligious freedom

The main thrust of lobbying came from two respectable Washington-based thinktanks, conservative but not aligned as such on the religious right: the Freedom House and the Hudson Institute, respectively through one Catholic and one Jewish activist, Nina Shea and Michael Horowitz, who aroused public interest from 1995 on through articles and books. Horowitz first wrote an editorial in the *Wall Street Journal* (not the most expected place) on July 7, 1995⁸⁰, and then sent a letter to 150 denominations. Nina Shea established the Puebla Program on Religious Freedom within Freedom House (founded in 1941 par Eleanor Roosevelt) in October of the same year and organized the first public conference on the issue on January 23, 1996. At this meeting, both presented a "statement of conscience" and a "call for action" which were endorsed by the National Association of Evangelicals⁸¹. On February 15, 1996, they gave testimony to a Subcommittee on International Affairs in the House of Representatives. A national day of prayer was scheduled for September 29. On the following day, Secretary of State Warren Christopher, as a counter-move, authorized the creation of an Advisory Committee on Religious Freedom Abroad under the chairmanship of John Shattuck, the Assistant Secretary for Democracy, Human Rights and Labor (instead of the post of

⁷⁹ H.R.2431, as amended by the International Relations Committee in March 1998, was brought to the floor of the House on May 14, 1998 and approved by 375 against 41.

⁸⁰ "New intolerance between Crescent and Cross". Michael Horowitz says he had become aware of the issue through their Ethiopian employee who couldn't get a return visa as he was in trouble with Muslims in his home area. Michael Cromartie, "The Jew Who Is Saving Christians," interview of M.Horowitz, *Christianity Today*, March 1, 1999. Jeffrey Goldberg, "Washington Discovers Christian Persecution," *New York Times Magazine*, December 21, 1997.

⁸¹ Text in appendix to Nina Shea, *In The Lion's Den*, Broadman and Holman, Nashville 1997

Special Adviser to the President promised to Nina Shea)⁸². Congress requested a special report on persecution of Christians⁸³. Surprisingly enough, the topic was taken up in the liberal *New York Times* by Abel Rosenthal in regular columns.

At the dawn of 1997, two books were published which paved the way for the Wolf-Specter bill: Nina Shea's *In the Lion's Den. A shocking account of persecution and martyrdom of Christians to-day and how we should respond* (with a foreword by Chuck Colson, former adviser to President Nixon and founder of an Evangelical ministry in prisons) and Paul Marshall's *Their Blood Cries Out. The worldwide tragedy of modern Christians who are dying for their faith* (with an introduction by Michael Horowitz)⁸⁴.

Though the instigators of this lobbying were a tiny group of people, some of them having occupied positions under the Reagan administration, specially related to Central America (Nina Shea and Elliot Abrams, see later on), and though their lobbying should have been made easier among the new Republican majority in Congress in 1994 and 1996, the two books were very critical of the "apathy" of American Christians on the topic. What might have been expected in their terms of the liberal mainline churches represented in the National Council of Churches, already known for their soft line on Communism and their renunciation of proselytism, was all the more true of the Evangelicals more concerned with "inner peace": societal issues at home, fund-raising, eschatological prophecies and self-therapy (Paul Marshall). After the demise of Communism, though not complete, and the painful experience of Central America, the religious right could not be easily remobilized on international issues, "even religious ones". Direct appeals did not raise much support. Persecution of Christians as such did not carry the day.

The Catholics were absent from the two books' criticism because, being a transnational institution, they usually took more interest and care of the fate of their co-religionists worldwide. As early as the fall of 1994, Pope John Paul II had stepped in, through his Apostolic letter announcing the way to Jubilee year 2000. "At the end of the second millenium, the Church has once again become a church of martyrs"⁸⁵. This remark, made almost in passing, produced various books related to the topic⁸⁶ and culminating in a day of prayer on May 7, 2000 in the Roman Coliseum. But it did not reach the sense of activism of Nina Shea and Michael Horowitz⁸⁷. The Vatican, preoccupied with the fate of Catholic Churches in the respective

⁸² The Committee was composed of twenty members representing most religious denominations. Several Academics were members due to their expertise on religious matters, among which Dr. David Little, senior scholar at the U.S. Institute of Peace, later professor at the Harvard Divinity School. No representative stood for "secular humanism". It produced an interim report on January 23, 1998 and a final one on May 17, 1999

⁸³ Assistant Secretary of State John Shattuck, July 22, 1997, U.S. Policies in Support of Religious Freedom: Focus on Christians, U.S. State Department

⁸⁴ World Publishing, Dallas, 1997. Paul Marshall, from the Toronto's Institute of Christian Studies where he had succeeded to Bernard Zylstra, Neocalvinist lawyer and politologist (see above part I). In September 2000, he too joined freedom House as senior fellow.

⁸⁵ *Tertio Millenio Adveniente* (As the third millenium draws near), November 10, 1994

⁸⁶ Didier Rance (National representative for France of l'Eglise en Détresse - Church in Distress- or Kirch in Not), *Les Martyrs Du XX eme siècle*, Fayard, Paris, 2000. Andrea Riccardi (president of San't Egidio community for peace, Rome, see later note), *Secolo Del Martirio I Cristiani Nel Novecento*, Milan, Montadori, 2000. Robert Royal (Faith & Reason Institute, Washington DC), *The Catholic Martyrs Of the XX th century*, Crossroad, 2000

⁸⁷ Astounding figures were provided by Dr David B. Barrett, who publishes every year an annual statistical table of global mission, *International Bulletin of Missionary Research*. His figures tend to show that more Christians had died from persecution in the XX th century than in the Nineteen previous centuries combined (27 million against 14) ?, and increasingly so at a rate of 160.000 each year. The anecdotal cases brought forward by Nina Shea and Paul Marshall did not amount to very many. Another argument is that 400 million Christians live at risk because 60% instead of 25% of Christians nowadays live in the South: Africa, Asia or Latin America. However the cases focused on Communist and Muslim countries. Cases within "Christian" countries (Latin America, Rwanda, South Africa) have not been brought to attention or have been played down as political (Mgr. Romero or the four American Nuns killed in 1980 in El Salvador).

countries, pleaded for a more cautious approach. Local bishops and missionaries abroad also interceded to the U.S. Bishops' Conference in favor of moderation. Trends of emigration of the Christian population, especially from the Middle East, already at an alarming rate, could have been further encouraged by IRFA, endangering the survival of local churches. Picturing Christians as "foreign" or "westernized" could be a consequence of an American public stand. The diplomacy of the Holy See was keen in keeping its autonomy, its freedom of manoeuvre, and its preferred case-by-case intervention to interference from a temporal power. On the whole, this issue was to be a matter of internal business for the Universal Church.

As for the Jewish community, it is difficult to see how far extreme statements by Michael Horowitz ("Evangelicals were with us on Soviet Jewry; it was time to pay them back" - a reference to the Jackson-Varnick amendment of 1974; "You're not allowed to sit out one Holocaust each lifetime") or Elliot Abrams (who made a parallel between condemnation of Switzerland on the Jewish accounts and silence on China's victims⁸⁸), and co-sponsoring of the successive versions of the Act by Jewish Senators Arlen Specter and Joseph Lieberman, had as an impact. The concentration of the two books on the "advancing Jihad" (fundamentalist Islam taking the place of ideological Communism) had been a major feature of the campaign⁸⁹.

The basic question for the activists was how to build a coalition. The general fate of Christians as such did not move majorities. Only a regional focus could produce results: Sudan and China finally caught the eye⁹⁰.

Sudan was a good combination because it drew the attention of Jews (as the power in Khartoum was labelled as Islamic fundamentalists), of Christians (because a notable percentage of Southerners were Christians), and of the Black Churches and liberal secularist humanitarians (because the victims were Black Africans and slave trading was going on⁹¹). The Wolf-Specter bill included immediate sanctions on Sudan, but the Clinton administration acted more swiftly to impose them as soon as November 1997. A further trigger was given after the bomb attacks on the U.S. embassies in Nairobi and Dar-es-Salaam on August 7, 1998, when a plant in Khartoum was bombed in retaliation by the U.S. Air force. The Clinton administration, which was accused of "apathy" in front of the "genocide" in southern Sudan, was suddenly able to launch an attack on Khartoum because of Islamic terrorism. The religious constituency behind IRFA was shocked and more resolute than ever to pass the bill.

The second factor was China. The religious community in this case made an alliance with the (at that time) powerful anti-China lobby in Congress. As the consequences of Tian-An-Men started to wane, the discovery of a hidden religious kind of opposition was most welcome. So far, the discussion of the bill had been delayed by the commercial, mainly pro-China, lobby which objected to the inclusion of economic sanctions in the range of presidential actions against severe violations of religious freedom. Under Gary Bauer⁹², the conservative Family Research Council, related to the Christian Coalition, merged religious and

⁸⁸ "Nazi gold and Chinese Christians" in *American purpose*, bulletin of the Ethics and Public Policy Center, 1998

⁸⁹ We recall that in 1996 was published *The Clash Of Civilizations And The remaking Of World Order* by Samuel Huntington. Pr Huntington hinted at an Islamic-Confucian kind of axis. His theories do not seem to have been influential among the main advocates of IRFA. However Pr. Huntington has favorably commented on IRFA: "Religious Persecution And Religious Relevance In Today's World", paper presented at the Ethics and Public Policy Center, Washington D.C., January 6, 1998

⁹⁰ Nina Shea, 'Religious freedom and American Foreign Policy', in Paul Marshall ed., *Religious Freedom In The World, A Global Report On Freedom And Persecution*, Nashville, Tennessee, 2000 by Freedom House, pp.1-8.

⁹¹ For a balanced account see Richard Minitier, 'The False Promise of Slave Redemption', *Atlantic Monthly*, July 1999; Christine J.Gardner, 'Slave Redemption', *Christianity Today*, August 9, 1999

⁹² Gary Bauer, "A Conservative View of American Foreign Policy", speech at the John F.Kennedy School of Government, Harvard University, 1999

strategic interests in support of IRFA. which was passed on this issue after mutual concessions. However the convergence was to be short-lived as we will see.

In both cases, the Catholic and mainline churches were reassured that religious freedom would not be the freedom of Christians only. In Sudan, there were also followers of native African religions as well as moderate Muslims (e.g. execution of Moh'd Taha in 1985). In China, there were the followers of the Dalai-Lama, Muslims of the Xin-Jiang province, Falun Gong, Taoists and others.

The appointments made to the Commission on International Religious Freedom (USCIRF), established under title II of the Act, took great care in reflecting the same pluralism. As per law, they had to be "selected among distinguished individuals noted for their knowledge and experience in fields relevant to the issue of international religious freedom". The constitutionality of this proviso might be doubtful in reference to the religious test⁹³. In actual practice, it seems to be understood that a seat is reserved to each main religion, though each representative is selected on his own and not officially designated by the institution of his faith. From the beginning, Bahais enjoyed a kind of permanent seat.

The presidency was assumed during the first two years by Rabbi David Saperstein from the Reform Jewish Movement, a Democratic appointee, who was succeeded in May 2000 by former Assistant Secretary of State Elliot Abrams, member of the American Jewish Committee, a Republican appointee. The Commission's vice-president is the secretary for external affairs of the Bahai National Assembly in America. Out of nine members, included are Nina Shea, the main lobbyist from Freedom House, a Catholic archbishop (today Theodore Cardinal McCarrick of Washington D.C.), a former president of a Muslim Women's League, and a former board member of American Baptist Churches. Five were appointed by Democrats (three by the president, one each by the minority leaders in House and Senate) against four by Republicans (two each by the majority leaders in House and Senate)⁹⁴. The Commission is due to be renewed in May 14, 2001. The Republicans will then have six posts to fill, the Democrats only three.

II-1-3 From civil religion to civil society

One of the goals of the work of the Commission was to reach outside religion, to the secular Human Rights community. One member, vice-president of the Commission in its first term of mandate, Professor Michael Young, a former State Department official and dean of the George Washington University Law School, had tried, with Professor Jean-Paul Martin, of Columbia University, to forge links between secular and religious Human Rights activists' concerns: "In order for religious perspective to be taken seriously by Governments

⁹³ Article VI of the Constitution: No religious test shall ever be required as a qualification to any office or public trust under the United States. Pr.Johan van der Vyver, Emory Law School, Atlanta, saw in IRFA a violation of art. 6 .Personal communication, November 2000

⁹⁴ President Clinton named Pr.Firuz Kamenzadeh (Bahai), Laila Marayati (Muslim) and Justice Charles Smith (Supreme Court of State of Washington). Leaders of the Democratic Party (minority) in House and Senate named respectively Rabbi Saperstein and Mgr McCarrick. Leaders of the Republican Party (majority) in House (Gingrich) named Elliot Abrams and Nina Shea, in Senate (Lott) Michael Young (dean of George Washington University Law School) and John R.Bolton (Vice-President of American Enterprise Institute).

Elliot Abrams served in the Reagan Administration as Assistant Secretary of State successively for international organizations, Human Rights and humanitarian affairs, and interamerican affairs. He is president of the Ethics and Public Policy Center, Washington DC.

John Bolton and Michael Young served in the Bush Administration in the State Department. John Bolton was also deputy Attorney General.

Three members had been in the Advisory Committee: Nina Shea, Laila Marayati and Mgr McCarrick.

and the international community and to ensure that religious perspective contributes to the movement of Universal Human Rights⁹⁵. The project did not meet expectations.⁹⁶

IRFA might be seen in a sense as a kind of affirmative action with all the possible setbacks, though the aim is to better integration in a pluralist society. IRFA came out of the idea that religious freedom was not well documented in general reports on Human Rights or advocated by secular H.R. activists⁹⁷. If so, the easy way would have been to instruct the diplomatic missions to be more accurate in their treatment of article 18 of ICCPR.

However, this would not resolve the whole issue of the integration of religious freedom within the broad framework of Human Rights and would not convince the Human Rights community to accommodate religion. Transnational Churches or religious organizations are increasingly considered as legitimate members of the "civil society"⁹⁸; that is to say, not only as part of the society, but of an institutional framework which expresses opinions outside and concurrently with the democratic electorate and which receive due attention. Churches, then, can enter into relations with states on the international level, for instance within the U.N. organizations, without reference to the separation restricted to the national level. However, such a concept is strictly applied within the working procedures of the intergovernmental organizations themselves, such as the U.N. family.

To this day, the international community is not sufficiently structured in a way that the authorized voices of the civil society are institutionally made part of the international process. The Vatican seems to prefer access to the civil channels already at hand and to strengthening them (as Human Rights' Commission) than to advocating specifically religious gatherings, such as the World Religions Conference⁹⁹. Why ?

First, an organizational issue. Second, a more philosophical one.

Though a privilege that no other denomination or religious organization could enjoy (compared with the structure of the World Council of Churches or the World Islamic Conference), the Vatican's special status as observer in the U.N. is more accepted in New York than the Vatican was in Washington in the 1950s, indeed until the 1980s¹⁰⁰.

⁹⁵ Michael Young, 'Religious Liberties And Religious Tolerance. An Agenda For The Future', *Brigham Young University Law Review*, 1996, 4, 973ff. (symposium of October 1994). Stephen Rickard (Washington Office Director of Amnesty International USA), 'Religion And Global Affairs: Repression And Response', *SAIS*-Fall 1998, pp.52ff (favor religious community joining the Human Rights battle).

⁹⁶ Personal communications of Pr Jean-Paul Martin and Dr. Lily Cole, November 2000

⁹⁷ As much U.S. Department of State annual reports on Human Rights in general as the U.N. offices. The example given is the marginalisation of U.N. special rapporteur on religious intolerance created by the U.N. Commission on H.R. in 1986, presently Mr. Abdelfattah Amor (Tunisia).

⁹⁸ Question addressed by Susanne Hoeber Rudolph, 'Dehomogenizing Religious Formations', in Susanne H. Rudolph & James Piscatori, *Transnational Religion And Fading States*, Westview Press, 1997, p.246

⁹⁹ Shortcomings of the Millenium Peace Summit of Religious and Spiritual Leaders at the U.N., N.Y. August 28-31, 2000. James Harder, 'U.N. Faithful Eye Global Religion', *InsightMag.com*, October 2, 2000

¹⁰⁰ Article XXIV of the Latran Treaty of 1929. The Holy See stated that "it will remain outside secular competition between States and of international meetings called for this purpose, unless the contending parties appeal to its mission for peace. The exercise of its moral and spiritual power was expressly reserved". On the basis of this article, the Holy See did not seek a status of full membership in the U.N. However, it was recognised a permanent status of observer only in 1964 (during the Council of Vatican II).

In Washington, opposition in 1952 to the appointment of a representative by President Truman: Leo Pfeffer, *Church, State and Freedom*, The Beacon press, Boston, 1953, pp.257-273. When President Jimmy Carter appointed again a personal representative to the Holy See in July 1977 (David Walters, a Catholic), it was still much criticized. Diplomatic relations between the US and the Holy See were not established until January 1984 in the outcome of a famous meeting between President Reagan and Pope John Paul II in the Vatican on June 7, 1982. The extent of cooperation between the

Though the objection is still the same, the justification for a special status for the Vatican has evolved. Legally, the Holy See exerts a temporal power, though its jurisdiction is limited to Vatican City. But the foundation or the mandate for the papal delegation in intergovernmental conferences is less the representation of a chief of state than that of a world spiritual leader, an "expert es Humanity" as Pope Paul VI put it on October 4, 1965, at the first appearance of a pope in the U.N. General Assembly. This was confirmed by Pope John Paul II in his three appearances in New York, in 1979, 1987 and 1995. The Catholic Church so chooses to be part of the international community on a new basis, which is not sovereignty but universality of Human Rights. In so doing, the Church is relegitimizing itself on the international scene but also universally, beyond and above national state boundaries, as a fully titled actor in the public sphere, though not part of the state apparatus nor linked to it.

So apart from his special hierarchical structure which makes it an effective transnational corporation, the main reason is to be found in the dynamics of the above mentioned declaration "Dignitate Humanae" which enables the Catholic Church to argue in Reason and not only from a Revelation, thus being part of the "public reason" discussion.¹⁰¹

Going separately, like in IRFA or in the World Religions's Assemblies would not further the kind of cooperation requested with the general public or the international secular Human Rights community.

II-1-4 Are religious freedom violations special ?

The idea was then to find a way of speech which could allow religious freedom to be part of the general conversation. If you find religion concerned with other core Human Rights, what privilege is it entitled to ? Religion then partakes of freedom of speech, of assembly, of press, and of course of association¹⁰².

U.S. and the Vatican in ending Communist control particularly in Poland is open to many interpretations. Although the American Embassy to the Holy See takes great care in avoiding any issue of separation of Church and State, regarding the internal policies within the U.S., or matters pertaining to the organization of the Catholic Church and any kind of religious activities as such, no wall of separation could stand in front of the Berlin Wall and the Iron Curtain in general. See Thomas Patrick Melady, the Ambassador's story. The United States and the Vatican in world affairs, Huntington (ID), 1994. He was the U.S. ambassador to the Vatican from 1989 to 1993. Personal communication with Mrs Margaret B.Melady, May, 2000.

The U.S. House of Representatives passed in October 2000 a resolution (415 to 1) against repeal of the Vatican U.N. status, in response to a petition by pro-abortion groups.

¹⁰¹ Pope John Paul II's encyclical *Fides et Ratio* (Faith and Reason), October 15, 1998.

"Public reason" as "shared public basis of justification" defined par Pr John Rawls in *Political Liberalism*, Columbia university press 1993 and especially as regards to religion in "the Idea Of Public Reason Revisited", in *The law of Peoples*, Harvard University Press 1999. "Political liberalism makes the distinction between a self-standing political conception of justice and a comprehensive doctrine. A religious doctrine resting on the authority of the Church or the Bible is not, of course, a liberal comprehensive doctrine...Nevertheless, it may endorse a constitutional democratic society and recognize its public reason", p.175

¹⁰²We are reminded here of the "even religious" of the French Bill of Rights, article 10: "No one should be prosecuted for his opinions, even religious ones, provided their expression does not disturb the public order established by law". Freedom of religion was asserted on its own because it was not obvious at that time that it was included in the other freedoms as it still seems to be doubtful for secular Human Rights activists or reporters. Some American law scholars have argued that freedom of speech, which immediately follows free exercise of religion in the First Amendment, included freedom for non-religious opinions. See Steven Gey, 'Why Is Religion Special ? Reconsidering The Accommodation Of Religion Under The Religious Clauses Of the First Amendment', *University of Pittsburg Law Review* 1990, 52. William P. Marshall, 'Religion As Ideas; Religion As Identity', *Journal of Contemporary Legal Studies*, 1996, 7, 385. This solution would have spared the Supreme Court to consider "Secular Humanism" or "Ethical Culture" as religion at the same time as Buddhism and Taoism, which as for them did not teach theism: opinion of Justice Black in *Torcaso v Watkins* 367 U.S.488 (1961), note 11 at p.495.

As part of this disillusionment, and out of realism, "religious persecution" was abandoned as the criteria. A large range of less severe violations would be more comprehensive and more comparable to other violations of secular Human Rights.

What is special about religious freedom violations ? Aren't they similar to any other violations of Human Rights ? Should their religious motivation, which may be as much of the victim as of the persecutor, be an aggravating factor ? Non-religious violations cannot be considered less severe: for instance in Indonesia, are tribal massacres in Borneo without religious implications more excusable than tribal massacres in Moluccas which could be labelled as Christian versus Moslems.

The outstanding example put forward by Paul Marshall at the beginning of his book is that of the French Trappist monks kidnapped in Algeria on March 27, 1996 and whose killings were discovered two months later. Were these killings different and more severe violations of Human Rights than all the other killings occurring in Algeria ? Are killings of foreign Christians more important than of Muslim nationals ? Of course not. If all Muslims in Algeria and elsewhere (Bosnia, Palestine, Iraq, Afghanistan, Chechnya, Kashmir, India, Philippines, China) were taken into account, will we be able to say that the Christians were the main target at the turn of this century ? The Muslim World League in Medina might have different figures.

But this is not the whole point. These eight French monks of Tibhirine were not even proselytizing. Who is usually under threat ? Active minorities, converts, missionaries. This was not the case here. They thought they had to live in Dar-al-Islam as silent witness, as respectful hosts, in the mystery of faith. They would be the last to imagine or to agree that their death - their martyrdom - could one day be exploited against Islam in general or against their country of adoption, Algeria. Their mention in Paul Marshall's book (and in Nina Shea's) was a counter-truth.

When missionaries or converts are nowadays victims of severe abuses, is it because of their being religious or for other activities they themselves link with their faith, but do not appear so to the outside world: their social advocacy or even their charitable work. Numerous examples can be cited of movements for Human Rights originating in people of faith, religious personalities and even institutions as such. The abolition of slavery and the Civil Rights Movement were at the core religiously inspired and fought for. Never was it acknowledged in court or elsewhere as a matter of the first amendment and the free exercise of religion. The Rev. Martin Luther King Jr did not get protection because of his religious ministry. Far from it. Would he enjoy more protection today ? Indeed he acted upon the dictates of his conscience and out of his affiliation with a religious organization. Meetings were held in churches, he was a true witness to his faith, but he was no proselytiser. "Even" though he was a minister, he was a Human Rights militant. The religious component gave him neither more nor less protection than any secular Human Rights militant¹⁰³.

If minorities are repressed, is it because they belong to a different religion than the majority or their neighbour, or because they have national or social claims ? Religion is part and parcel of the approach to conflicts, as well as the strategies of development. IRFA's narrow definition of religion, under religious freedom only, as a formal right, wanted to picture religion only as a victim, as the persecuted. It cannot be accepted back into the international secular community if it does not agree to its consequences. Armed conflict and poverty are the two main sources - most of the time joined -of Human Rights violations. Religion plays a role in both, either positive or negative. Both the religious and secular sides have to reconcile themselves with that fact.

¹⁰³ Stephen L.Carter, *The Dissent Of The Governed*, Harvard University Press, 1998. Philip Hammond points out that King's influence came from "his translating the Christian gospel message into terms readily understood by non-Christians even the non-religious", *The Dynamics Of Religious Organizations*, p.181

For instance, no reference was made to religious freedom in the United Nations Human Development Report, 2000. It could have been one criterion among the others. This reticence come not so much from the secular but from the religious side, as such a comparison might have discriminatory consequences¹⁰⁴.

As a parallel to Algeria, how is it that Rwanda was not included in the martyrdom of Nina Shea or Paul Marshall ? As a matter of fact, Sudan was clearly promoted from 1995 on, apparently as a direct reaction to the Rwanda genocide. It became necessary to argue that Sudan was a worse case (two million deaths versus eight hundred thousand ?). But Rwanda did not fit the "clash of civilizations" theory. Ambassador Seiple acknowledged that "Rwanda becomes a significant case for thinking about religious freedom". How is it that a very Christianized nation could not do anything to stop genocide, which was also to become the most costly in religious personnel in recent years¹⁰⁵ ? Ambassador Seiple offered what he called "a personal theory", one much in line with his Baptist faith. Freedom of choice allows you in moments of crisis to stand the test more than just inherited faith ("If you do not at the point of conversion assimilate the cost of faith, the cost of this free gift, then in moments of crisis the faith may not stand the test"). It was a lesson which he thought relevant also in the U.S¹⁰⁶.

The same argument could also be applied to Bosnia and Kosovo. Ambassador Seiple, addressing Kosovo in his 1999 report on "the significance of religion in Human Rights violation" could not reach a decisive conclusion: "The key question for this report is the extent to which the religion of the victims played a part in Serb behavior...This is an issue on which people of good will hold strongly differing views." Though he did not venture to do so, couldn't we see in the religious affiliations in the Balkans results of past coerced conversions or "just inherited faiths" and not, as the IRFA stated, "free choice" or "free religious belief" ?

Or shouldn't we leave this differentiation - and inevitably discrimination - of religion for a purely statal and political classification, which is IRFA's very object ?

II-2 Enhancing diplomatic capability

The main opposition to the Wolf-Specter bill came from the Department of State. Initially, the proponents of the bill had designed a limited range of four harsh sanctions and a waiver for the president's action only based upon "national security" or certification that waiving the sanctions would "promote the objectives of the Act". Congress was to receive 45 days advance notice of the intent to waive.

¹⁰⁴ Though religion may be a hidden factor in several of the criteria: profile of political life, crime, personal distress (among which divorces), gender and education, women's political participation, *United Nations Development Programme*, Oxford University Press, 2000. Not a single word on religion!

¹⁰⁵ Three bishops, 103 priests, 112 nuns and brothers killed.

¹⁰⁶ Interview to *the Christian Century*, April 14, 1999. Until Democratic and religious "left" Southern Baptist President Jimmy Carter made it public and political (1976), the notion of "conversion" implied here ("born again") was not familiar outside the American revivalist tradition.

See also Jeremy Gunn, 'Preliminary Response To Criticisms Of IRFA' *Brigham Young Law Review*, 2000, 3, p.841ff. The author who served as Research director to USCIRF until 2000, identifies two "general types" as "traditional" versus "individual choice": "In the United States, religious affiliation is now generally understood to be a matter of personal choice. Although children may be born and raised in a particular religious tradition, as adults they will be free to convert to other faiths". Such a presentation implies an inner construed value judgment. If two general types are to be figured, they should address two types of piety or two types of reason, and not again and again "ancients" versus "moderns". We again refer to an underlying theology in Sullivan's terms, see above I-2 and Pr. Sandel's comments on freedom of choice, note 42.

Both restrictions were considerably loosened at the request of the Department of State: the range of actions has been extended to fifteen. "Commensurate action" may be decided in substitution thereto. Under section 403, a set of consultations will be carried out prior to taking action: (1) with the government of the country concerned, privately or publicly; (2) with appropriate foreign governments for the purpose of achieving a coordinated international policy, and eventually in a multilateral forum; (3) and (4) with appropriate humanitarian and religious organizations, or U.S. interested parties, concerning the potential impact of intended action".

The latest amendment was particularly reassuring for the institutional churches: the Catholic and Lutheran churches mainly stressed this point under which they would be duly consulted as U.S. parties but also through their international bodies, the Vatican itself might be included in (3) as well as the World Lutheran Federation. Under (2) the U.S. government should renounce unilateralism and try to reach a common position, for instance with its traditional allies as well, as with the U.N.

The reporting delay to Congress has been increased from 45 to 90 days. Under section 407, the presidential waiver, subject to report to the appropriate congressional committee, with "a detailed justification thereof", has been extended from "national security" to "important national interest", which is the core of foreign policy if anything. An "important national interest" can deter the U.S. government not to act upon international religious freedom violations, even severe ones. If it may be relatively easy to identify and justify this type of situation, how are we to define circumstances in which important national interest and international religious freedom will not at be odds with each other but converge or coincide?¹⁰⁷ Unilateralism could then collide with the various consultations encouraged by the Act: at the three levels, bilateral (II-2-1&2), multilateral (II-2-2) and non-governmental, especially religious (II-2-3).

II-2-1 Performance of the Foreign Service

In her opening remarks in her first public meeting with the Advisory Committee on February 13, 1997, Secretary of State Madeleine K. Albright could only see one undisputable advantage in the inclusion of religious freedom as part of foreign policy which is: "Frankly, I think we will be much more capable diplomats".

The first and foremost achievement of IRFA was the completion of annual reports by each and every American diplomatic mission abroad. This task was performed through observations, interviews and field investigations. Many of the reports are very detailed and constitute a major source of documentation. Though this work would come under the usual duty of information, it was clear that U.S. diplomats - as much as their European colleagues in this sense - had previously been weak on this topic and were poorly equipped for the job: they had been trained, to the contrary, in the obligation of respecting the wall of separation between church and state and of not engaging whatsoever in religious activities abroad¹⁰⁸. Moreover, the Advisory Committee observed that "some U.S. officials perceived Human Rights advocacy as an impediment to good relations with foreign governments rather than as the promotion of a core U.S.

¹⁰⁷ Allen D. Hertzke and Daniel Philpott, 'Defending The Faiths', *The National Interest*, 61, Fall 2000, p.75: "Pursued wisely, the elevation of religious freedom can properly serve the national interest...It may easily be pursued in tandem with our other interests".

¹⁰⁸ In contrast with generations of sons of missionaries, Ambassadors to China, China-born, like John Leighton Stuart (himself first a long-time missionary. His biography by Yu-Ming Shaw, Harvard University Press 1992) who was the last U.S. Ambassador to the Nationalists (1946-1949) or subsequently Ambassador Stapleton Roy (1991-5), or in the Middle East in the 70s, Lebanon-born Ambassadors William T. Stoltzfus, Jr. (To Kuwait), or Talcott W. Seelye (To Syria) in Robert D. Kaplan, *The Arabists, The Romance Of An American Elite*, The Free Press, 1993.

interest"¹⁰⁹. The Committee could have added that these officials were lining more with the Realist school than the Idealist one; it could have related this state of mind to the legacy of the Cold War period until the 1990s. Diplomats as well as most scholars dealing with international affairs were more accustomed to weighing strategic and economic powers than cultures or identities. Sharing Stalin's scepticism: The Pope: How many divisions ? Washington until the very end hardly credited Pope John Paul II' s non-violent Solidarity approach of a possible demise of Communism in Poland and elsewhere in eastern Europe, including within the USSR borders.

When research was begun on international religious freedom - usually, remarked the Advisory report, by junior political officers - plain ignorance even unconscious prejudices became apparent. Some country reports were poorly documented; others were grossly imbalanced. Most of the officials are of a Christian background, whether secular-minded, born-in or born-again. "IRFA can be criticized in practice for focusing disproportionately on religious issues of particular concern to Americans including difficulties encountered by American missionaries and by religions that are particularly identified with the U.S. origination, such as the Jehovah's Witnesses and the Mormons....There is, in a word, under-reporting by the State Department of discrimination suffered by certain groups that are relatively under-represented in the U.S."¹¹⁰

Some of the difficulties had been anticipated. As much as on Nina Shea and Paul Marshall's accounts of Christian persecution, the Advisory Committee relied on a recent study entitled *Religion, the Missing Dimension of Statecraft*¹¹¹, in which a chapter devoted to the "Implications for the Foreign Policy Community" had stressed the importance of training in the field of religion as much for intelligence as for action purposes.¹¹²

One suggestion put forward in this book by Edward Luttwak, was to appoint "Religious Attaches" like Cultural Attaches¹¹³ in countries where religion was specially important.

The duty of training is compelling for each and every political officer, as well as cultural, consular or immigration officers. As a result, IRFA included a section 104 devoted to "training for foreign service officers". It obliged the Secretary of State, assisted by the Ambassador-at-Large and the Director of the Foreign Service Institute, to "establish as part of the standard training" for officers, including Chiefs of Mission, instruction on Human Rights in general and in particular on "the internationally recognized right to freedom of religion, the nature, activities and beliefs of different religions, and the various aspects and manifestations of violations of religious freedom."¹¹⁴

¹⁰⁹ p.40

¹¹⁰ Jeremy Gunn, 'Preliminary response' adds: "It is probably not obvious to Muslims living in Norway or Old Believers living in Russia that they should report on incidents of discrimination to U.S. embassies in Oslo and Moscow respectively".

¹¹¹ Douglas Johnston & Cynthia Sampson ed., Center for strategic and international studies, Washington D.C., 1994 (foreword by Jimmy Carter).

¹¹² The author, Stanton Burnett, dwelled on a previous study: "The Foreign Service in 2001", Report of the Institute for the Study of diplomacy, School of Foreign Service, Georgetown University, August 1992. The study addressed moral or ethical grounds though nowhere mentioning expressly religion. See chapter 13, pp.285 ff.

¹¹³ *The Missing Dimension*, p.16. The model in Luttwak is the Sovietologists or Kremlinologists, highly trained experts during the Cold! ? Since a long time the French Embassy to the Holy See includes an ecclesiastical Attache, which is a Catholic priest. A Consular Attache (of Arabic background though not necessarily Moslem) has also been appointed to the French Consulate-General in Djeddah (Saudi Arabia) for the purposes of the Haj. The French Foreign Ministry has always had an office of Special Advisor to the Minister for Religious Affairs.

¹¹⁴ As early as 1984, in France, Regis Debray, then an advisor to President Mitterrand, put it in his own terms: " A public servant for whom administrative procedures have no secret, wrongly despise that of the double nature of Christ as if the

Courses at the Foreign Service Institute were duly updated to enhance training related to religious rights, as shown in the appendices of the 1999 and 2000 reports.

But as Jeremy Gunn's remarks suggest, is it only a matter of training ? Though better knowledge might lead to a new openness, even empathy, isn't it altogether a question of neutrality of the state, and of personal loyalties of diplomats on the field and policymakers in Washington (or Paris, or anywhere) ?

II-2-2 Presidential action waiver

The Department of State has been able to take credit for various noteworthy improvements in respect of religious freedom. As it states in its 2000 report, "the most productive work often is done behind the scenes for a very simple reason: no government or nation is likely to respond positively when publicly rebuked."

In other words, IRFA can be regarded as a mere deterrent. In this approach, the waiver is more important than any of the other fifteen actions; the diplomatic gain would be obtained by NOT taking action. However, "particularly severe violations" can only be addressed openly. The whole apparatus of the legislation would then amount to keeping violations under control and deterring them from becoming "severe". What about the latter ?

In October 1999, five countries were officially "designated": Burma, China, Iran, Iraq and Sudan, as were the Taliban government of Afghanistan and President Milosevic's government of Serbia (regarding Kosovo). The U.S. Commission on International Religious Freedom (USCIRF) as of May 1, 2000 had focused its report on three violators: China, Russia and Sudan. But Russia was never designated. A deadline was set for December 31, 2000 for registration of religious groups under its 1997 law on religious freedom.¹¹⁵

As for China, the recommendation of the president of the U.S.C.I.R.F not to grant China permanent normal trade relations with United States as a way of accession to the World Trade Organization (WTO) was not followed by Congress: "The Commission", he said in his testimony before the House Ways and Means Committee, of May 3, 2000, "believes that an unconditional grant of PNTR at this moment may be taken as a signal of American indifference to religious freedom." PNTR was granted on May 23 by the House, September 9 by the Senate. Congress, which nevertheless set up a special committee for monitoring Human Rights in China, avoided incorporating a condition of annual review of them as requested by the Catholic Bishops' Conference. Relations have been tense in the whole year 2000 between Beijing and the Vatican, and also with Falun Gong followers and other groups. However, in 2000 there was talk that China could ratify the International Covenant on Civil and Political Rights of 1966 (part of IRFA). Instead, on February 28, 2001, the People's Assembly ratified the International Covenant on Economic, Social and Cultural Rights (with exceptions).

If Russia opposed the Commission to the President, China to the Congress, Sudan is a matter of strain with the State Department itself. The Commission denounced a lack of open cooperation from Foreign Service officials and failures in their report.

Council of Chalcedonia did not overshadowed the grey area he observes through binoculars", *La Puissance Et Les Reves* (The Power and the Dreams), Gallimard, Paris, 1984 p. 261 (seven years before the break-up of Yugoslavia)

¹¹⁵ Most religious organizations passed the test. 6000 were registered. The Jehovah's Witnesses in Moscow won their case in court on February 23, 2001. A court action is still going on regarding the non-registration of the Salvation Army in Moscow.

In July 2000, the Commission requested the adjunction of four more countries: Laos, North Korea, Saudi Arabia and Turkmenistan. It decided to "closely monitor" India, Pakistan, Uzbekistan and Vietnam, and expressed its "concern" for Indonesia and Nigeria. The Secretary of State in October 2000 did not designate any new country in addition to those designated in 1999. USCIRF in its December report, regretted this and stressed the point that "the designation of a CPC (Country of Particular Concern) is dependent solely on the facts and circumstances of religious freedom; the consideration of other factors should come into play with respect to what policies to adopt and what sanctions to take in response to such a designation".

The objectives of the lobbyists have only been partially fulfilled¹¹⁶. Thanks to IRFA, religion was effectively back in the public square in the discussion of foreign policy in Washington D.C. However if the results were to be limited to better documented reports and public diplomacy, and sustainable foreign advocacy, while not negligible, these are in the end modest and equal more or less to what would have been achieved by a consistent national interest foreign policy. So what is missing ?

First the substance of consultation with the government of the country concerned. Acting more as a court than as a counsel, the U.S. administration under IRFA totally missed the point of good governance regarding religion. Apart from atheist states, there is no such thing as "good" or "bad" states regarding religion. The present international situation might be more accurately described as an imbalance. "Weak" churches versus "Strong" states or "Strong" religions versus "Weak" states¹¹⁷. What should be of most concern to the international community is the "weakness" of nation-states compared to world-backed religions. The case has been very well illustrated by Pr. Abdullahi An-Na'im and his colleagues in the African case¹¹⁸. It might explain for instance why regional states in Northern Nigeria had no alternative but to make Shar'ia the law of the land. In making the religious law legal, they regained control of its secular implementation as full states. The question is how will these states be able to incorporate some of the values today possessed only by religious organizations? How could religion consolidate these states instead of further weakening them ?

How could IRFA help in this process (which we may qualify as secularization), not in taking sides, not in exerting "sanctions", but in building trust and more accurately in acting as a midwife for the birth of "strong" institutions ?¹¹⁹ Can it do it alone ?

The second missing point in IRFA's implementation is international coordination.

II-2-3 Unilateralism versus international coordination

¹¹⁶ The report of the U.S. Commission on IRF on the State Department's annual report 2000 was particularly critical. Press Conference of Commission Chairman Elliot Abrams, December 8, 2000. A way of pressure on the new Administration? Again the new report dated May 1, 2001 keep complaining about the handling of the issue by the State Department. It protests against non-immediate access of the Commission to cables to and from embassies, p.180.

¹¹⁷ I freely adapt here a distinction made by Pr Peter L. Berger, 'Protestantism And The Quest For Certainty', *The Christian Century*, August 26, 1998. E.Sivan, *Strong religions*, University of Chicago Press, 2000 (certainty in creed and will)

¹¹⁸ *Proselytization and Communal Self-Determination in Africa*

¹¹⁹ This is a point of which the Vatican has been conscious especially in the aftermath of the demise of Communism in Europe. Also regarding the Middle East, its policy during the Lebanese crisis and post-crisis period should be noteworthy. It was not aligned on the Christian miliciae but oriented towards the preservation of the unity of the Lebanese State. Its disagreement with the U.S. on Iraq has hindered Washington's expectations for a growing alliance so soon after the demise of Communism. It was also to be understood as a defense of the integrity of Iraq as a nation. We could multiply the examples. A foreign policy based on religious freedom should first compare with the foreign policy of the first "strong" organized religious power in the world, which partake since the Council Vatican II in the philosophy of Universal Human Rights.

The question is how strong is the Ambassador-at-Large within the foreign policy apparatus ? Section 301 of IRFA provides for a special adviser to the president on international religious freedom within the National Security Council. Though Ambassador Seiple occupied both positions, it is not necessarily the case that the special adviser, according to this section, should serve as liaison with the Ambassador at Large, the Commission, Congress and "as advisable religious non-governmental organizations".

It appeared that the Ambassador-at-Large was to monitor religious freedom in the respective countries but never to really coordinate with them on a more general basis. The latter would interfere with the duties of other Agencies or other Departments within the State Department. So when he is received by the French Foreign Minister or other State officials, the discussion will be on the internal French policy¹²⁰ and not on coordinating foreign policies regarding third countries like Sudan, China or Russia - or Nicaragua or Mexico or Saudi Arabia ? In fact, he is not part of the general discussion.

The type of diplomatic exchanges a Foreign Minister can have with the Secretary of State in the Holy See could be taken as a model. They would not so much discuss any aspect of internal policy regarding the Catholic Church at home as the overall international situation.

The case for international cooperation is obvious.

For a long time in history, the Western Powers, from their international position of "defenders of the Faith", were able to impose religious freedom. The defense of faiths seems today to put international powers under submission: they are the ones who would have to make concessions for the sake of the faithful. For instance the U.S. government saw that it could no longer deny the accession of China to WTO because the price to be paid would have been too costly. Against more religious liberty, the Chinese government could have asked for more commercial or even strategic concessions. The stakes would have become too high for Americans, at least as long as they wanted to go it alone, as international religious freedom is so far a matter raised in purely bilateral discussions or in rhetorical multilateral forums.

Problems are very much interrelated. Let us take factual examples:

First, Russia. Its 1997 law on religious freedom is considered by American scholars to have been inspired by Western Europeans' restrictions on "dangerous cults"¹²¹. Does coordination mean requesting France and Belgium to change their legislation in order not to give excuses to Russia not to amend its own law ? Poland is now going on the same track. Wasn't it easier to coordinate in the first instance with American providers not to stop "less-than-honorable tactics" of proselytizing but to teach respect and knowledge¹²² ? Again Russia was not so much at stake than for the example it sets for other less reliable members of former USSR.

Second example: the Serbian Orthodox Church. Coordination may well mean making contacts with Russia or Greece to put pressure on Patriarch Pavle to pronounce against Milosevic's wars in Bosnia or Kosovo - which he actually did on his own account¹²³. But at the same time the U.S. request the Patriarchs of Moscow and Athens to renounce any state protection against new religions. Nevertheless the rules

¹²⁰ In December 1999, the French Foreign Minister told his American counterpart that the matter of religious freedom in France was not to be raised anymore in bilateral discussions.

¹²¹ Marat S.Shterin and James T.Richardson, 'Effects of The Western Anti-Cult Movement on Development of Laws Concerning Religion in Post-Communist Russia', *Journal of Church and State*, 42, 2, Spring 2000, pp.247ff

¹²² Marc Gopin, *Between Eden And Armageddon: The Future Of World Religions, Violence And Peacemaking*, Oxford University Press, 2000, p.214: "Perhaps if this had been subject to a conflict resolution process early on, we might not have the legal results now of institutionalized anti-religious prejudice".

¹²³ Paul Motjes ed., *Religion And The War In Bosnia*, Atlanta, 1998

governing the relations between the autonomous Eastern Churches should be well understood in order not to expect the impossible from Moscow or Athens or even less from Constantinople¹²⁴.

Third example: The World Islamic Conference. It should be perfectly feasible under IRFA to coordinate with the W.I.C. as such. Issues could be raised in this setting which would otherwise harm bilateral relations. Usually there is much apprehension in doing so, as such a move would go across the boundary between religion and politics. The question is precisely: what to make out of religion ? The quiet promotion of evolutions within Islam would be impossible if it was understood as directed at "separation" as a purely intellectual or legal concept unknown of in the other's theology. Likewise internal evolutions would be ruled out if the aim was only to ask Islamic states to tolerate Christians among them. European experiments regarding Islamic communities might be very valuable in that sense.

The question is not in these examples the legitimacy of every measure taken isolately as promotion of Human Rights but the overall coherence of the actions. Delegitimizing the potential partners does not lead anywhere. To make them appear as "persecutors" will not help the persecuted in the least. As long as there is no agreement on international standards and a real international strategy to implement them, unilateral actions by the U.S. will not amount to much more than what has already been achieved.

II-2-4 Religion back as a subsidiary of foreign policy ?

How can we find a common ground ? Is it through religion itself ? Or in spite of it ?

Unilateralism can only put the U.S. under suspicion of following hidden political agendas. If IRFA is not achieving what it was set to achieve, at least it will succeed in promoting the U.S. in larger religious constituencies abroad for the pursuance of "important national interest". As more officials fulfil their mission under IRFA, multiplying high - as well as medium - and field-level contacts (section 105 of IRFA) and exchanges (section 503) with religious leaders and organizations all over the world (as well as internally, through U.S. faith-based organizations), U.S. diplomacy could gain a powerful base. President Truman's dream of a kind of "holy alliance" in the early fifties could come true¹²⁵. We are back then to the historic concept of subsidiarity. The Churches will play the role of supplements or surrogates in American foreign policy.

This was very clear from Mrs. Albright's short introduction referred to and from a later one stating: "Even more than the expression of the American ideals: it is a fundamental source of strength in the world"¹²⁶.

Ambassador Seiple, in conclusion of his 1999 report, had other goals: "Aside from fulfilling the requirements of the law, this report and its successors have two longer-term aims. The first is to accelerate the incipient dialog to ensure that religion is a transnational vehicle of conflict prevention and post conflict reconciliation and not a tool of division...So understood, it can engender both forgiveness and constructive remorse. The second objective is to signal unambiguously to persecutor and persecuted alike that they will not be forgotten."

¹²⁴ The only example of IRFA's two years record put forward by Jeremy Gunn was a demarche by Greece for U.S. Embassy to Turkey to request the non-closure of an Orthodox seminary in Istanbul.

¹²⁵ In 1948-49, President Truman instructed his special envoy to the Vatican, Myron C. Taylor, to rally the spiritual leaders of Europe around his policy of confrontation with USSR. A kind of "Holy Alliance" (though different from 1815's) would precede the foundation of the Atlantic Alliance. Churches were divided on the issue especially within the Protestant World Council of Churches (WCC) where Myron C. Taylor tried and failed to exert an influence. I am indebted to Pr. Jean-Dominique Durand. The letters of Myron C. Taylor, special envoy from 1939 to 1952, have only been published in Italian by Ennio di Nolfo, *Vaticano E Stati Uniti 1939-1952 Dalle Carte Di Myron C. Taylor*, Milano, 1978.

¹²⁶ July 22, 1997

The United States would defend religious freedom in order for religions to work for peace in the international field with their own values which are, according to Ambassador Seiple, drawing on the "theology" of Commissions for Truth and Reconciliation in South Africa and elsewhere: forgiveness and remorse. Let us assume that these values, under different names and understandings, are present in all world religions. How will the U.S. government work with them under IRFA ?

In her first speech Mrs Albright outlined the examples of Mahatma Gandhi, the Dalai Lama, Reverend Martin Luther King and Pope John Paul II. Muslims and Jews did not enjoy a leader in that top list. A few other names could have been added. Among Bishops, Oscar Romero of El Salvador, Pierre Claverie of Oran (Algeria), Juan Gerardi (Guatemala), all three assassinated, Desmond Tutu of South Africa, Samuel Ruiz of Chiapas (Mexico), Carlos Belo of East Timor, Cardinal Jaime Sin of Philippines or less well known organizations like the Mennonites, San't Egidio, or Buddhists in Burma¹²⁷, enough to stress the pervasive role of religious leaders, if not of religion as such, in conflict resolution, though not all of them would be agreeable to the U.S. government and Congress. Important as they are, they are not exclusive. And not always looking in the expected direction. Religious leaders can also be protagonists of conflicts like the Rev. Ian Paisley in Ulster, Ayatollah Khomeiny and his successors in Iran, the Taliban in Afghanistan, Buddhists in Sri Lanka, and so on and so forth.

The question here is not any more about religious freedom. The four spiritual leaders were named by Mrs. Albright not because of their fight for religious freedom but for their "contribution to human development that has to come if political progress will come". In other words, they fought for justice, political and social rights, whether for Indians, Tibetans, African-Americans, or Poles (in the understanding of Mrs. Albright, in that list the Pope stands for freedom from Communist rule in his native country). In these cases, as much as in South Africa, Central America, East Timor and so on, the secular purpose of people of faith, in one sense or the other, should be regarded as prevailing. They can be supported or opposed without any breach in the separation of church and state. They should be treated accordingly under the general framework of Human Rights' international policy, not of religious ones.

Religious factors have certainly been underestimated by the U.S. in the last decades. Failures in Vietnam, Lebanon and Iran have been attributed to such blindness. The role of religion in peaceful transition in South Africa, as well as in the Philippines (from Marcos to Mrs Aquino) has much impressed the Americans. Research programs were started at the Congress-financed U.S. Institute of Peace¹²⁸ and in dozens of universities and think-tanks. Efforts were consequently launched, especially in Bosnia, with many difficulties. They should not be misunderstood. International religious freedom in this context is a kind of threshold or *entree en matiere* for a peace-building policy.

Conversely, the effects of general or specific foreign policies on religious freedom do not seem to have been much stressed. How does the policy of support for Israel affect the religious freedom of Palestinian Muslims and Christians ? How did the policy of support of Latin American dictatorships affect "faith-based

¹²⁷ Scott Appleby, *The Ambivalence Of The Sacred: Religion, Violence And Reconciliation*, Rowman&Littlefield, N.Y., 2000, especially chapter 4, 'Militants For Peace' on Mennonites, Mark Gopin, chap.7 'Conflict Resolution As A Religious Experience.' On San't Egidio, Cameron Hume (from the American Embassy in Maputo), *Ending Mozambique's War*, Washington, Institute of Peace, 1994.

¹²⁸ Dr. David Little was from 1990 to 1999 director of a programme on Religion and Peace at the US Institute of Peace; see "Coming to terms with religious militancy", in which he sees in IRFA a way to oppose policies of persecution and repression perpetrated BY "religious militants".(to be published)

communities" ? How did support for radical Islamist groups in Afghanistan (and Pakistan and Iraq) affect other Muslim moderate or secular wings ? Conversely how would an "anti-Jihâd" labelled policy affect the overall comprehension of the Muslim world ?

CONCLUSION

Western Europe should not feel embarrassed by IRFA. Nothing in its past experience with protection of religious freedom abroad, nothing in its legal traditions, nothing in its Human Rights background or in its foreign policy as such, disqualify it in this field. Especially its interpretation of separation of church and state does not bear any of the potential contradictions we have stressed in U.S. jurisprudence. Accommodation and subsidiarity have always inspired practical arrangements in the relations between both institutions, perhaps because religion has been regarded from the start as institutional.

If IRFA has been designed to avoid any political entanglement of the state with religion and to protect individual freedom against "religious militancy" in the rest of the world, then again Western Europe has paved the way through its secular approach.

Indeed, objections to IRFA can be summed up in two words: consistency and neutrality (or secularity).

A) Consistency

IRFA was clearly intended to make religious freedom an integral part of American foreign policy. How integral ?

If it was going to be integral, it should not remain an item among others. It should be coordinated with all branches and all aspects; otherwise, you may have two foreign policies not only separate or parallel but sooner or later conflicting. Sometimes a conscious choice is made, as IRFA allows it, between religious freedom and "important national interest". But in many more instances there is no choice. A general foreign policy in an area, either geographic or thematic, simply subverts religious freedom at the same time that the latter is locally advocated as a Human Right.

Each of the following issues has a major religious freedom component:

- The theology of Liberation in Latin America
- The overall issue of poverty and development
- The role of Islamic fundamentalists in Algeria
- Iraq, Iran and the Gulf war
- The whole question of Sudan, Central and Eastern Africa
- Afghanistan (and Pakistan); Chechnya and Central Asia
- The Balkans
- Russia
- China, where we could see a new and devastating "scramble for souls"
- First and foremost, at the heart of our monotheistic traditions, Israel, Palestine and the questions of Jerusalem and Lebanon..

IRFA is not simply about rituals. If it is to be taken serious, if it is to be consistent, it may be about taking sides in civil wars, arming Bosnian Muslims or Christian guerillas all over the world.

But is there any consistency as regards the treatment of religious freedom ? What was consistent during the Cold War is no more today. Communism was global, religion local. There was hardly any inconsistency in promoting Islamism against Communism; it became more difficult later to support Iraqi Shi'is against

Saddam Hussein and supposedly secular Moslems in Iraq against Iran's Shi'i government. On the reverse, Christian militancy for justice is no more to be confounded with Communist revolution.

Supporters of IRFA have seen no religious freedom or simply Human Rights consistency in a foreign policy which was, under the Clinton administration, free trade-driven. But is there any more in democracy if free and fair elections bring into power what will be termed as "extremist" forms of religion against more reassuring authoritarian regimes in Algeria, Tunisia, Morocco, Egypt, Jordan or even Turkey, notwithstanding Kuwait or Saudi Arabia, or in Asia, Malaysia, Indonesia or Pakistan ?

More generally, isn't there a political "disharmony"¹²⁹ between foundations and policies, ie between religion and politics ? Religion - "taken seriously" - as true teaching, especially social teachings, do not significantly influence the actual course of U.S. foreign policy. Under the new Bush administration, tensions and "disharmony" might be growing between the political clout of religious freedom activists and the realist approach of foreign policy makers. Where are the Niebuhrs, the successors of the theologian who could reconcile Faith or Belief and Realism¹³⁰ ?

B) Neutrality (or Secularity)

IRFA is not supposed to favour one religion over another or even religion versus non-religious beliefs. How neutral is it ?

The public debate in the U.S. is often raging. Though American religion is more on mores than dogmas as Tocqueville already remarked, no one can escape theological judgments on what exactly religion means, how is it supposed to "work", which type "works" best along the Weberian model. In a pluralistic situation, "strong" institutions, whether church or state, are being challenged. Religious freedom is supposed to strengthen both in the long run. But it may be that "strong" states have become strong because they have taken up much of the strengths of the church. Through their interaction, in the long run, states have incorporated some of the prophetic role of the churches and made theirs some of their spiritual and moral values¹³¹. In turn, sects have integrated some of the rule of law and renounced some of their deviances in the course of the process of mutual adaptation or development of doctrine. This process of secularization is not to be considered only as a demise of any churchly influence but as the integration of much of it into its global "culture".

As such, neither Europe nor the U.S. should be regarded as exceptional. The debate within Europe may be more deafened and the perceptions less vivid, more implicit. The controversy on the Preamble of the European Bill of Rights¹³² has revealed that Europeans are not agreeing on the status of religious freedom as

¹²⁹ Samuel P. Huntington, *American Politics: The Promise Of Disharmony*, Harvard University Press, 1981

¹³⁰ A Lutheran theologian, Reinhold Niebuhr (1892-1971) and his "Christian Realism" influenced many diplomats of the fifties. In 1949, he served as an Advisor to the Planning Staff Department set up by George Kennan, who conceived the policy of containment and was a major drafter of the Marshall Plan. Ambassador in Moscow, Kennan opposed the moralistic approach of John Foster Dulles and had to leave the Foreign Service. "Foreign Policy And The Christian Conscience", *Atlantic Monthly*, May 1959. Richard W. Fox, *Reinhold Niebuhr, A Biography*, Cornell University Press, 1985. Dean C. Curry, 'Where Are All The Niebuhrs Gone. Evangelicals And The Marginalisation of Religious Influence In American Public Life', *Journal of Church and State*, winter 1994,

¹³¹ Marcel Gauchet, *Le Désenchantement du Monde, Une Histoire Politique de la Religion*, Gallimard, Paris, 1985 and *La Religion dans la Démocratie, Parcours de La Laïcité*, Gallimard, Paris 1998.

¹³² Various lobbying have repeatedly tried and failed to bring religion into the European treaties. Amsterdam Treaty, 1995, Annexes, Declaration n°11, expressly leave the question to the Member States' national law. The debate was again raised during the discussion of the Charter of Rights adopted in Nice, December 8, 2000. No religious reference was included as a source of European Human Rights. The Preamble reads: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of Human dignity, freedom, equality and solidarity. It is based on the

the "first liberty". They thought that their religious roots should not be taken isolately or historically but as part of the so-called secularization process, extended in the last decade to Central and Eastern Europe.

All the same, a common foreign and security policy (CFSP) cannot avoid a reflection in "public reason" on its "religious" consistency or inconsistency. Though on the whole they regard their policies as being more prone to justice and peace, the Europeans are faced with a singular inaptitude and sometimes reluctance (especially in contemporary France) to justify their political choices with "idealistic" arguments. Their actions are always described by others (the U.S.) and by themselves in Machiavellian categories of Realpolitik. As such they cannot compete in American public opinion and in Congress, which totally ignore what system of values supports them if any. They are considered immoral or at best amoral, cynical or sceptical. France and Europe should reassert their credibility especially regarding values, ethics, morals, based on a comprehensive approach of "freedom of thought, conscience and religion".

This model is no less universal than the American experiment. Perhaps has it managed to construct the concept put forward by Tocqueville for America of "a civil religion"¹³³ as the United States would with IRFA still acknowledge itself as "a Nation with a soul of a Church" (G.K.Chesterton).

It's all the more important that a transatlantic conversation on religious factors in world politics take place between government officials and international relations experts, and that this conversation should not be left to religious-based representatives alone or to Human Rights advocacy groups.

Cambridge, June 8th, 2001

principles of democracy and the rule of law". A previous version which derived these values from "its cultural heritage, both humanist and religious" was rejected by France on the basis of "laïcité".

¹³³ Not the religion of the Nation or the Republic, the civic symbols, but the "Catho-Laïc" society described by Jean-Paul Willaime, 'Religious And Secular France Between Northern And Southern Europe', *Social Compass*, 45, 1, p.155ff. Pierre Bouretz, 'La Démocratie Française au Risque du Monde', in Marc Sadoun ed., *La Démocratie En France, I. Idéologies*, Gallimard, Paris 2000.