

# The Functions of Religion in the International Legal System

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© Mark W. Janis & Carolyn Evans (ed.), RELIGION AND INTERNATIONAL LAW (1999)  
at 159–165 (footnotes omitted)

Religion and international law often appear to be congruent. They share elements of ritual, tradition, authority and universality that “connect the legal order of any given legal society with that society’s beliefs in an ultimate transcendent reality.” There is, too, a certain sanctity to any body of law, just as there is an authoritative and often constitutive structure in religion. Judaism is based on a covenant. In Martin Buber’s terminology of I and Thou, both religion and international law are essentially dialogue; both seek to prove orientation of knowledge and a greater realization of the meaning of life. In a sense, the whole concept and practice of global order presupposes a moral and teleological viewpoint that is essentially religious. United Nations Secretary General Javier Perez de Cuellar has referred to the U.N. Charter as “my religion.” ... As ethical systems, both law and religion address the global order in a profound manner; both are concerned with the manner in which we accept and organize the world and universe around us.

Sometimes, however, religion and positive international law are anything but congruent. They may even be in conflict. For example, prohibitions on whaling by national and international agencies, for the best of environmental reasons may conflict with indigenous religious practices. Prescriptions to protect the rights of women, such as those that were developed and codified in the Convention Against the Elimination of All Forms of Discrimination Against Women, have been rejected by some Islamic traditions.

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Integration of law and religion can, of course, result by definition whenever religious institutions or ideas are deliberately made the subject of international prescription. Examples include the Lateran Treaty between Italy and the Vatican ... and the recognition of the Vatican as a state. ‘Right to life’ provisions in human rights instruments that are intended or interpreted to prohibit abortion have religious foundations. An extraordinarily inflammatory issue was the [1975] ‘Zionism is racism’ resolution of the United Nations General Assembly.... Several global instruments articulate a fundamental freedom of thought, conscience and religion ... [including] the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. Regional conventions and accords contain similar provisions. Other human rights agreements protecting religious freedoms include the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Relating to the Status of Refugees. These provisions highlight the topic of religion’s role in the international legal system.

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Religious institutions and doctrine have helped shape and develop modern international law. Certain denominations—for example, the Society of Friends (Quakers), the Brethren in Christ (Mennonites), the Church of the Brethren, the United Society of Believers in Christ’s

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Second Appearing (Shakers), and the Bahá'í Faith—have accorded a central role to peace and the development of global order.... Many other denominations and such ecumenical institutions as the World Council of Churches (WCC), influenced by Third World churches, actively pursue programs for the progressive development and implementation of international law....

Religious groups may sometimes be inhibited from active participation in the development of global order because of their disassociation from any politically related institutions, as international law and legal institutions may be viewed. Conversely, some groups may be motivated to create and help implement international law precisely because the latter *does* have political implication that symbolize a constraint on secular, fractious sovereignty and a cosmopolitan expression of the limits of sovereign authority. ... On the one hand, Shiite belief deliberately merges religion and the state, and Latin American liberation theology joins forces with Marxist and other political movements in exercising a 'preferential option for the poor.' On the other hand, some (but not all) Western versions of evangelism tend to be distinctly Separationist in order to protect their cherished civil liberties.

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So far in attempts to understand the historic role of religion in shaping modern international law, the message seems to be that international law did not replace the old time religion, as conventional learning implies, but entered into a continuous dialectical interdependence with religion.

... Rules and principles of international extradition appear to have originated in sanctified delivery of criminals, "bound up in solemn religious formulas," practiced by ancient Chaldeans, Egyptians and Chinese. The doctrine and practice of asylum—a "right of sanctuary" blessed by the medieval church—is rooted in ancient Greece. Gandhi's Hindu strategy of *satyagraha* (passive resistance) helped define principles of self-determination and peaceful resolution of conflict in the modern world, and Confucian ideology has encouraged the growth of non-litigory methods for resolving international commercial disputes.

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Even after fragmentation of medieval Christendom and the emergence of the nation-state system after the [Protestant] Reformation, the medieval concept of a universal law continued to encourage cosmopolitanism among Roma Catholic sovereigns. Legal thinking in the Protestant states that emerged from the Reformation concurred in formulating and applying legal rules that would transcend the State and conform with religious thinking. The Protestant perspective of Grotius and his contemporaries and his contemporaries and disciples included the idea of brotherhood and universal love based on natural law that was stoic-Christian in origin but secular in expression. Within the essentially Roman law framework of the new states, accepting a secular definition of natural law with Christian roots inspired greater respect for codifying extant community practices.

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Several examples of specific doctrinal contributions ... may help confirm the creative function of religious doctrine in the formulation of modern international law. At a very deep level of significance, there seem to be certain universal, religious doctrine in the formulation of modern international law.... For example ... all of the major religions propound a Golden Rule—treat others as you would like to be treated—that is the basis of reciprocity ... that has shaped humanitarian legal doctrine. Personal redemption by acceptance ... may help explain "positivism's preoccupation with consent" [e.g., a treaty-based agreement or that a State cannot be forced to appear before the International Court of Justice without its consent]; and the rules

and principles of state succession may be rooted in the historic need of a religiously defined polity to attribute an implied choice of permanent exclusion to an untolerated ethnic order or other excluded group. International environmental law is rooted in the basic Judeo-Christian values, as is the concept of a 'common heritage of mankind,' which has at times influenced international environmental law, the law of the sea, cultural property law, the law of outer space and the legal status of Antarctica.

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One of the most important contributions of religious thinking to international law is the doctrine of a just war. It has proven to be endlessly controversial ... but endlessly durable as well.

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In the nuclear era, the [just war] doctrine has proven to be particularly uncertain. Some would argue that it has been superseded by Article 2(4) of the United Nations Charter [prohibiting the aggressive use of force] and more recent, cognate formulations of customary ... law. These publicists recognize that although some use of military force is acceptable, the exception to non-use must be premised on not the requirement of justice but rather on the defense of peace and opposition to aggression. It is now said the Charter "clearly favors peace over justice."

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