

## **DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF**

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When the United Nations General Assembly adopted on 25 November 1981, without a vote, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the “1981 Declaration”), it was hailed by diplomats as a major landmark in the promotion and protection of human rights in this important and fundamental field (A/36/PV.73). It is indeed the first international soft law instrument focusing on religious intolerance and since 1986 the United Nations have also mandated a Special Rapporteur to monitor the implementation of the 1981 Declaration globally. Yet why did it take almost two decades for the 1981 Declaration to be adopted and how have its key provisions influenced subsequent legal developments?

### **Historical context**

In 1954, the then United Nations Secretary-General Dag Hammarskjöld in his address to the second Assembly of the World Council of Churches referred to ideological tensions at the time with “two predominant trends, one in the direction of social and economic equality within the nations, the other one in the direction of equal rights and opportunities for all nations”. This led in the 1950s and 1960s to the drafting of two separate covenants, one for the protection of civil and political rights as well as another one concerning economic, social and cultural rights. The ideological and political tensions during the Cold War furthermore implied that Western States advocated for freedom of religion, whereas the Communist bloc emphasized the right not to have a religion and the protection of atheistic belief. This definitional issue is also reflected in the Study of Discrimination in the Matter of Religious Rights and Practices (1960), in which Special Rapporteur Arcot Krishnaswami defined the term “religion or belief” to “include, in addition to various theistic creeds, such other beliefs as agnosticism, free thought, atheism and rationalism.” This seminal study, especially its first annex with *draft principles on freedom and non-discrimination in the matter of religious rights and practices*, subsequently became in part a blueprint for the 1981 Declaration. Special Rapporteur Krishnaswami stressed that “equality of treatment is not ensured for all religions and beliefs, or for their followers, in certain areas of the world” and that “it must not be forgotten that mankind only recently has witnessed persecutions on a more colossal scale than ever before”. In 1959 and 1960, a wave of anti-Semitic incidents notably in countries of the Western hemisphere, which were reminiscent of the crimes and outrages committed by the Nazis prior to and during the Second World War, triggered resolutions in 1960 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (in its resolution 3 A (XII)) and subsequently the Commission on Human Rights (in its resolution 6 (XVI)). The latter noted with deep concern the manifestations of anti-Semitism and other forms of racial prejudice and religious intolerance of a similar nature which might be once again the forerunner of other heinous acts endangering the future.

### **Significant Developments in the Negotiating History**

In view of “growing divisions” among delegates about the appropriate response from the international community, the General Assembly adopted in 1962 two resolutions requesting the Economic and Social Council to ask the then Commission on Human Rights to prepare draft declarations and draft conventions on the elimination of all forms of racial discrimination (resolution 1780 (XVII)) and of religious intolerance (resolution 1781 (XVII)). These envisaged two non-binding and two legally

binding texts on racial discrimination and on religious intolerance were initially pursued in parallel, yet the debate of the former encountered less problems and delays than the latter. Thus it took less than one year for the Declaration on the Elimination of All Forms of Racial Discrimination to be adopted by the General Assembly in 1963 (resolution 1904 (XVIII)) and only another two years for the related Convention in 1965 (resolution 2106 (XX)). By contrast, the road to negotiating and finalizing the declaration on religious intolerance was “long, arduous and full of obstacles”, as noted by the delegation from the Netherlands at its adoption in 1981. Furthermore, the elaboration of a draft convention on religious intolerance was deprioritized by the General Assembly in 1972 (resolution 3027(XXVII)) and was ultimately no longer actively pursued. This is also linked to the entry into force of the two legally binding overarching human rights covenants in 1976, i.e. ten years after their adoption. They both contain provisions relating to religious freedom. The International Covenant on Economic, Social and Cultural Rights (the “ICESCR”) guarantees in its article 13 the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Furthermore, the International Covenant on Civil and Political Rights (the “ICCPR”) includes several provisions related to religion, notably in its article 18 (freedom of religion or belief), article 26 (prohibition of discrimination on any ground such as religion) and article 27 (protection of religious minorities). Since 1977, the United Nations Human Rights Committee has also been monitoring the implementation of the legally binding ICCPR through issuing concluding observations on periodic reports by State parties and adopting views on communications concerning individual cases, including on religious discrimination.

Between 1974 and 1981, an informal working group of the Commission on Human Rights discussed and formulated the preamble and substantive articles of the draft declaration. Faith-based and secular civil society organizations played an important role in the *travaux préparatoires*, including through lobbying efforts at the outset and substantive contributions to the final wording of the declaration. In addition, the Special Rapporteur on freedom of religion or belief acknowledged the active part taken by the Holy See in preparing and adopting the 1981 Declaration (E/CN.4/2000/65). Furthermore, the Chairperson of the United Nations Human Rights Committee, Andreas V. Mavrommatis, called the unanimous adoption on 25 November 1981 an “auspicious and extremely gratifying event”, expressing specific thanks to the two chairpersons of the Commission’s Working Group, i.e. the Canadian diplomat Yvon Beaulne and Abdoulaye Dieye from Senegal; the latter was also a member of the Human Rights Committee from 1979 to 1982. This illustrates the cross-border collaboration of diplomats, faith-based civil society organizations and United Nations treaty body members in formulating and finalizing the 1981 Declaration.

### **Summary of Key Provisions**

Its preamble contains a key provision that characterizes freedom of religion or belief, and indirectly provides elements for a definition, by “[c]onsidering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life”. This phrase has also been taken up by the General Assembly, Human Rights Council and the Special Rapporteur on freedom of religion or belief in several resolutions, reports and press releases. It combines a general openness for a broad range of different types of religious or belief-related convictions and concomitant practices with safeguards against dangers of trivialization. The “open definition” in the 1981 Declaration’s preamble has been commented to underline that religions and beliefs “have an existential significance, which permeates the entire self-understanding of a person and his or her way of life”, which thus also helps avoiding potential pitfalls if all sorts of trivial interests were deemed to be covered by freedom of religion or belief (H. Bielefeldt, M. Wiener, *Religious Freedom Under Scrutiny*, University of Pennsylvania Press, Philadelphia, 2019).

The formulation in article 1 that the right to freedom of thought, conscience and religion “shall include freedom to have a religion or whatever belief of his choice” is a diplomatic compromise due to the opposition from certain delegates against the explicit reference to the “freedom to change his religion or belief”, even though this formulation has been enshrined since 1948 in article 18 of the Universal Declaration of Human Rights (the “UDHR”) (J. Walkate, “The Right of Everyone to Change his Religion

or Belief – some observations”, *Netherlands International Law Review*, vol. 30, issue 2, 1983, pp. 146-160). However, article 8 of the 1981 Declaration clarifies that nothing in that declaration shall be construed as restricting or derogating from any rights defined in the UDHR, ICCPR or ICESCR. This safeguard clause was also flagged by the delegation from the Netherlands immediately after the adoption of the 1981 Declaration, stressing that “the exercise of the right to maintain, change and manifest one’s religion or belief should be seen as a healthy sign of freedom and democracy”. Furthermore, the Special Rapporteur on freedom of religion or belief (A/67/303) and the Human Rights Committee (CCPR/C/21/Rev.1/Add.4) have clarified that the rights to replace one’s current religion or belief with another or to adopt atheistic views or to retain one’s religion or belief, remain fully protected in spite of the slightly different wording in the UDHR, ICCPR and 1981 Declaration. Freedom to change one’s religious or belief-related orientations thus remains an indispensable component of freedom of religion or belief. Indeed, it defines its very nature as a right to freedom.

Article 2, paragraph 1, of the 1981 Declaration sheds light on the rights-holders and duty-bearers by stressing that “[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief”. The formulation “no one” underlines that all human beings, not only citizens, are rights-holders and must be protected, whereas both States and non-State actors may be duty-bearers and potential perpetrators of discrimination on the basis or in the name of religion or belief. In mission reports and communications with *de facto* authorities in protracted conflicts, Special Rapporteurs have quoted the 1981 Declaration, which is not legally binding but has the advantage – compared to the ICCPR – that it does not need to be ratified by a State.

Article 2, paragraph 2, provides an important definition of the terms “intolerance and discrimination”, meaning “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis”. Even though this definition in article 2 appears to equate both terms, the interpretation by Donna J. Sullivan is more convincing; she distinguishes the human rights violation through “discrimination” from its “intolerant” motivation, i.e. “intolerance describes the emotional, psychological, philosophical and religious attitudes that may prompt acts of discrimination or violations of religious freedoms”. Natan Lerner also noted that the term “intolerance” is “imprecise and vague”, whereas the term “discrimination” has a clear legal meaning due to its use in various international treaties.

Similar to the formulation in the 1963 Declaration on the Elimination of All Forms of Racial Discrimination, also the 1981 Declaration in its article 3 stresses that “[d]iscrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the UDHR”. This is a strong formulation, which links claims to non-discriminatory treatment to the due respect of everyone’s human dignity. In addition, the 1981 Declaration also refers to the enunciation of these freedoms in the ICCPR and ICESCR, which obviously the 1963 Declaration on the Elimination of All Forms of Racial Discrimination could not do before the two Covenants were ultimately adopted in 1966.

Article 4 of the 1981 Declaration requests all States to “take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life”. This is an important clarification, not least in the face of ongoing attempts to draw spatial limits to the exercise of freedom of religion or belief, for example by mainly locating this right in the “private sphere” or by purging public institutions or certain companies from visible or audible manifestations of religiosity. The Declaration’s broad formulation (“in all fields ...”) was used by the Special Rapporteur on freedom of religion or belief in his thematic report on discrimination in the workplace to argue that providing reasonable accommodation should be understood as part of the States’ legal responsibility, including with regard to guaranteeing freedom of religion or belief (A/69/261).

Article 5 provides for detailed rights of parents and legal guardians to organize the life within the family in accordance with their religion or belief, while also referring to the “best interests of the child” as the guiding principle. This provision obviously predates the adoption in 1989 of the Convention on the Rights of Child, which enshrines the “best interests” principle and requires that the views of the child be given due weight in accordance with the age and maturity of the child (article 12, paragraph 1) and explicitly guarantees the right of the child to freedom of thought, conscience and religion (article 14, paragraph 1). The Special Rapporteur has combined the provisions of the 1981 Declaration with the Convention on the Rights of the Child, for example in a communication that criticized the missing recognition of the right to religious education and belief for children (E/CN.4/1995/91).

Article 6 contains a non-exhaustive list of manifestations that are protected under the right to freedom of thought, conscience, religion or belief. Once again, the 1981 Declaration insists on a broad application. The wording used here includes the freedoms (a) to maintain places for worship or assembly; (b) to establish charitable or humanitarian institutions; (c) to make, acquire and use materials related to the rites or customs; (d) to write, issue and disseminate publications; (e) to teach a religion or belief in suitable places; (f) to solicit and receive voluntary financial and other contributions; (g) to train, appoint, elect or designate by succession appropriate leaders; (h) to celebrate holidays and ceremonies; and (i) to maintain communications with individuals and communities at the national and international levels. Given the fact that in many national constitutions, provisions relating to freedom of religion or belief mainly focus on the element of “worship”, the insistence on a broad understanding of manifestations proves highly relevant.

Article 7 requires national legislations to ensure that in practice everyone shall be able to avail themselves of the rights and freedoms set forth in the 1981 Declaration. Several Special Procedures mandate-holders have underscored the importance of non-discriminatory laws, effective remedies for human rights violations and wide dissemination of the 1981 Declaration, for example through artistic displays, civic/religious education programmes and the peer-to-peer learning methodology of the #Faith4Rights toolkit.

### **Influence on Subsequent Legal Developments**

In the four decades since the adoption of the 1981 Declaration, more than 500 United Nations reports, resolutions, summary records, letters by States and statements by civil society organizations have made reference to it. For example, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in its preamble stressed the desire to promote the realization of the principles contained in various international instruments, including the 1981 Declaration. Furthermore, the 1993 World Conference on Human Rights in Vienna invited all States to put into practice the provisions of the 1981 Declaration and similarly the 2001 World Conference against Racism in Durban called for its implementation “in order to obviate religious discrimination which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination”. In 2020-2021, the General Assembly explicitly referred to the 1981 Declaration in its thematic resolutions on the promotion of interreligious and intercultural dialogue, understanding and cooperation for peace (resolution 75/26), freedom of religion or belief (resolution 75/188), International Day of Human Fraternity (resolution 75/200) and on promoting a culture of peace and tolerance to safeguard religious sites (resolution 75/258).

Since 1986, a Special Rapporteur on religious intolerance (renamed in 2000 to “Special Rapporteur on freedom of religion or belief”) has been mandated to examine incidents and governmental actions that are incompatible with the provisions of the 1981 Declaration and to recommend remedial measures as appropriate. This global Special Procedures mandate compensates partly for the lack of a legally binding instrument and treaty body exclusively dedicated to eliminating all forms of religious discrimination, bearing also in mind that the Human Rights Committee monitors the implementation of articles 18, 26 and 27 of the ICCPR and the Committee on Economic, Social and Cultural Rights does the same with regard to article 13 of the ICESCR.

At the regional level, Principle 16 of the Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe takes up several elements from the catalogue of rights enumerated in article 6 of the 1981 Declaration. At the national level, an Argentinian bill on religious freedom refers to the 1981 Declaration and the Australian Human Rights Commission can inquire into complaints about the Commonwealth's acts or practices that are inconsistent with or contrary to the 1981 Declaration. Furthermore, article 1.2 of the 2006 Law on Freedom of Religion in Kosovo is almost a verbatim copy of article 6(a)-(i) of the 1981 Declaration. In his thematic report on recognition issues, the Special Rapporteur on freedom of religion or belief also used each of these nine categories to illustrate the practical problems encountered by unregistered religious or belief communities and the human rights implications of missing legal personality status. Similarly, it is a key source for the Special Rapporteur's 2020 report to the General Assembly (A/75/385), proposing specific indicators of impact in reducing inequalities, combating intolerance and tackling discrimination against religious and belief minorities.

International and regional jurisprudence also refers to the 1981 Declaration, for example in cases decided by the United Nations Human Rights Committee (*Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*), the European Court of Human Rights ("*Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy*") v. *the former Yugoslav Republic of Macedonia*), the Inter-American Court of Human Rights (*Nadege Dorzema et al. v. Dominican Republic*) and the African Court on Human and Peoples' Rights (*African Commission on Human and Peoples' Rights v. Republic of Kenya*).

Yet it is not referred to in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (2012), due to the conspicuous absence of incitement language in the 1981 Declaration, apart from the allusion in its preamble to "foreign interference in the internal affairs of other States and [...] kindling hatred between peoples and nations", which has a different target than article 20, paragraph 2, of the ICCPR. However, the Beirut Declaration and its 18 commitments on "Faith for Rights" (2017) directly quotes article 2 of the 1981 Declaration to support the point that religious institutions, leaders and even each individual within religious or belief communities bear responsibilities independently from public authorities. The Beirut Declaration, which applies both in times of peace and armed conflict, also stresses that under certain circumstances, in particular when non-State actors exercise significant/effective control over territory and population (e.g. as *de facto* authorities), they are also obliged to respect international human rights as duty-bearers.

By way of conclusion, the 1981 Declaration has been lauded as "a milestone in the progressive development of human rights norms", whereas a more critical appraisal regards it at least as "a victory taking into account the surrounding gloomy political circumstances and the delicacy of the subject-matter". The 1981 Declaration indeed provides important guidance for defining the contours of freedom of religion or belief, notably through the non-exhaustive catalogue of protected manifestations as enumerated in its article 6 which has inspired regional and national norms. Furthermore, it has been a practical yardstick for the Special Rapporteur's country missions and communications, especially with regard to States that have not acceded to the legally binding ICCPR. However, the lengthy and difficult negotiations during the *travaux préparatoires* of the 1981 Declaration ultimately led to compromise language and several substantive gaps in the final text, which for example does not refer at all to the protection of religious or belief minorities, the prohibition of incitement to hatred and violence, or the specific role of religious leaders and faith actors. Yet, as explained above, these lacunae have been filled and fixed through subsequent soft law standards such as the 1992 Minorities Declaration, the 2012 Rabat Plan of Action and the 2017 Beirut Declaration on "Faith for Rights". Together with the pertinent provisions of the two legally binding Covenants (ICCPR and ICESCR), this jigsaw of hard and soft law standards constitutes the Special Rapporteur's framework for communications (E/CN.4/2006/5) and is also the legal backbone of international jurisprudence and academic commentary on freedom of religion or belief.

*This Introductory Note was written in February 2021.*

## **Related Materials**

### ***A. Legal Instruments***

International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, United Nations, *Treaty Series*, vol. 660, p. 195.

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, p. 3.

Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, p. 3.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly resolution 47/135 of 18 December 1992).

### ***B. Jurisprudence***

Human Rights Committee, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Communication No.1249/2004, (CCPR/C/85/D/1249/2004, 21 October 2005).

Inter-American Court of Human Rights, *Nadege Dorzema et al. v. Dominican Republic*, Judgment of 24 October 2012, Series C No. 251.

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European Court of Human Rights, "*Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)*" v. *the former Yugoslav Republic of Macedonia*, no. 3532/07, Judgment of 16 November 2017.

### ***C. Documents***

Address by Secretary-General, Dag Hammarskjöld, Second Assembly of the World Council of Churches, 20 August 1954.

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General Assembly resolution 75/188 of 16 December 2020 (Freedom of religion or belief).

General Assembly resolution 75/200 of 21 December 2020 (International Day of Human Fraternity).

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