

February 2017

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### Recommended Citation

Mark Weston Janis (2017) "Faith, the State, and the Humility of International Law," *Journal of Catholic Legal Studies*: Vol. 45 : No. 1 , Article 5.

Available at: <http://scholarship.law.stjohns.edu/jcls/vol45/iss1/5>

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# FAITH, THE STATE, AND THE HUMILITY OF INTERNATIONAL LAW

MARK WESTON JANIS<sup>†</sup>

## INTRODUCTION

Father Robert Drinan, long a leading advocate of human rights, has had a distinguished career serving as a U.S. congressman from Massachusetts, as Dean of the Boston College Law School, and now as Professor of Law at Georgetown University Law Center. Father Drinan's new book, *Can God and Caesar Coexist?: Balancing Religious Freedom and International Law*,<sup>1</sup> sensitively and persuasively sets out the often tortuous relations among religion (the "God" of his title), national governments ("Caesar"), and international law (the new and possibly helpful partner in this relationship).

My essay employs the facts and arguments in Father Drinan's *Can God and Caesar Coexist?* as a sounding board for a single, central observation. In the oftentimes dysfunctional family of faith, the state, and international law, it is international law that is very much the weak sister, doomed to play a humble and subservient role vis-à-vis the much more powerful figures of religion and the sovereign state. I think Father Drinan and I agree that it will be extraordinarily difficult for international law, the Cinderella of the tale, to rise up to engage either faith or the state on anything like an even playing field.

The question of Father Drinan's immediate interest is religious tolerance. He sets the problem out clearly: "The most important question relates to an ancient issue: whether a nation should or can establish one religion as the official faith of the country. Will world law someday hold that, for the sake of

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<sup>1</sup> ROBERT F. DRINAN, S.J., *CAN GOD AND CAESAR COEXIST?: BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW* (2004).

maximizing religious freedom, no nation can formally exalt one religious faith over any other?"<sup>2</sup>

Belief in religion and belief in the sovereign state are two of the strongest human emotional attachments. What hope does international law have to limit the assertions of either faith or the state? Even more daunting, what realistic hope does international law have to moderate claims made jointly by religion and national government, claims made with the awesome combined authority of both? Should or can international law, for example, in the name of religious freedom or religious tolerance, limit the acts of nationally dominant religions when they act through national governments to restrict or prohibit the activities of other religious faiths? Realistically, ought international law be expected to be a protector of minority religious beliefs and practices in states where the dominant religion and the ruling secular authority agree that other religious beliefs should be kept out or at least significantly restricted?

As I set out answers to such questions, I will move along a somewhat different trajectory than that of Father Drinan but will always stand on the foundation of his work. My starting place is to ask: What is "international law?" Elsewhere I have tried to look at religion through the eyes of international law, concluding that "religion and morality, once proof for Grotius, problem for Vattel, sanction for Wheaton, history for Oppenheim, have become for Brownlie anathema."<sup>3</sup> However, I have not before attempted to look at international law through the eyes of religion. Using Father Drinan as my first example, let me try to do so now. In doing so, I will also set out the key parts of Father Drinan's analysis.

## I. A VISION OF INTERNATIONAL LAW

What does Father Drinan think international law is? The answer is a little complex. In general, Father Drinan identifies international law as a law that is universal. He sometimes calls this universal law by different, but equivalent terms. His two most important terms are "international law" and "world law."

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<sup>2</sup> *Id.* at 9.

<sup>3</sup> Mark W. Janis, *Religion and the Literature of International Law: Some Standard Texts*, in RELIGION AND INTERNATIONAL LAW 121, 140 (Mark W. Janis & Carolyn Evans eds., 2004).

The book's title, of course, refers to "balancing religious freedom and international law" and Father Drinan's first paragraph explains that "the right to religious liberty . . . is so foundational and precious that it should be guaranteed by international law[.]"<sup>4</sup> Throughout the book the term "international law" seems to signal the discipline in general. In looking in Chapter 2 at the problems that this universal law might have for states, Father Drinan writes, "Will international law someday require the Republic of Ireland to delete from its laws the provisions that establish Catholicism as the stated faith of the entire country?"<sup>5</sup> When viewing the foreign policy position and activities of the United States in Chapter 4, he asks, "Does international law require that sovereign nations admit missionaries when it is known that they will proselytize and seek to inculcate beliefs that the host nation considers alien to or even subversive of its culture?"<sup>6</sup> In describing in Chapter 6 the developments that led to the liberalized approach of Vatican II towards religious freedom, Father Drinan argues that "the thrust of international law in this area should be to extend the guarantees of the Universal Declaration of Human Rights and the covenants on political rights to religion in all its forms."<sup>7</sup>

The other prevalent general term used for this universal law in Father Drinan's book is "world law." This term appears much less frequently than "international law," but when used, "world law" is apparently interchangeable with "international law." In Chapter 1, when speaking of the 1993 U.N. World Conference on Human Rights in Vienna, Father Drinan notes that the 172 nations participating at the Conference "repeated and reinforced the proclamations of world law in favor of religious freedom."<sup>8</sup> In Chapter 2, he asks, "What will be the consequences of this new world law granting the freedom to act on one's 'conscience, religion or belief?'"<sup>9</sup> In Chapter 4, immediately after using "international law" in discussing American foreign policy, he asks, "Do Christians from the United States have a right under world law to set up churches in non-Christian countries and seek

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<sup>4</sup> DRINAN, *supra* note 1, at 1.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.* at 65.

<sup>7</sup> *Id.* at 109.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 22.

to change their cultures?"<sup>10</sup> In his account of government repression of religion in Chapter 9, Father Drinan states that "[r]ights of all kinds guaranteed by world law were violated in El Salvador."<sup>11</sup> Also, note a key section title in the concluding chapter, Chapter 13: "Can There Be a World Law Regulating Religious Freedom?"<sup>12</sup>

Two other general terms equivalent to "international law" and "world law" appear, albeit only on occasion. One is "global law," most prominently using "global" as an adjective. For example, the title of Chapter 1 is "A New Global Right: Religious Freedom."<sup>13</sup> Arguably, Father Drinan could equally have denominated the chapter "A New International Legal Right: Religious Freedom" or "A New Right in World Law: Religious Freedom." Another term equivalent to "international law" and "world law" is the unadorned use of the word "law." For example, in discussing the United Nations and religion in Chapter 3, Father Drinan writes that "[t]he law stands in near awe of a person who adopts a religious idea as his 'conception of life.'"<sup>14</sup>

Father Drinan's general concept, whether styled "international law," "world law," "global law," or simply "law," seems to encompass universal rules applicable, at least in theory, to all states. International law might, then, be said to be differentiated from the law of a state in that it is a law for the many states rather than a law for a single state. So far, at least, this seems to be a fair description of international law from either an ordinary positivistic or naturalistic point of view. Both agree that there is such a thing as international law. Both part with narrow Austinian positivism's rejection of international law as not law but mere morality.<sup>15</sup>

Assuming then that Father Drinan accepts the discipline of international law as law, how does he fall on the spectrum of positivism versus naturalism? The key difference between them in this respect may be said to pertain to the sources of authority of international law. Positivism draws authority from the consent of sovereign states. Naturalism, while usually accepting

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<sup>10</sup> *Id.* at 65.

<sup>11</sup> *Id.* at 153.

<sup>12</sup> *Id.* at 212.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 39.

<sup>15</sup> See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (1st ed. 1832).

that sovereign states can make international law by consent, also believes that international law can spring from natural sources beyond state sovereignty.<sup>16</sup> Interestingly, Father Drinan mostly departs from the naturalistic tradition of much important Catholic thought and adopts a more-or-less positivistic approach to international law.<sup>17</sup> As I explain below, he seems to do so as a result of skepticism about the realities of enforcing international law.

Respecting sources, Father Drinan's book is replete with references to treaties, pacts, and covenants, the most secure form of international law for those of a positivistic persuasion. Indeed, the relative importance of treaties for him is emphasized early on in Chapter 1:

The uncertainty around the world concerning the extent to which governments should guarantee religious freedom is one of the major reasons why the United Nations has not pursued a covenant or a legally binding instrument on freedom of religion, as it has done with respect to such issues as the rights of minorities, women, and children.<sup>18</sup>

While others will disagree here and maintain that freedom of religion is already protected by treaty law, most notably in Article 18 of the International Covenant on Civil and Political Rights,<sup>19</sup> for our purposes it is sufficient to note that Father Drinan distinguishes treaties as that form of international law which constitutes "a legally binding instrument." He thus implies that other forms of international law may not be legally binding or perhaps not so legally binding. A similar distinction appears in Chapter 3 in his discussion of the United Nations: "The difficulties inherent in drafting any worldwide resolution on religious freedom caused delays, but in 1981 the United Nations Commission on Human Rights finally completed a declaration (but not a covenant) on religious freedom."<sup>20</sup> Most tellingly, he

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<sup>16</sup> See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1-4, 59-67 (4th ed. 2003).

<sup>17</sup> For an overview of the naturalistic tradition, see Josef L. Kunz, Editorial Comment, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951, 951 (1961).

<sup>18</sup> DRINAN, *supra* note 1, at 3.

<sup>19</sup> See Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385, 395-400 (2005).

<sup>20</sup> DRINAN, *supra* note 1, at 38.

comments, "However, it does not seem likely that any movement in the foreseeable future will induce the United Nations to put forward a covenant on religious freedom to elevate the aspirations listed in the Declaration on Religious Freedom into a binding contract."<sup>21</sup> So, Father Drinan appears to divide international law into two kinds of sources: treaties which are legally binding and other norms which are something else.

What are those other norms? Father Drinan does refer to customary international law, but much less often than might be expected. His first reference to it may indicate that he views customary international law as another way of expressing international law in general. In Chapter 1, he writes:

One would like to think that wars inspired by religious zeal were safely in the past. Clearly they are now forbidden by customary international law; after all, the 191 nations that have ratified the United Nations covenants on political and economic rights have solemnly pledged to refrain from such wars.<sup>22</sup>

Another indication of the same, such as conflating customary international law with international law in general, is to be found in Chapter 2: "Many may feel that any treatment of the evolution of the freedom of religion into a right enshrined in customary international law should not complicate the story by remarking on the international law of human rights that embraces the aspirations of conscience. But the two stories are inseparable."<sup>23</sup> Father Drinan's infrequent and perhaps ambiguous use of customary international law means that he gives little play to a source often seen as a halfway house between consent-based positivists and the less state-centered naturalists. It could be that this is, indeed, a wise choice. For my part, I have sometimes argued that the implicit consent of customary international law, often called the *opino juris*, is more a judge- or jurist-made glue to make an international legal rule stick than it is cement actually applied by consenting states.<sup>24</sup>

For his part, Father Drinan devotes substantially more attention to proclamations, declarations, and doctrines as sources for what he seems to feel is the less binding side of international

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<sup>21</sup> *Id.* at 43.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.* at 16.

<sup>24</sup> See JANIS, *supra* note 16, at 41–55.

law. We have already seen some examples above where he contrasts the binding law of treaties to the non-legally obliging rules drawn from other sources. Throughout the book, he stresses that states today are unlikely to feel bound by non-treaty sources. For example, in Chapter 2:

Many religious groups will be very reluctant even to consider that the place of religion in a nation such as Norway, Nigeria, or Pakistan should be determined by the norms set forth in 1981 in the United Nations Declaration on Religious Freedom. Most of the world's nations would agree, at least in theory, that Article 19 of the Universal Declaration of Human Rights could govern freedom of the press everywhere in the world; this freedom is nearly universally accepted. But when it comes to religious freedom, it is clear that the nations where a religion is a part of the entrenched establishment will not so readily accept outside authorities. Furthermore, in nations with a long-standing relationship between government and religion, many will claim that any weakening of the hegemony of the traditional religious belief would threaten the morality and well-being of the country.<sup>25</sup>

As noted above, Father Drinan argues that the failure of the international community to draft and implement a meaningful treaty protecting religious freedom and promoting religious tolerance is due to a widespread unwillingness of both states and religions to accept legally binding limits on established national religions. Hence, Father Drinan emphasizes the significance of the dividing line between legally binding treaties and non-legally binding declarations, proclamations, and opinions. Both, in his view, are international or world law, but only treaties are viewed as possibly legally binding on states.

An expression of this incongruity between the two forms of international law is given in this account of the Islamic nations:

Will the exaltation of religious freedom now so clear in international law eventually require Islamic countries to cease to base their civil laws on the Koran, even though the vast majority of their citizens have inherited and presumably accept the Muslim faith? International law has hardly commenced the tricky task of balancing the right of nations to prefer the faith of the majority against the claims of citizens in the religious

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<sup>25</sup> DRINAN, *supra* note 1, at 11.



minority who feel that they have, by law, been relegated to second-class citizenship.<sup>26</sup>

When describing the sources of "the exaltation of religious freedom now so clear in international law," Father Drinan chooses not to employ the "softest" of all sources, those relating to fundamental norms or natural law. His account of the legally non-binding, more-or-less merely persuasive sources of international law emphasizes only state-generated evidence, such as declarations and proclamations. Other international lawyers, however, especially international human rights lawyers, often turn to notions of *jus cogens*, peremptory norms, fundamental principles, and the like when they seek to demonstrate new rules of international law.<sup>27</sup> This is all in the tradition of natural law, a tradition often associated with the Roman Catholic heritage and with many Catholic international lawyers since at least Suárez and Vitoria in the sixteenth century. Father Drinan's approach to international law, leaving out these fundamental norms, puts him on the positivistic side of the positivism-naturalism divide.

Moreover, Father Drinan gives little attention to general principles of law. The concept of general principles of law, like that of customary international law, is one of the usual compromise categories of international law sources between naturalism and positivism; it is the notion that certain rules exist in so many legal systems so as to be presumed to exist in all or most legal systems. As gap-fillers, general principles are acceptable to some positivists because, like customary international law, general principles are presumed to have the implicit consent of states. They are welcomed by naturalists since they help add basic norms to international law beyond those to which states explicitly consent.<sup>28</sup> If Father Drinan had emphasized either or both fundamental norms or general principles of law as sources of international law, it is likely that he would have put them on the "soft" non-obligatory side of his division of international law, no more, and perhaps even less, legally binding than the declarations and proclamations of states.

But how effective are even the legally binding international obligations of states? Throughout his book, Father Drinan

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<sup>26</sup> *Id.* at 9–10.

<sup>27</sup> See JANIS, *supra* note 16, at 59–67.

<sup>28</sup> See *id.* at 55–59.

apparently pins his principal hope for an effective legal regime on some sort of a world court devoted to the protection of religious freedom. In the first chapter, he complains that heretofore the United Nations “has never considered establishing a world entity to monitor compliance with the demands of religious freedom.”<sup>29</sup> A few pages later, he admits that “[t]he idea of creating some sort of international legal machinery to resolve clashes between these religious groups may seem quixotic.”<sup>30</sup> He fears that “[t]he idea of creating a world tribunal that would guarantee the free exercise of religion will elicit a strong reaction from both believers and nonbelievers.”<sup>31</sup> He writes, “The feeling is somehow pervasive that government organizations—or even a transnational legal body—should not get involved in the religious practices of 84 percent of the human race.”<sup>32</sup> Nonetheless, Father Drinan argues in Chapter 3 that “[t]he hope and even the expectation of those involved in the revolution of expectations brought on by the United Nations era of human rights is the establishment of a world court to which persons victimized by religious zealots or by nations hostile to religion can appeal for justice.”<sup>33</sup>

What is such a world tribunal protecting religious freedom to look like? Father Drinan is nowhere very clear as to his own vision. He asks, “Is it possible that the United Nations Human Rights Committee will in due course become a tribunal where individuals and religious organizations can obtain relief from a denial of their religious rights?”<sup>34</sup> Perhaps. He deems the Committee “a sleeping giant; if the appropriate case were presented, it could issue a ruling that would raise religious freedom to a height not yet attained in world law.”<sup>35</sup> Yet, he does not explain why a mere ruling of the United Nations Human Rights Committee would be treated as binding law.

So far, he believes the most effective forces “operating to make the United Nations and other global entities more proactive in protecting human rights, particularly religious freedom . . . are mostly nongovernmental organizations (NGOs)

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<sup>29</sup> DRINAN, *supra* note 1, at 3.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 47.

<sup>34</sup> *Id.* at 36–37.

<sup>35</sup> *Id.* at 37.

that were created to protect the rights of such groups as the Christians in southern Sudan and the Kurds."<sup>36</sup> Though "[t]hese NGOs have broad constituencies, . . . there is as yet no worldwide network of organizations united in their efforts to protect the religious freedom of a wide variety of religious nonconformists, dissidents, and conscientious objectors."<sup>37</sup>

Why not? Father Drinan puts the central problem down to the unwillingness of states to permit any international institution, even a worldwide network of NGOs, to participate in national regulation and promotion of religion. This unwillingness encompasses many key governments. For example, and perhaps controversially, he writes that "[i]t may not be helpful to say that one particular country has the worst record on religious freedom in the world. If we undertook to assign that label, however, and possibly overlooked Sudan, the People's Republic of China would have an almost unchallenged claim to that distinction."<sup>38</sup> China, he is distressed to say, "openly rejects the right to the free exercise of religion."<sup>39</sup> The reason? "Although faith in an unseen god is mysterious and sometimes frightening for everyone, China sees it as a grave threat. . . ." <sup>40</sup> He fears that the "adamantly antireligious policies of Beijing may not be resolved for some time."<sup>41</sup>

Not surprisingly, Father Drinan finds the Islamic countries almost equally hostile to the possible intervention of international machinery to protect religious freedom. "[O]ne has to wonder if any worldwide juridical authority could define and apply international principles of religious freedom to the Muslim world; or, more pointedly, if the rulings of such a tribunal could ever win acceptance in the world of Islam—some fifty nations and 1.2 billion adherents."<sup>42</sup>

Father Drinan's vision of international law thus may be said to be both positivistic and idealistic. As for positivism, he prefers the more black-letter possibilities of the discipline: treaty law rather than law drawn from custom, general principles, or natural law. He is inclined to that part of international law

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<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Id.* at 12–13.

<sup>38</sup> *Id.* at 165.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 177.

<sup>41</sup> *Id.* at 179.

<sup>42</sup> *Id.* at 181.

which is based on the posited consensual agreements of governments. As for idealism, Father Drinan hopes not only that governments will explicitly protect religious freedoms in international agreements but also that they will live up to their agreements. The means to do so, he suggests, should be the establishment of an international court charged to enforce religious tolerance against the practices of sovereign states.

## II. THE VISION IN PRACTICE

What are the prospects for such a positivistic, yet idealistic, vision of international law? It might be argued that this is just the right time to create a new international tribunal to protect religious freedom. After all, since World War II, a great many international law courts and dispute settlement mechanisms have been constituted. To mention just a few, there are the International Court of Justice,<sup>43</sup> the European Court of Justice and the Court of First Instance,<sup>44</sup> the European Court of Human Rights,<sup>45</sup> the International Tribunal for the Law of the Sea,<sup>46</sup> the WTO Dispute Settlement System,<sup>47</sup> and the International Criminal Court.<sup>48</sup> Indeed, a recent book devoted to conflicts, real and potential, among international courts and tribunals listed eighteen functioning international courts and tribunals—the six above and a dozen more!<sup>49</sup>

Why not a nineteenth international court or tribunal devoted to the protection of religious freedom? Reluctantly, I conclude that the prospects are, in my opinion, bleak. Speaking as an international lawyer, my guess is that Father Drinan's vision faces a tough test in the field of religious freedom. His may be a vision better suited to fields of international relations less

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<sup>43</sup> See JANIS, *supra* note 16, at 125–57 (describing the roles, the reform, and the proliferation of international courts).

<sup>44</sup> See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 86–102 (3d ed. 2003).

<sup>45</sup> See MARK W. JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 27–92 (2d ed. 2000).

<sup>46</sup> See LOUIS B. SOHN & JOHN E. NOYES, *CASES AND MATERIALS ON THE LAW OF THE SEA* 825–53 (2004).

<sup>47</sup> See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 246–337 (4th ed. 2002).

<sup>48</sup> See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2001).

<sup>49</sup> See YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 1–11 (2003).

confrontational than the one concerning religious tolerance, particularly to fields that are more economic and less emotional. In the real world of international affairs, issues concerning trade and investment are the ones most prone in practice to be effectively governed by black-letter legal rules and actually determined by the ordinary legal processes of courts and arbitral tribunals. This is a centuries-old phenomenon of international law. It accounts, among other things, for the fact that today, the lion's share of practicing international lawyers are engaged in one or another form of international economic law: international sales, international finance, international trade, international business, international investment, international tax, and so on. The "friendliness" of international economic transactions to international law and international process is due to many causes, but central among them is the fact that the consummation of international economic transactions generally on balance benefits both sides in the long run. Hence, the regularities of black-letter law and effective legal process are perceived by most participants as beneficial, since, whatever the short-term costs of the authoritative application of legal rules and process, the long-term benefits of rule compliance is greater.

The utility and employment of international law, international courts, and international lawyers are notably less in other areas of international affairs. In matters of war and peace, for example, international law and international legal process are notoriously ineffectual. War may sometimes be too important to be left to the generals, but it may also be too important to be left to the lawyers. Hence, in matters concerning the use of force, international rules are often breached, and international courts are almost never employed.

I have argued before that the affinity of international problems to be addressed effectively by international law and legal process varies on a spectrum of efficacy.<sup>50</sup> The efficacy spectrum varies from a relatively "friendly" area like international economic transactions to a relatively "unfriendly" area like international military conflict. Where on the international legal spectrum of efficacy does Father Drinan's field, international religious freedom, fall?

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<sup>50</sup> See JANIS, *supra* note 16, at 159-85; Mark W. Janis, *Do 'Laws' Regulate Nuclear Weapons?*, in NUCLEAR WEAPONS AND INTERNATIONAL LAW 53, 59-61 (Istvan Pogany ed., 1987).

Sadly, I am afraid that the protection of religious freedom falls towards the “unfriendly” end of the efficacy spectrum of international law. Indeed, Father Drinan’s book is itself good evidence for this conclusion. Too many countries—he mentions so many—are too deeply committed to certain religious preferences to make international legal decisions about the practice of religion easy to apply or to be made efficacious. Especially difficult are questions about the place of minority religions in countries where church and state are united in a conviction that the majority religion is the only true path of religious belief. In practice, religious tolerance is not a field where most players would gain most of the time were the domain to be regularized by international rules and international adjudication. A nationally dominant religion is unlikely to let its predominance be challenged by minority and especially foreign faiths. Moreover, from the standpoint of a national government, foreign-supported efforts to proselytize within national territory are likely to be viewed as affronts to national sovereignty.

In practice, I cannot understand why many states would be willing to permit an international body, much less an international court, to review national religious practices. The practice of religion is simply taken too seriously by too many states to induce them to yield any sort of sovereign authority to an international group to evaluate authoritatively national religious tolerance. I think it would be highly unlikely, for example to name just a few, for countries as different as the United States, Ireland, Israel, Saudi Arabia, and China to agree to submit disputes about the practice of religion or religious tolerance to a panel of international judges or arbitrators in the way they submit disputes about trade or investment. Moreover, even if some governments were to contemplate such a measure, I think it virtually certain that organized dominant religions, whatever or wherever they may they be, would be unlikely to be willing to cede review of their dominant positions to any sort of international legal or judicial review and control.

Even in Europe where the European Court of Human Rights has made such progress in providing an international supervisory mechanism to protect human rights,<sup>51</sup> the Strasbourg Court has been slow and relatively reluctant to

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<sup>51</sup> See JANIS ET AL., *supra* note 45, 64–92.

enforce Article 9 of the 1950 European Convention on Human Rights. It was not until 1993 in *Kokkinakis v. Greece*<sup>52</sup> that the Strasbourg Court first applied Article 9 against a state. This came well after it had enforced all of the other substantive freedoms protected by the Convention. And, despite the occasional ruling against a state for the blatant violation of freedom of religion,<sup>53</sup> the Strasbourg Court has given states a wide margin of appreciation in restricting the free exercise of religion.<sup>54</sup> Thus, even the relatively powerful and well-accepted European Court of Human Rights finds the protection of religious freedom a hot topic, many times too hot to touch.

This, I know, will be a pessimistic opinion for Father Drinan, and I would be glad to be buoyed by a more optimistic assessment. However, I think it a fair reading of *Can God and Caesar Coexist?* to conclude that international law and legal process is the Cinderella to the combined authority of dominant faiths and states, Father Drinan's gods and Caesars. Faced with the powerful emotional appeals of religion and nationalism, international law is likely to be the weak and humble sister.

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<sup>52</sup> 17 Eur. H.R. Rep. 397 (1993).

<sup>53</sup> See, e.g., *Buscarini v. San Marino*, 1999-I Eur. Ct. H.R. 605, 619.

<sup>54</sup> See, e.g., *Murphy v. Ireland*, 2003-IX Eur. Ct. H.R. 1, 31; *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 301-03; *Otto-Preminger Inst. v. Austria*, 19 Eur. H.R. Rep. 34, 47-48 (1995).