Book Review

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Book Review

Cover Page Footnote
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I. Introduction

As Robert Drinan acknowledges in his book entitled Can God and Caesar Coexist? Balancing Freedom and International Law, the “very concept of talking about religious freedom and world law bristles with concepts that seemingly do not cohere.”¹ What exactly is incongruous about connecting the two disciplines is the subject of varying opinions that differ substantially throughout the world. In much of the Western world, particularly the United

¹ Chayes Fellow, Harvard Law School. The author would like to thank Julie Gold for her support in writing this piece.

¹ ROBERT DRINAN, CAN GOD AND CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW (2004). The title is taken from a verse in the Book of Matthew, which Drinan uses to show Biblical precedent for separating Church and State: “[and He said to tender] to Caesar the things that are Caesar’s; and to God the things that are God’s.” Matthew 22:21 (King James).
States, the source of the tension derives from an understanding that spiritual matters are issues of individual conscience; the heavy hand of state regulation is an unwelcome intruder. In the People's Republic of China as well as in the Muslim world, where the "mosque and government are one," the issue is one of national sovereignty. The control of religion is a matter of the essential nature of a "Muslim nation" or a "Communist state," and, thus, any transnational ruling on the matter assails national prerogatives. Both sides of the debate, however, do converge on at least this conclusion: the vague edges and sources of international law, coupled with the nebulous contours of what "religion" entails and what constitutes appropriate religious actions, suffice to make the reach of international law into the religious domain dubious at best.

Despite the lack of agreement as to rationale, the widespread accord that religion and international law do not mix has meant that enshrining religious freedoms in international law has taken a secondary role to promoting other "fundamental" human rights. While aspects of human rights such as assertions of freedom of the press and mandates against torture have dominated the global human rights agenda since World War II, there has been a basic "absence of any real discussion on religious freedom at the world level." The irony of this silence is that the horrors of World War II—which spurred the modern human rights movement—in large part stemmed from religion. Indeed, the slaughter of Jews, Romani, and other ethno-religious groups led many to contend that

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2 One of the first explications of the "allergy" the United States has regarding almost any state (let alone supra-state) intrusion into religion was from Thomas Jefferson in voicing his "Wall Theory": "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Reynolds v. United States, 98 U.S. 145, 164 (1878). The United States is far from consistent in its separation, providing special government-sanctioned rights to religious groups (such as tax exemption), including references to God on official state documents and products (such as on its currency), and, at least in the case of forcing Mormons to delegitimate polygamy, denying certain groups the right to practice religion as they see fit. See Drinan, supra note 1, at 48-85, 139.

3 Drinan, supra note 1, at 113.

4 Id. at 12.

5 Id. at 13.
"never again" started with guaranteeing the basic freedom of religious observance.6

While Drinan's work does not purport to provide a unified definition of what religious freedom does or does not entail, it fills a surprisingly large void in international legal scholarship. Though religion has been at the heart of conflicts since World War II, ranging from the Cold War fight against "Godless Communists" to today's "War on Terror," little has been written on its inter-relationship with international legal regimes,7 with a particular dearth of discussion concerning international law and religious persecution.8 Such a brief work (200 pages) cannot hope to fill the gap entirely, but it does offer a good beginning step for such analysis. Drinan, a professor of law and an ordained Jesuit priest, does a formidable job at discussing both the history of religious freedom in the international sphere and the inherent inconsistencies, both legal and canonical, in promoting such freedom.

Part II of this review discusses Drinan's analysis of the various international measures proposed since 1945 to aid religious freedom. Part III focuses on the definitional problems inherent in

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6 Id. at 14. It is these "incredible atrocities . . . [that are] the fundamental reason why the architects of the moral revolution that created the new international reign of human rights have consistently sought to maximize the thrust and scope of religious freedom around the world." Id.

7 There is some work on the matter, including an annual symposium at Brigham Young University on Religion and International Law. See International Center for Law & Religion Studies, Religion in the Public Sphere: Challenges & Opportunities, http://www.law2.byu.edu/Law&Religion [last visited Mar. 14, 2005]. See also Derek H. Davis, The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 2002 BYU L. REV. 217, 217. However, the majority of the literature on this subject is not on point, arguing that a religious ethic is (or should be) the basis for international law. See, e.g., Shabtai Rosenne, The Influence of Judaism on the Development of International Law: An Assessment, in RELIGION AND INTERNATIONAL LAW 63 (Mark W. Janis & Carolyn Evans eds., 1999).

8 Drinan notes that the absence of interest is not only academic, for very few nongovernmental organizations have been active on this issue. In the United States at least, "[it] seems that the only . . . groups vehemently protesting the denial of religious freedom are a unit of Freedom House and Commission on Religious Freedom related to the U.S. State Department." DRINAN, supra note 1, at 107.
"religious freedom" before moving on to discuss two vigorous means for monitoring and enforcing religious liberty, namely the United States' Commission on International Religious Freedom and the European Court of Human Rights. Part IV discusses Drinan's solution for religious persecution—the establishment of a U.N. backed religious tribunal to rule on matters such as the rights of homosexuals, women, and religious minorities. It is here that Drinan's analysis proves unpersuasive. Drinan makes little attempt to provide support for his tribunal proposal, and the questionable recent history of tribunals in addressing religious freedoms—some of which he cites—leads an observer to question whether the problem of religious persecution can be best "solved" via judicial means.

II. Religion and International Law

A. Religious Protection in the International Context: History and Politics

Most commentators point to the 1648 Treaty of Westphalia as the start of the modern era of international law. It was in that document that the primary building block of contemporary international law—the "inviolability" of national sovereignty—was first explicated and widely embraced.9 Though it does not profess to be a "religious" document, negotiations leading to Westphalia were held to end a particularly gruesome chapter of the "Wars of Religion" which were fought following the Protestant reformation.10 Further, the Treaty called for a "Christian and Universal Peace," and, while not guaranteeing rights to a true diversity of religious groups, it demanded that Protestants and Catholics be protected when they were minorities in signatory states.11 This limited protection afforded to religious minorities

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9 Some commentators have argued, however, that "[it] is hard to surmise from [reading the Treaty]... any general principle of 'sovereignty...'." [Rather] the compact represented the passing of some power from the emperor with his claim of holy predominance, to many kings and lords who then treasured their own local predominance. As time passed, this developed into notions of the absolute right of the sovereign, and what we call 'Westphalian sovereignty.'" John H. Jackson, Sovereignty: Modern: A New Approach to an Outdated Concept, 97 Am. J. Int'l L. 782, 786 (2003).

10 Id.

11 Peace Treaty between the Holy Roman Emperor and the King of France and
was a revolutionary advance; in pre-Enlightenment Europe, distinctions between church and state were all but unknown, and religious heterogeneity was viewed as a direct affront to state control. Demanding not only tolerance but also protection for religious minorities directly countered the larger provision of seemingly unchallengeable national sovereignty.

Despite this advance, in the long term, it was Westphalian sovereignty—not religious protections—that proved resilient. The continuation of religious persecution in the centuries following Westphalia proved that it would be difficult "to effectively secure the enforcement of any international legal guarantees, whether in treaty or custom, to protect religious diversity."14

Westphalian sovereignty, even if never uniformly and completely respected, proved such a barrier to the growth of religious protections primarily because of where it drew the limits of international law.15 Freedom of religious practice, especially in contravention to a governing ruler’s wishes, is a right clearly anchored in the individual. International law, however, could not reach down into the state to empower individuals, so long as Westphalia prevented the piercing of the "veil of the state."16

It took the Holocaust and subsequent humanitarian disasters for much of the international community finally to begin to loosen the grip of Westphalian sovereignty and enter a world in which international law extended beyond the reach of states.17 Just as Westphalian sovereignty was never absolute, however, the breakdown of Westphalia has similarly proceeded unevenly, advancing at different rates depending upon the state and issues at

Their Respective Allies, Oct. 24, 1648 (also known as The Treaty of Westphalia), available at http://www.yale.edu/lawweb/avalon/westphal.htm (last visited Feb. 21, 2005) (This treaty is also known as the Treaty of Westphalia).

12 DRINAN, supra note 1, at 98 (referencing "actions of Christendom" such as the Crusades and the Inquisition).

13 Id.


15 Id.

16 Id.

17 See DRINAN, supra note 1, at 191-93.
hand. In many cases, it is in the area of religious liberties that states continue to hold fast to sovereign prerogatives “granted” to them in trust at Westphalia.

Even so, it is irrefutable that recent pronouncements and actions of the international community have continued to chip away at Westphalian immutability. Indeed, the three sets of post-World War II legal instruments that Drinan points to as providing some international legal support for individual religious liberty can be seen as direct affronts to 17th century-style sovereignty. The author discusses multilateral treaties, “sectarian” international statements, and customary international law as tools by which individuals have been granted internationally-prescribed rights to religious freedom. It is the weakness inherent in each of these tools, combined with the difficulty of defining “religious liberty” itself that has nonetheless left the promise of such freedom illusory in much of the world.

1. The Multilateral Treaty

The end of World War II saw the dawn of what appeared to be an ecumenical, if not atheist, international arena. The far-reaching multilateral agreements into which states increasingly entered seemingly provided robust protection for the free exercise of religion, separating spirituality from statecraft.

The apparently irreligious United Nations has been responsible for almost all of these “mega-treaties.” Yet, the two documents which form the foundation of almost all subsequent agreements—the United Nations Charter (U.N. Charter) and the Universal Declaration of Human Rights (UDHR)—manifest ambiguous

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18 See id.
19 See id.
20 For example, the “Annan Doctrine,” promulgated by the United Nations Secretary-General, provides justification for intervention into the internal affairs of member states “to prevent or arrest conflict, even when perpetrated against a state’s own people.” Adam M. Smith, From Democracy to Conflict: The UN’s Search for Peace and Security, 34 SECURITY DIALOGUE 3, 358 (2003).
relationships with religion. Drinan claims that the works contain a "vague deism,"23 with the existence of some divine presence an essential premise as to both.24

Though the U.N. Charter states that one of the purposes of the organization is "promoting and encouraging respect of human rights and...fundamental freedoms...without...distinction as to race, sex, language, or religion...,"25 the Charter has rarely been used to further religious liberties.26 The UDHR has proven a significantly stronger affirmation of the "right to freedom of thought, conscience and religion"27 and also provides "parents the right to choose the kind of education that shall be given to their children," a clause often used to imply the protection of religious-based education.28

The weakness of UDHR comes both from the intricacies of international law and from drafting provisions that allow easy derogation. Concerning the former, the key limit to the UDHR is the fact that it is merely a "declaration." Such an instrument, while more legally persuasive than "principles"29 or "recommendations,"30 is legally inferior to a binding covenant.31

23 DRINAN, supra note 1, at 116. As discussed below, neither document adequately allows for atheism or agnosticism.
24 Id.
25 See UN CHARTER, supra note 21, art. 1. Drinan argues that the Charter's "authors...made it clear that the protection of religious freedom was the central purpose of the United Nations." DRINAN, supra note 1, at 31.
26 DRINAN, supra note 1, at 31 (noting that the mention of religious freedom in Article 2 of the UN Charter is a "slight exception" to the Charter's non-assertion of divine origin of human rights).
27 See Universal Declaration of Human Rights, supra note 22, art. 18.
28 Id. art. 26.3 See also DRINAN, supra note 1, at 122. Drinan notes that the words contained in the article "were the result of compromises, accommodations, and the strong feelings of parents, especially religious ones, that they should have the some right to decide the kind of schooling that their children would receive." Id.
Further, while many of the other protections accorded in UDHR have since been incorporated into binding covenants, the full panoply of religious protections have never attained more than "declaratory" status. Consequently, accountability for a state's abuse of the religious rights of its citizens is legally one step below its accountability for violations of their political and economic rights.

The drafting loophole, through which many signatory countries manage to follow simultaneously the declaration's edicts while oppressing religious freedom, comes in its proscribed exceptions to the protection of rights:

In the exercise of his rights and freedoms, everyone shall be subject... to such limitations as are determined by law... for... meeting the just requirements of morality, public order and... general welfare....

In practice, this "limited" exception has often swallowed underlying protections, giving "legal" cover to states that do not wish to protect religious liberties.

An additional failure in subsequent agreements purporting to protect religious freedom is the absence of certain rights that once were thought necessary for real practice of such liberties. The key right absent in both the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, and the legally more substantial International Covenant Regulation).

31 DRINAN, supra note 1, at 43.

32 Id. at 213.

33 Id. at 213-214. Drinan notes that national sovereignty still takes priority over the promotion of international religious freedoms such that "national leaders... will argue strenuously that a sovereign nation has the right to prohibit any activity related to religion that, in the eyes or in the imagination of reasonable leaders, could be threatening to the independence or welfare of the nation." Id.

34 See Universal Declaration of Human Rights, supra note 22, art. 29, §2.

35 See, e.g., DRINAN, supra note 1, at 184. Drinan notes that, despite the Declaration of Religious Freedom, many Muslim nations still adhere to the strong Islamic principle that no person has a right to change his or her religion. Id.

on Civil and Political Rights\textsuperscript{37} (ICCPR), is the right to change religions or to cease believing altogether. While the right is mentioned in the UDHR, any allowance for conversion, let alone for becoming an atheist or agnostic, is absent from these two instruments.\textsuperscript{38}

The rationale behind this change lies in the politics of the United Nations, and, in particular, the large increase in the number of Islamic member states who have been most averse to allowing religious change. When the UDHR was passed in 1948, there were only six Islamic states in the United Nations; now there are thirty-five,\textsuperscript{39} which are joined by a further twenty-one states in the umbrella Organization of Islamic Conferences.\textsuperscript{40}

Nevertheless, Drinan claims that the ICCPR remains a potentially powerful bulwark against religious oppression.\textsuperscript{41} "Conventions," as opposed to declarations and other agreements, have usually created monitoring bodies which demand regular reports from signatories on the status of implementation of the Convention's guarantees.\textsuperscript{42} The ICCPR's monitoring agent, the


\textsuperscript{38} DRINAN, supra note 1, at 34, 248.

\textsuperscript{39} Id. at 43. Despite their membership in the OIC and the fact that many Islamic countries abstained from the final vote of approval for the UDHR, Drinan notes that Islamic nations are "deeply divided over the question of religious freedom," with the only "consensus among Muslim nations that [a] . . . secular state can embrace the full exercise of the rights and duties that derive from the Koran." Id. at 3.

\textsuperscript{40} The Organization of Islamic Conference includes states that are not uniformly Islamic, such as Lebanon, Uganda and Nigeria. See General Activities of the OIC available at http://www.oic-oci.org/ (last visited March 14, 2005).

\textsuperscript{41} See id. at 34-36. Under the ICCPR, "all forms of coercion [based upon religion] are barred, and restrictions on religious freedom are permitted only if they are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others." Id. at 34.

Human Rights Committee, holds frequent meetings in which the body assesses the compliance of signatory states. One final right under the ICCPR is accorded to citizens of those states who have ratified the "First Optional Protocol" to the convention. This protocol addresses what Drinan believes is a prime oversight in the global protection of religion: the absence of standing for individuals to press claims against their states for wrongs committed in contravention to their treaty obligations. Article One of the Optional Protocol mandates that a State Party: "[Recognize] the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant." Despite this significant allowance, the weaknesses of ICCPR, as well as the entire multilateral religious liberties protection regime, remain serious. Countries must ratify the Option Protocol for individuals to be granted standing, a privilege presently enjoyed by only a minority of the world’s population, and oppressed individuals must exhaust all available domestic remedies before resort to the Committee. Additionally, even in Optional Protocol One signatories, the issue of enforcement remains. While the "Committee can recommend specific remedies


44 See, e.g., DRINAN, supra note 1, at 5-7 (discussing the creation of an international legal tribunal to hear and enforce the guarantees of religious freedom).

45 Optional Protocol to the International Covenant on Civil and Political Rights, supra note 37.

46 Though 104 states have signed the protocol, many of the most populous states in the world have not: Peoples Republic of China, India, Indonesia, the United States, the United Kingdom, Nigeria, Pakistan and Bangladesh. See Status of Ratifications of the Principal International Human Rights Treaties, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, June 9, 2004 [hereinafter ICCPR Ratifications], available at http://www.unhchr.ch/pdf/report.pdf (last visited Feb. 21, 2005). Moreover, even the fact that a state is a signatory may overstate the real protection provided by the Optional Protocol, as many countries have appended various reservations or declarations to their ratifications of the protocol greatly limiting the domestic legal impact of any adverse ruling. Id.

47 See Optional Protocol to the International Covenant on Civil and Political Rights, supra note 37, art. 2.
for victims... it has little leverage to ensure that states implement these recommendations. The result, according to Drinan, is that there have been no "overwhelming victories for religious freedoms... in the U.N. Human Rights Committee," and there continues to be an absence of "any [effective] laws offering victims of... religious intolerance injunctive or compensatory relief."  

2. "Sectarian" Internationalism

Given the global pervasiveness of organized religion and the fact that some religious entities favored by secular authorities have often been accorded a wide berth of autonomy, protection of religious liberties could theoretically be promoted by the faiths themselves. History indicates, however, that this has not in fact occurred. Rather, the "special" place accorded certain religions in various states has resulted in widespread suppression of minority believers. Indeed, "intolerance is taught not by religion but by political leaders who use religion for their own purposes." The obligations felt by some states to exalt the "true faith" allowed favored religions to be "as zealous as they wanted to be without concern for other religions."  

Drinan offers a fascinating analysis of one effort to change this mold, examining the history and political impact of the Second Vatican Council (Vatican II) in 1965. Altering a hitherto fundamental tenet of Catholicism, Rome issued a document claiming inter alia: "Religious acts... transcend the order of

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48 Beth Van Schaak, In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention, 42 HARV. INT'L L.J. 141, 162 (2001). Further, due in large measure to the limitations of the Committee, there has been a lack of enthusiasm on behalf of many citizens from actually filing complaints with the Committee. This may also indicate some structural difficulties that effectively prevent oppressed people from filing such complaints despite their legal potential. See Dennis & Stewart, supra note 41, at 508.

49 DRINAN, supra note 1, at 37.

50 Id. at 94.

51 Id. at 186. For example, the Koran states: "There must be no coercion in matters of faith." Id. It further states that religious diversity should be promoted "unto you, your moral law, and unto me, mine." Id. (quoting Koran 2:256, 109:6).

52 Id. at 100, 110.
terrestrial and temporal affairs. Government, therefore, ought... to take account of the religious life of the people.... However, it would clearly transgress the limits set to its power were it to pressure to direct or inhibit acts that are religious..."53

The Vatican thus set out a broad policy demanding both separation between church and state and firm support for religious freedom. The limitations of Vatican II, ignored by Drinan, are significant, however. First, while the Vatican may have foregone its long-held dictum that "error" had no rights,54 it nonetheless held fast to a traditional model of faith.55 Governments were charged to "show favor"56 to religion. While no specific religion is mentioned, the language of Vatican II strongly suggests that "religion" implies those faiths based on fundamental tenets of the Abrahamic religions, such as monotheism.57 Even if polytheism is protected under the instrument, Vatican II, like so many of the UN agreements discussed above, does not provide any political space for non-believers.58

An additional limitation is self evident: while the Vatican is a persuasive authority in many nations, its words have considerably less impact in the majority of the world.59 While Vatican II, and a similarly wide-ranging document issued from the World Council of Churches,60 ought not to be discounted, it would be a mistake to overvalue the power these Christian documents have, even on state behavior in the "Christian" West, let alone the plight of religious minorities throughout the Muslim world and in states like the People’s Republic of China.61

54 DRINAN, supra note 1, at 100. The implication is that "untrue" faiths were undeserving of any protection. Id.
55 Id.
56 Id. at 101.
57 The Vatican, supra note 52.
58 Id.
59 DRINAN, supra note 1, at 165, 182.
60 Id. at 105.
61 See id. at 165 (noting that according to U.S. State Department Reports, China is,
3. Religious Protection in "Customary International Law"

A final existing source of religious protection stems from Customary International Law (CIL). Drinan writes that some of the guarantees sought via a more robust international legal protection of religious freedom may have already moved into the realm of CIL.\textsuperscript{6} This "de facto" international law develops when states follow certain "practices generally and consistently out of a sense of legal obligation."\textsuperscript{63} By this argument, the consistent practice of many states in protecting religious freedoms means that the world community has adopted religious liberty as a universal norm. This implies that those to whom religious freedom is denied have some legal authority with which to demand redress. In many respects, this is Drinan's primary thesis: "religious freedom has been elevated to the status of Customary International Law . . . ."\textsuperscript{64}

Despite Drinan's contention, the very existence of CIL, even apart from its content, has proven controversial. Not only are there some who claim that the existence of CIL is contrary to the basic premise of international law, by binding states who have not necessarily consented to be, there remains significant uncertainty as to what "consistent" practice entails. In particular, there are inconsistent examples regarding how long an act must be practiced before it is accorded CIL status.\textsuperscript{65}

\footnotesize{\textit{year after year, "unremittingly hostile to Christians and other Religious groups"); see also id. at 182 (stating that "[m]any Islamic nations have . . . asserted flatly and repeatedly that they will not yield to any norm of religious freedom that violates what they perceive to be an obligation derived from the teachings of the Prophet").}}

\textsuperscript{62} See Id. at 185

\textsuperscript{63} RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986). Typically, actors that are either not directly elected, or elected at all—such as courts, academics, and non-governmental organizations—determine whether norms have met the basic requirements of "general practice" and "sense of legal obligation" (opinio juris). Id.

\textsuperscript{64} DRINAN, supra note 1, at 185.

\textsuperscript{65} Some contend that customary international law can develop "instantly" with the unanimous ratification of a treaty. George M. Berrisch, The Establishment of New Law Through Subsequent Practice in GATT, 16 N.C. J. INT'L L. & COM. REG. 497, 502-03 (1991). Others maintain that "instant" customary international law has formed around human rights instruments. International and domestic judicial opinion is also split on the
CIL is consequently a weak place from which to gain any robust protection of religious practice. Even if it were recognized that CIL has developed mandating protections, there are three fatal flaws in relying on CIL. First, following Article 38 of the Vienna Convention on the Law of Treaties, CIL cannot derive from treaties to which a party is not a member. That is, as religious protections are provided in various treaties, states not party to them cannot be made subject to their obligations even if the obligations have subsequently become CIL.

Second, even if CIL were found, those promoting religious freedom would run into the “Persistent Objector” problem. This rule “provides that if a state objects to the establishment of a norm while it is becoming law and persistently objects up to the present, it is exempt from that norm.” It would be hard to claim that the states most often cited for religious oppression have not persistently objected to unfettered freedom of faith. While some states, such as Saudi Arabia, have simply refused to accede to any conventions guaranteeing such liberties, others have couched their acceptance of certain provisions within constraints that tacitly permit religious oppression, especially the oppression of minority faiths. Indeed, Article 10 of the 1990 Cairo Declaration on Human Rights in Islam limits the right to convert from Islam, and

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68 For example, Egypt explicitly ratified the ICCPR within the constraints permitted under Shari’a (the Muslim Code of Law), while other states inserted substantive reservations to their ratification. See ICCPR Ratifications, supra note 45.
Articles 24 and 25 make it clear that all rights guaranteed are subject to limitations and interpretation under Shari’a.69

Finally, even if a religious dissident is legally correct in her assertion of the impermissibility of the persecution she faces, it is not clear to whom she would make such a claim. Absent Optional Protocol One, individuals in the majority of the world simply have no standing to assert such rights.

B. Definitional Problems: The Inconsistencies of Religious “Freedom”

Drinan makes clear that the existence of Shari’a and religious law derived from other faiths creates inherent semantic confusion.70 The author notes that before one can even contemplate the contours of the “freedom” one must first define “religion.” The term has proven unamenable to definition, and remains essentially “undefined as a matter of international law.”71 Establishing a coherent definition of “religion” is more than academic. Ascribing a group as a “religion,” as opposed to a “cult” or a “sect” can often mean the difference between governmental suppression and support.72

This is especially clear in the European context where there has arisen a significant debate concerning “cults,”73 which are almost universally legally disdained, in contrast to “religions” which often receive official state backing. An example of the impact of such equivocation can be seen in the German and Belgian governments’ treatment of Scientology. While both states have made their animosity towards the “cult” of Scientology clear, they have left the distinction between “cult” and “religion” rather vague.74 Similar government disdain for “cults” and “sects” can

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70 See DRINAN, supra note 1, at 77.


72 Id. at 196.

73 DRINAN, supra note 1, at 73.

74 See U.S. DEP’T OF STATE, 2004 EXECUTIVE SUMMARY, INTERNATIONAL RELIGIOUS FREEDOM REPORT, Denouncing Certain Religions by Affiliating Them with
be seen in Spain and France.\textsuperscript{75}

The nature of freedom demanded by religious "liberty" has incurred contrasting interpretations long before the post-World War II human rights debates. Though other shades of interpretation exist, a significant portion of the difficulties related to religious freedom stem from unclear parameters for allowing "positive" and "negative" liberties.\textsuperscript{76}

How much positive freedom does true religious liberty demand? At the extremes of religious practice, such as Sati, female genital mutilation and nihilistic interpretations of Jihad, the matter may seem elementary. Religious freedom surely cannot include the allowance of such acts. Even with these extreme examples, however, and perhaps more so in regard to more moderate acts, the issue can be much more complex. For example, Drinan argues that some religions have a well-developed martyrdom myth.\textsuperscript{78} According to some interpretations of the New Testament, Christians are supposed to suffer for their faith.\textsuperscript{79} How much suffering should international law allow such faiths to endure? Further, the author makes the contentious argument that it may be inherent in some religions to express animus to other faiths. For example, he claims that there is "something almost inherent in Christianity that promotes anti-Judaism." If this is


\textsuperscript{76} See ISAIAH BERLIN, \textit{LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY.}


\textsuperscript{78} DRINAN, \textit{supra} note 1, at 200. "Persons of faith may claim that God ordains the persecution of his own people." Id.

\textsuperscript{79} See, e.g., 2 Timothy 2:12: "[I]f we suffer, we shall also reign with Him" and 1 Peter 4:12-14: "Beloved, do not be surprised at the fiery ordeal which comes upon you to prove you, as though something strange were happening to you. But rejoice in so far as you share Christ's sufferings, that you may also rejoice and be glad when His glory is revealed."

\textsuperscript{80} DRINAN, \textit{supra} note 1, at 194.
the case, what does a demand for religious freedom entail for both Christians and Jews?

Another example of such conflicting requirements comes in the treatment by religions of various sub-groups, women and homosexuals in particular. Should religious freedom to force women into a subservient position be a part of a religious liberty? What if a practice within a religion directly contravenes conventions to which a state is party? Drinan points again to Catholicism and asks whether the Church's refusal to ordain women—arguably in direct conflict with Article 2 of the Convention to Eliminate Discrimination Against Women—could be maintained.  

The Convention demands that signatory states "undertake to . . . take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." With this in mind, would true religious freedom in signatory countries mandate that Catholics ordain women?

Negative liberty is similarly complex. The primary aspect in this regard is whether allowing freedom of religion would also entail freedom from religion. Proselytism and blasphemy are very sensitive subjects, and it is far from clear how true religious liberties can be protected for both those whose faith demands them to "spread the word" and those for whom receiving missionaries contravenes their own beliefs.

III. Monitoring and Enforcement Regimes

While effective enforcement of religion has been hindered by both the legal and definitional difficulties discussed above, Drinan points to two regimes that have managed to develop some

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82 Id.

consistency in interpretation and even some limited enforcement powers: the United States government's Commission on International Religious Freedom and the Council of Europe's European Convention on Human Rights, enforced by the European Court of Human Rights (ECHR).  

A. The Commission on International Religious Freedom

With the 1998 passage of the International Religious Freedom Act (IRFA) and the consequent creation of the Commission on International Religious Freedom charged with annually reporting the global state of religious freedoms, the United States has "in essence proclaimed to the world that it is the self-appointed defender of religious freedom in 190 nations." As such, the United States has been subjected to significant criticism that the Commission is another example of unwarranted U.S. unilateralism. While some of the criticism is based on a misconception of the IRFA, other critics correctly point out that the Act avoids any of the above-mentioned definitional difficulties and nuance innate in "religious freedom" by simply adopting America's uniquely "privatized" definition of the concept. Thus, for the authors of the report, almost any state involvement in religion is anathema to the American conception of free practice and consequently would provide cause for the Commission to deem a country "unfree"—a recognition regularly accorded to a significant plurality of the world's nations.

Though IRFA has consistently applied its definition and has tracked the ebb and flow of religious freedom since its inception, it is not clear that the Act has resulted in any actual changes in

84 DRINAN, supra note 1, at 13, 18.
86 DRINAN, supra note 1, at 77.
87 Id.
88 See generally id, 69-77 (discussing the difficulties inherent in unilateral actions taken towards promoting religious freedom.)
89 Id. at 69. In particular, the United States disdains requirements for religious groups to register with the State under the assumption that such laws are easily and frequently abused to limit minority religions. Id.
90 See U.S. DEP'T. OF STATE, supra note 73.
religious liberty for those citizens living in unfree states.\footnote{Id.} When a country is found in breach of religious freedom, the IRFA provides the President with a menu of fifteen punitive options with which to respond.\footnote{See 22 U.S.C.A. § 6445(a). Presidential actions are limited to: (1) a private demarche, (2) an official public demarche, (3) a public condemnation, (4) a public condemnation within one or more multilateral fora, (5) the delay or cancellation of one or more scientific exchanges, (6) the delay or cancellation of one or more cultural exchanges, (7) the denial of one or more working, official, or state visits, (8) the delay or cancellation of one or more working, official, or state visits, (9) the withdrawal, limitation, or suspension of United States development assistance in accordance with section 116 of the Foreign Assistance Act of 1961, (10) directing the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve the issuance of any (or a specified number of) guarantees, insurance, extensions of credit, or participations in the extension of credit with respect to the specific government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402, (11) the withdrawal, limitation, or suspension of United States security assistance in accordance with section 502B of the Foreign Assistance Act of 1961, (12) consistent with section 701 of the International Financial Institutions Act of 1977, directing the United States executive directors of international financial institutions to oppose and vote against loans primarily benefiting the specific foreign government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402, (13) ordering the heads of the appropriate United States agencies not to issue any (or a specified number of) specific licenses, and not to grant any other specific authority (or a specified number of authorities), to export any goods or technology to the specific foreign government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402 under [various export control statutes], (14) prohibiting any United States financial institution from making loans or providing credits totaling more than $10,000,000 in any 12-month period to the specific foreign government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402, (15) prohibiting the United States Government from procuring, or entering into any contract for the procurement of, any goods or services from the foreign government, entities, or officials found or determined by the President to be responsible for violations under section 401 or 402. Id.} Unfortunately, as many of these options can be carried out surreptitiously, it is difficult to measure what, if any, impact has resulted from U.S. policy.\footnote{DRINAN, supra note 1, at 63.}

B. The European Court of Human Rights

Formed with the merging of the European Commission and Court of Human Rights, the European Court of Human Rights...
(ECHR) is the most developed multinational judicial body protecting religious freedoms. Though religious claims were hindered due to procedural encumbrances prior to reforms in 1998, since seen tens of thousands of applications made to the body. Uniquely, individuals have standing before the court and have frequently asserted their rights under Article Nine of the European Convention on Human Rights: "Everyone has the right to freedom of thought, conscience and religion; [including] the right to change his religion . . . and manifest his religion . . . in worship, teaching, practice and observance." The impact of ECHR rulings is significant given the decision of many states to be bound by the Strasbourg court on such issues. Though stronger than any other multinational body, the ECHR’s ability to fully protect religious freedoms in the face of member state oppression is far from absolute. Much like the United Nations treaties mentioned above, a state’s protection of its citizens’ religious freedom is derogable in the face of threats to law or to protect “public order, health or morals . . . .” Given the close relationship many profess between their religious beliefs and their moral bearings, the limitation on religious liberty in order to protect “public morals” can be significant.

Moreover, for various reasons, the ECHR (along with most other bodies of the European Council and Union) has developed a philosophy of subsidiarity, whereby it grants significant deference to local authorities on many matters. This has resulted in the

95 DRINAN, supra note 1, at 87.
96 See European Convention, supra note 93, art. 9.
97 The United Kingdom is a notable example of this trend. See DRINAN, supra note 1, at 87. In all, about “half of the signatories to the Convention have incorporated the treaty into domestic law . . . The remaining states [give] . . . effect to . . . judgments of the ECHR [by] agreeing to introduce legislative amendments, reopen judicial proceedings, grant administrative remedies, and pay monetary damages to individuals whose treaty rights have been violated.” Jenny S. Martinez, Towards an International Judicial System, 56 STAN. L. REV 429, 498 (2003).
98 See DRINAN, supra note 1 at 87-89.
99 See European Convention, supra note 93, art. 9.
100 See Carol Harlow, Voices of Difference in a Plural Community, 50 AM. J. COMP. L. 339, 367 (2002); see also Dennis J. Edwards, Fearing Federalism’s Failure:
ECHR developing the jurisprudential doctrine of “margin of appreciation,” demanding clear abuses by member states before it intervenes. Consequently, despite the number of petitions the court has received, there have been few cases in which the court has held that state limits on religious freedom were in contravention of state obligations under the European Convention. In particular, the ECHR has come to recognize religious liberties in a very narrow frame, holding states’ actions illegal only if they limit personal religious acts and only if those acts are compelled by religious belief.

Thus, in Kahn v United Kingdom, the conviction of a man for marrying an underage girl without her parents’ consent was upheld. Though the marriage was legal from the point of view of Shari’a, the court nevertheless found him guilty because Islamic law only allows such marriages rather than requires them. Similarly, in X v. Austria, the state was permitted to stop a “Moonie Sect” from setting up a legal association, and in X v. United Kingdom, the state was allowed to prohibit a Buddhist prisoner from sending letters to a Buddhist magazine, because neither act was necessary to the practice of either faith.

References


102 Id.


105 See generally MAJMA’ AL-BUHUTH AL-ISLAMIYAH, MARRIAGE IN ISLAMIC LAW (1998) (discussing the requirements for marriage under Islamic Law); see also JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 161 (1964).


108 DRINAN, supra note 1, at 92.
More than employing a narrow interpretation of religious freedom, the ECHR has, at times, been inordinately hostile to religious dissenters claiming violations of their rights. For example, a Jehovah’s Witness was arrested and subsequently convicted for violating the Greek constitution’s ban on proselytizing. In upholding the verdict, Judge Valticos described the defendant as “a hard-bitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts.”

In light of such rulings and the continuing deference the ECHR has shown to member state actions limiting religious liberty, Drinan concludes his examination with a dire lament:

One of the major reasons for the creation of the ECHR was . . . to establish a legal framework that would prevent religious groups from being persecuted as the Jews were under Hitler . . . . It is not entirely clear that the ECHR would be able to accomplish that mission if European leaders [today] began to repeat the mistakes of the Third Reich.

IV. Moving Toward a Judicial Solution?

Drinan’s solution, mentioned throughout his book, is that an effective salve to religious persecution would be the establishment of a U.N.-backed multinational tribunal on religious issues. Given the author’s concerns for the ECHR’s inability to effectively counter religious oppression, this prescription is puzzling. If the most sophisticated existing judicial body concerned with the matter has had such questionable success, why does Drinan believe that a U.N.-backed body would be more effective? Indeed, Drinan’s presumption that the U.N. could “solve” this problem represents a monolithic view of the source of international law and is out of line with recent moves away from U.N. structures when addressing issues of justice.

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111 Drinan, supra note 1, at 95.

112 The author himself admits that it “may seem quixotic.” Id. at 5.

113 Most notable in this regard is the 2004 establishment of the International Criminal Court, an entity outside the United Nations family. See “RELATIONSHIP WITH
Moreover, Drinan does not address the significant political and logistical hurdles with a U.N. tribunal dedicated to freedom of religion issues. Regarding politics, as the ICC has found, there remains substantial global reluctance for states to submit themselves to the jurisdiction of a non-national judiciary. If it is true that the ICCPR provides for only watered-down religious freedoms because of the political difficulty of "tangling with Muslim states," it seems that such difficulties would be exacerbated in the face a court that would presumably make binding decisions on such matters.

Even without these political difficulties, the idea of an international religious tribunal is hobbled by unaddressed logistical problems. Apart from the determination of who would sit on such a court, there is a significant problem regarding compliance. International tribunals today, such as the U.N.'s International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created under Chapter VII Security Council resolutions and are thus legally binding courts on all U.N. member states. Added to this legitimacy is a host of secondary Security Council resolutions, also passed under Chapter VII, demanding that UN member states cooperate fully with the tribunals. However, even with this legal force, the courts have received only marginal cooperation from states, with serious impacts on the quality of justice.

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114 Indeed, the international character of the "International" Criminal Court is severely tested by the fact that of the 191 member states of the United Nations, only 97 have agreed to even partial jurisdiction of the court. See Coalition for the Int'l Criminal Court, CICC: Home Page, at http://www.iccnow.org (last visited Feb. 21, 2005).


Drinan also leaves the exact use of such a tribunal vague, and the few concrete examples of where he sees its operation prove perplexing. For instance, he claims that if a U.N. tribunal on religious freedom existed, "its members would now be holding hearings to help the world understand the source and meaning of the rage that prompted the savage attacks on the United States." To argue that a "religious" body is the correct place to frame, let alone adjudicate such issues, seems offensive to the vast majority of Muslims who argue that there is nothing in Islam that could possibly provide a basis for the terrorist attacks. Issues of political and economic oppression, combined with limits on various other freedoms, seem the more likely culprits for spurring such attacks—matters that are more appropriately addressed via other fora.

An additional concern of such a court would be whether it would effectively protect local prerogatives. The protection of religious freedoms does not mean an end to diversity, but there is an unclear line between acceptable and unacceptable forms of subsidiarity. The anxiety of a court's ability to make just rulings (let alone enforce them) has been deemed the "Strasbourg Effect." This phenomenon is the gradual homogenizing of jurisprudence emanating from international tribunals. This raises serious concerns of legitimacy, while potentially denying national identity. This too would make compliance even more difficult.

Given the difficulties of definition and the sensitivities on the matter, perhaps the better option would be not to develop a specific religious-based tribunal or even religious-freedom-enhancing jurisprudence. It may be more effective and palatable delivered.117

117 For instance, in the ICTY case Prosecutor v. Blaskic, the inability of the prosecutor to gain access to the state archives of Croatia—an impossibility while President Franjo Tudjman presided over the country—led to a trial that did not include significant material documents. The result was a greatly extended appellate procedure, and a final reduction in sentencing from forty-five to eight years after many of the documents finally came to light. See Press Release, ICTY, Appeals Chamber Judgment in the Case of Prosecutor v. Tihomir Blaskic (July, 29, 2004), available at http://www.un.org/icty/cases/jugemindex-e.htm.

118 DRINAN, supra note 1, at 84.

to recognize that all too often instances of religious oppression fit into more universally-agreed-upon violations and should be so addressed. To take an extreme example, under this model the Holocaust would be deemed "legally" wrong not because it consisted of arbitrary attacks on religious minorities, but because of the attacks themselves. In such case, religion would not provide a separate basis for legal complaint. Admittedly, folding religion into other claims is not a completely satisfying response. It is akin to recent indictments in the ICTY and ICTR that have included the charge of rape within the larger crime of torture, much to the consternation of many who want to see rape listed on par with larger crimes. Still, if the option is either to ignore the rape charge (or the religion charge) or to include it in an imperfect manner, surely the latter is preferable.

This solution also leaves many of the awkward issues regarding definition unresolved and cases of oppression that fall short of clear joucogens violations indeterminate. Drinan's book does not help on this point either, and indeed his work tends to raise substantially more questions than answers. The questions his work poses, however, are fascinating and important. So, too, is his lucid application of these queries to some country and regional studies at the end of the book. Transnational political discourse has become imbued with religion, and forcing policy makers to at least recognize the difficult religious dimensions of decisions is an important goal. In as much as this book endeavors to bring religion and religious freedom firmly into the international legal policy arena, Drinan's work is a critical and timely contribution.

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120 Note, however, that even if not a separate crime basis, the religious component could potentially aggravate the seriousness of the charge.
