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A SAMPLER OF RELIGIOUS EXPERIENCES IN INTERNATIONAL LAW

Mark Weston Janis *

Religious principles, religious problems, and religious enthusiasts have all played profound, if sometimes little appreciated roles in the development of international law.[1] This essay highlights the impact of religion on international law by providing a sampler of religious experiences in international law, to wit: three suspicions international lawyers have of religion, two contributions made between religion and international law, and one great and telling similarity between religion and international law.

To begin, consider the three suspicions. First, many international lawyers are suspicious of religion because they try to turn international law into a "science." This has long been a tradition in Europe, often an important part of legal positivism. Those positivists who do this seem to feel that to do or study international law objectively or scientifically means keeping religion altogether out of the discipline.

A good example of this approach is to be found in the classic turn-of-the-century treatise by Oppenheim. Turning to the eighth edition by Lauterpacht, one sees that the sources of international law are all consensual, either express or tacit consent.[2] As Lauterpacht explains in the part on "The Science of the Law of Nations":

> But, on the whole, positivism was victorious at the end of the nineteenth century and the beginning of the twentieth. In denying the validity of sources of International Law other than the will of States, it constituted yet another manifestation of the extreme doctrine of State sovereignty which, at that time, was typical of the science of law and politics. So uncompromising was the positivist attitude that it denied the character of science to any other than the purely positive Law of Nations.[3]

I must admit to having little sympathy with this effort. I doubt that the expectations for making international law a positive "science" were ever realistic. As Thomas Kuhn, among others, has demonstrated in his studies of intellectual paradigms, even the natural sciences are a lot less "scientific" than we used to think.[4] What has sometimes passed as objective or positive scientific truth has been far more subjective than we once believed. In any case, international law, indeed any law, is never in my view a science but only an art, a humanistic endeavor, at best descriptive, evaluative, and prescriptive of human aspirations, attitudes, and

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1. RELIGION AND INTERNATIONAL LAW (Mark W. Janis & Carolyn Evans eds., 1999) (A collection of essays dealing with this topic. (1999)) [hereinafter Janis & Evans].
2. LASSA OPPENHEIM, INTERNATIONAL LAW A TREATISE 25 (Hersch Lauterpacht, ed., 8th ed. 1960) (1940).
3. *Id.* at 106.
4. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

styles.[5] If suspicious international lawyers, in the name of science, reject international law's religious connections and concerns, they curtail any proper attempt to adequately account for the discipline's real nature and configuration.

There is, however, a second cause for the suspicion of religion by international lawyers which is in my mind better rooted. It is grounded in the remarkable diversity of human societies, particularly in modern times. Since World War II, more than one hundred new, mostly non-European states, have been added to the international political community. Conscious that Western values and religions are not necessarily shared with other cultures, many international lawyers are trepidatious of focusing on the connection between religion and international law for fear of excluding or alienating those whose values and religious beliefs are quite different from their own. As has been observed with respect to the debate about international human rights law:

> The Western perspective thus arrogates to itself the defining terms of any debate with a non-Western perspective. The non-Western perspective becomes accordingly apologetic having jurisprudentially to defend any position at variance with the Western perspective. This is particularly true of the international debate over rights talk. . . . Such methodological narcissism should give pause to any discussant in this debate.[6]

With this problem, I am fully sympathetic. One of the most difficult tasks weighing on modern international lawyers is to craft a truly universal law and universal legal system capable of ordering relations among widely diverse people with not only differing religions, but different cultures, histories, economies, laws, and languages.[7] However, in so doing, we need to take the world's people as we find them. International lawyers must not pretend out of existence the wide variety of the human condition. This proper respect cuts two ways. Neither should we be presumptuous about European religious traditions nor should we avoid them or the religious traditions of others. Given their real importance, we ought to pay everyone's religion due regard.

Third and finally, a suspicion of religion by international lawyers sometimes stems from a feeling of quiet desperation. Few problems have so much divided the people of the world as religious controversies. No other kind of issue has probably caused so much needless death and destruction. Bridging religious divides may well constitute a bridge-too-far for the fragile tools and capabilities of international law. Take a brief look at the record.

From its earliest days, what we now know as international law has been intertwined with religious problems. The Sixteenth Century Spanish Catholic priests, Suarez and Vitoria, who are often viewed as among the founders of the modern

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5. Mark W. Janis, *The Nature of International Law, in* AN INTRODUCTION TO INTERNATIONAL LAW 1-8 (3d ed. 1999) [hereinafter Janis], best explains my approach. Among several analyses of my books on international law, the one that I think best captures the advantages and disadvantages of my approach to the discipline is James J. Friedberg, *An Introduction to International Law,* 22 N.Y.U. J. INT'L L. & POL. 319 (1990) (book review).

6. Matthew A. Ritter, *Universal Rights Talk/Plurality of Voices: A Philosophical-Theological Hearing, in* Janis & Evans, *supra* note 1, at 417, 431.

7. See Mark W. Janis, *American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition,* 39 NETH. INT'L L. REV. 37 (1992).

discipline of international law, argued from religious sources, more or less unsuccessfully, that the Spanish Crown was obliged to treat native Americans as real people under the moral influence of the law of nations. Another founder of international law, the Dutch Protestant jurist, Hugo Grotius, relied heavily on Old and New Testament citations to demonstrate a universal law of nations in his monumental Seventeenth Century text, *The Laws of War and Peace* (1625), usually seen as the first book on international law. Though Grotius depended on Christian texts for his proofs, he felt that much of the law of nations bound not only Christian states, but those of Islam and China, too.[8]

The Peace of Westphalia of 1648 is usually considered to signal the beginning of the modern era of the international political system, a construct based on the concept of sovereign states, each legally entitled to govern its own territory and its own population free of external influence. Westphalia's principle of sovereignty, now embodied in Article 2 (4) of the 1945 Charter of the United Nations, brought an end to the bloody Thirty Years War where Protestants and Catholics fought to impose their faiths on each other. It is said that half of Germany perished in these religious wars. Sovereignty meant that each state could choose its own religion without outside intervention, but the Peace of Westphalia also included provisions calling for the protection of Catholics in Protestant states and vice versa.[9]

Since Westphalia, of course, religious controversies have not faded away. Moreover, the star of state sovereignty shines brighter than ever. Over the last four centuries, religious persecutions have been all too frequently the stuff of current events. It has been estimated that as many as 170 million persons died in the Twentieth Century alone as a result of "ethnic cleansings," many resulting from religious antagonisms.[10] It is, it seems, one thing to recognize the right of states to order their own domestic affairs, religion included. It seems quite another to effectively secure the enforcement of any international legal guarantees, whether in treaty or custom, to protect religious diversity.

The task is made easier when a nation like the United States enshrines religious freedom in its domestic order in its constitution and domestic laws and when a society is deeply committed to tolerance and religious diversity. Sadly, this is the happy story for only a handful of the world's nearly 200 sovereign states. Even some of the most tolerant European societies, the United Kingdom for example, still maintain an established church as part and parcel of the national political system. Outside the Western democracies, the picture is often bleak.

Moving along from the three suspicions, what about the two contributions? For all that has been done to international law in the name of religion, and for all that has been done to religion in the name of international law, what good has come of it? Although the answer is by no means simple, two positive contributions do stand out: first, the sometimes beneficial influence of religious enthusi-

8. Mark W. Janis, *Religion and the Literature of International Law: Some Standard Texts, in* Janis & Evans, *supra* note 1, at 121.

9. Janis, *supra* note 5, at 157-168.

10. 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, 219 [hereinafter Davis].

asms on the development of international law, and second, the occasional generation of universalistic norms of international law to protect religious diversity.

Like Suarez, Vitoria, and Grotius before them, later important promoters of international law have been motivated at least in part by religious convictions. This has never been so true as it was for the American Protestant reformers of the Nineteenth Century. Men like David Low Dodge in New York and Noah Worcester in Massachusetts, dissatisfied with the waste of men and material in the War of 1812 and inspired by the earlier pacific success of the Jay Treaty arbitrations between the United States and the United Kingdom, founded state peace societies in 1815 to promote international arbitration as a substitute for war. They were followed by William Ladd of Maine, who not only founded the first American nation-wide peace society in 1828, but in 1840 published an influential book, *Essay on a Congress of Nations*, detailing a project for an international court and parliament. Next came Connecticut's Elihu Burritt, who internationalized the American peace movement, organizing the first international peace conference in London in 1843, and founding the still-existing International Law Association in 1873.[11]

The movement that culminated in Woodrow Wilson's proposals for a League of Nations and a Permanent Court of International Justice in 1919, embodied since 1945 in the United Nations and the International Court of Justice, had little to do with the original thought of Woodrow Wilson himself, who evinced little interest in international law during his long academic career at Johns Hopkins, Bryn Mawr, Wesleyan, and Princeton. Rather Wilson drew his proposals from a deep well of Protestant reform proposals, from which he, the son and grandson of Presbyterian ministers, had often drunk. Along with other Nineteenth Century reform causes--the abolition of slavery, women's rights, and the prohibition of alcohol--international law attracted many, though of course not all, religious enthusiasts. It was this popular sentiment inspired by religious fervor, not elite opinion crafted in studied argument by professional international lawyers, that carried the cause of international law in Nineteenth and early Twentieth Century America. I think modern international lawyers too often forget the considerable potential support that religious enthusiasms can provide the cause of international law and organizations.[12]

Another principal contribution is that made by international law to religion in the form of universalistic norms protecting religious diversity. Although some such rules are to be found in early modern treaties such as Westphalia ending the Thirty Years War in 1648 and Vienna ending the Napoleonic Wars in 1815, it was the League of Nations Covenant after the First World War that truly inaugurated the modern period of international guarantees, often violated, of religious freedom.[13] The Covenant's article 22 (5), respecting the duties of Mandatory States vis-à-vis administered peoples, provided *inter alia* that a "[M]andatory must be responsible for the administration of the territory under conditions

11. Mark W. Janis, *Protestants, Progress and Peace: Enthusiasm for an International Court in Early Nineteenth-Century America, in* Janis & Evans, *supra* note 1, at 191.

12. This material is drawn from a work in progress. Examples may be furnished by the author.

13. Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief,* 2000 BYU L. REV. 905, 908-909 (2000).

which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals."[14]

Following the ethnic and religious massacres of the Second World War, the United Nations Charter went much further than had the League of Nations Covenant in asserting rights to religious freedoms. The Charter's preamble proclaimed that the "Peoples of the United Nations" were "determined . . . to practice tolerance and live together in peace with one another as good neighbors."[15] Article I sets forth as one of the UN's purposes: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[16] Article 13 gave the UN General Assembly the power to "initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[17] Article 55 pledged the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[18]

Putting these aspirations into practice, however, has been a largely un-met challenge. Paper guarantees are plentiful. The 1948 United Nations Declaration of Human Rights, for example, was careful to guarantee freedom of religion. The Declaration's Preamble identified "freedom of speech and belief" as among Athe highest aspiration[s] of the common people."[19] Most importantly, Article 18 provided that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[20] Albeit formally non-binding as a U.N. General Assembly resolution, the Declaration has, in the eyes of many international lawyers, passed into the realm of "customary international law."[21]

The U.N. Covenant on Civil and Political Rights in 1966, a multilateral treaty binding on more than 140 states parties to it, also protects religious freedoms, but significantly does not explicitly guarantee the right to change religion, the most controversial religious freedom.[22] The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, although also non-binding, is thought by many to be the most important international statement protecting religious diversity.[23] Again, however, its provisions respecting rights to promote religious conversion are weak, reflecting the deep divide between states permitting and states prohibiting religious proselytism and conversion.[24]

14. "In" Sir Eric Drummond, *League of Nations: Ten Years of World Co-Operation* 427 (1930).
15. U.N. CHARTER pmbl.
16. *Id.* at art. 1, para. 3.
17. *Id.* at art. 13, para. 1.
18. *Id.* at art. 55.
19. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).
20. *Id.* at 18.
21. Janis, *supra* note 5, at 256-257.
22. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.
23. G.A. Res. 55, U.N. Doc. A/36/684 (1981).
24. Davis, *supra* note 10, at 229-30.

Despite the rights to religious freedoms proclaimed in these important international conventions and declarations, it is generally agreed that no area of human rights is so distant from a meaningful international consensus as the right to religious diversity. Moreover, there is virtually no effective universal supervision of international rights to religious freedom. There is, however, a regional exception in European human rights law. Article 9 of the 1950 European Convention on Human Rights and Fundamental Freedoms guarantees the right to freedom of thought, conscience, and religion. Article 9 has been applied, albeit less often and forcefully than some other parts of the European Convention, by the European Court of Human Rights in Strasbourg.[25]

Having provided a sampler, so far, of three suspicions and two contributions, what of the great and telling similarity between religion and international law? It is the aspiration of both to teach and affirm a universalistic message. Most religions and most international lawyers believe that they have a common message for all people at all times. Indeed, it may not be too much to say that there is a rooted evangelistic core to international law.

Many international lawyers are absolutely convinced that their discipline, or at least their particular part of the discipline, should and does bind all nations. This is true not only for international law's traditional peace advocates, but also for more recent international law causes like international human rights and international environmental law. There is a visionary fervor among some international lawyers that matches that of many religious enthusiasts.[26] Whether the international lawyers will be any more successful than the religious enthusiasts in securing universal acceptance, remains, of course, to be seen.

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25. CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001).

26. This can become quite explicit. Consider Weeramantry, formerly Sri Lankan Judge on the International Court of Justice, e.g., C.G. WEERAMANTRY, THE LORD'S PRAYER: BRIDGE TO A BETTER WORLD: A VISION FOR PERSONAL AND GLOBAL TRANSFORMATION (1998).