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A Religious View of the Foundations of International Law

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The 2011 Charles E. Test Lectures at Princeton University

A RELIGIOUS VIEW OF THE
FOUNDATIONS
OF
INTERNATIONAL LAW

March 23, 28, and 30, 2011

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for Will Storrar

Lecture One: Wednesday, March 23----p. 3
THE CRISIS OF INTERNATIONAL LAW AND THE
STRICTURES OF PUBLIC REASON

Abstract: Over the last ten years there has been something of a crisis in American confidence in, and support for, international law. As the idea of order and justice in the international realm is considered and rationalized from various perspectives, it seems appropriate to consider also how it might be regarded from the viewpoint of the world's leading religions. This lecture will begin the task of considering law beyond the state from a specifically Christian point of view, mapping Christian ideas of peace, community, redemption, and the task of ordering a disordered world onto the kinds of global structures that were imaginable in the first century CE and that are imaginable today. But it will also consider the difficulties of sustaining a viewpoint of this kind in a multi-faith and indeed increasingly secular world.

Lecture Two: Monday, March 28, 2011----p. 27
SOVEREIGNS, BORDERS, AND RESPONSIBILITY
FOR THE WORLD

Abstract: The ideas of nationhood and sovereignty are both central to and troubling for international law. But the basis for the division of the world into separate political communities (nation-states) remains controversial. And clearly a religious approach to order in the international realm will endorse the position of most modern international jurists that sovereign independence is not to be made into an idol or a fetish, and that the tasks of order and peace are not to be conceived as optional, which sovereigns may or may not support at their pleasure. At the same time, sovereigns have their own mission in world, ordering particular communities of men and women; and this task, too, should not be slighted. Something similar can be said about ideals of national self-determination. Though Christian commitments are not at odds with the idea of a people taking responsibility for order in their own community, it ought to be highly suspicious of any form of exclusive nationalism, particularly in light of what may be read as the fundamental cosmopolitanism of the New Testament.

Lecture 3: Wednesday, March 30, 2011----p. 49
THE SOURCES OF ORDER: WHY NATURAL LAW
IS NOT ENOUGH

Abstract: It is sometimes thought that a religious view of international law will argue for natural law as a primary basis of international order. Natural law is no doubt important in any Christian jurisprudence. But the most telling part of natural law jurisprudence from Aquinas to Finnis has always been its insistence on the specific human need for positive law. This holds true in the international realm as much as in any realm of human order—perhaps more so, because in the international realm law has to do its work unsupported by the overwhelming power of a particular state. So this final lecture will address, from a religious point of view, the sources of law in the international realm: treaty, convention, custom, precedent, and jurisprudence. It will focus particularly on the sanctification of treaties. Though parchments and institutions are not the final word in human affairs, they are our best hope for peace and justice in the meantime that is given us to order our affairs.

Lecture One: Wednesday, March 23, 2011
THE CRISIS OF INTERNATIONAL LAW AND THE
STRICTURES OF PUBLIC REASON

1. “The powers that be” and “I am a Roman citizen”

Just so there is no doubt about the perspective from which I am approaching the subject of these lectures, I would like to begin with a story about St. Paul. Paul is famous (among a great many other things) for his hard line on the duty owed by Christians to “the powers that be.”

Let every soul be subject unto the higher powers. ... Whosoever therefore resisteth the power, resisteth the ordinance of God.... Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.¹

Who are these powers to whom tribute, custom, fear and honor are due, in Paul’s world? When *we* reflect on *Romans* 13, we think of the law of the land and the constitutionally ordained authorities of our nation: the tribute we owe to the IRS; the fear that we have of legal sanctions, and the honor we accord to our legislature, our President and the courts. We think of the legal and political institutions of the nation-state that holds power around here. Is the same true of St. Paul in the middle of the first century of the common era? Well, not quite.

For Paul, the powers that be were mainly Roman, and these were not the institutions of the local nation-state or its legal system, but those of a vast empire, effectively a world government. It was to Rome that fear, custom, tribute and honor were due,² and often this was at the expense of local authorities.

As in his writings, so too in Paul’s life. St. Luke tells us in *The Acts of the Apostles* that when the religious authorities in Jerusalem—the Sanhedrin—were beating Paul and preparing to kill him, and when the local soldiers sensing yet another disturbance in the city took Paul into custody and stretched him out to flog him, Paul cried out: “I am a Roman citizen!” This wouldn’t be the last time someone appealed to a world authority against the exercise of local powers of detention and interrogation. And when pursuant to this plea he was sent to

¹ Romans 13: __.

² The same is true of the famous story, repeated in three of the Gospels, about the Pharisees questioning Jesus about whether it was lawful to pay tribute to Caesar. Matthew 22: 15-22; Mark 12: 13-17; Luke 20: 20-26. This is not just a question about our attitude to taxes. It is a question about the attitude we should take to distant imperial authority. When Jesus says “Render unto Caesar the things that are Caesar’s,” it is world government that is being vindicated (if indeed that’s what is happening: Tom Wright has suggested a different view which has Jesus saying in effect after noting the image on the coin, “The only thing to do with something like this is give it straight back to its pagan owners.”) N.T. Wright, *Jesus and the Victory of God*, p. 506.

Caesarea, a local administrative center in Palestine for trial, and his adversaries came and demanded his rendition back to Jerusalem, Paul cried again, “I am a Roman citizen. I appeal to Caesar!” “Then Festus [the Governor], when he had conferred with the council, answered, Hast thou appealed unto Caesar? unto Caesar shalt thou go.”³ And off he went. It may or may not have been a good idea. We know that Paul encountered many dangers on his journey to Rome, the centre of world government, and tradition has it that after some years under house arrest in that city he was eventually put to death under Nero (not crucified, like Peter, but beheaded as befitted a Roman citizen). Not only that, but there was some irony in Paul’s appeal to a higher power. Agrippa II, one of the local satraps called in by Festus to consult about the case, was so convinced by Paul’s response to his questions that he said to the governor, “This man might have been set at liberty, if he had not appealed unto Caesar.” But this was no longer a matter for Agrippa’s merely kingly authority; Paul’s demand now made it a matter for world government not for a client state or for provincial or national administration.

2. From empire to international law

My subject this afternoon, and in the two lectures that follow next week, is “Religious Foundations of International Law,” and as my use of this story about Paul suggests, I am going to concentrate particularly on the *Christian* approach to international law. I will tell you why and how in a moment.

But you may think that the story, from the final chapters of the *Acts of the Apostles*, is inapposite because it is a story about Roman law not international law, and Roman rule—however vast and cosmopolitan it was—was not international law. Roman imperial rule was one thing; the basis, if any of Rome’s dealings—by way of custom or treaty or diplomacy—with other independent or, as we might say, *sovereign* centers of power was another.⁴ Only the latter qualifies truly as international law, and we know little or nothing of Paul’s orientation to that.

It is a fair point, as far as it goes, although the image of international law as dealing purely with inter-sovereign relations is less true now than it used to be; nowadays international law also protects the rights of individuals as Roman law protected Paul’s rights and international institutions—like the International Criminal Court—adjudicate claims against individuals not just claims against sovereign nations.

But it is too early in the lectures to base anything on that point. What I mostly wanted to do by introducing this story at the beginning was to jolt us out of the assumption that Christian attitudes towards legal authority—epitomized in the

³ Acts 25:

⁴ See Bederman, *International Law in the Ancient World*.

opening verses of *Romans* 13—are to be understood as confined in their application to the laws of national political institutions and what the international lawyers would call municipal legal systems. They are not, at least not in these passages. They are oriented to much larger global institutions whose hegemony was justified in theory and to a large extent in practice by the need to maintain peace and do justice uniformly in the world. Roman government was world government, to all intents and purposes.

Of course, there are all sorts of other things to say about Christian attitudes to empire generally and to the Roman empire in particular. We know that St. Paul’s attitude to Rome was highly ambivalent. He appealed to it, he counted on it as a counterweight to local injustice, and he counselled submission to its authority. But he didn’t tie up his identity with it, despite his invocation of Roman citizenship: “For here we haven continuing city.”⁵ N.T. Wright has highlighted in his recent work a prominent strand of Paul’s teaching which is devoted specifically to a furious denunciation of the cult of the emperor-worship, and what the empire seemed to preach as “the divine lordship of Caesar.” And even apart from that idolatry, there is a sense inherited by the early Christians from the prophets of Israel that empire in general is, in Oliver O’Donovan’s words, “a bestial deformation,”⁶ and that the best that can be said for it is that historically it has been one of God’s many ways of punishing Israel for her sins.

On the other hand, Professor O’Donovan also cites the view of Eusebius of Caesarea who believed that it was no coincidence the incarnation took place in a time of empire, at a time when

one universal power, the Roman Empire, arose and flourished, while the enduring and implacable hatred of nation against nation, was now removed; and as the knowledge of one God and one way of religion and salvation, even the doctrine of Christ, was made known to all mankind; so at the self-same period the entire dominion of the Roman empire being vested in a single sovereign, profound peace reigned throughout the world.⁷

I don’t know how to navigate through all this, and I should certainly not attempt it at this early stage. We will talk in Lecture 2 about O’Donovan’s confrontation with this sort of Constantinianism and about his inference that the Judaeo-Christian tradition is implacably hostile to the notion of any world government apart from the exaltation and kingship of Jesus Christ.

⁵ Hebrews 13: 14.

⁶ O’Donovan, *The Desire of the Nations*, p. 72.

⁷ Eusebius of Caesarea, *Speech on the Dedication of the Holy Sepulchre Church* (Laus Constantini) 16; IG, p. 58. – quoted by O’Donovan, *Ways of Judgment*, at 213.

My point about Pauls' appeal to the pax Romana was to introduce (rather than conclude) a conversation about Christian attitudes towards forms of law—forms of legality and legal institutions, forms of authoritatively maintained order—that transcend national polity, just as other theorists and theologians have begun a conversation—no doubt also beginning with *Romans* 13—about modes of community that are smaller and more local, modes of neighbourhood that are more modest, some would say more human in scale than the over-bearing institutions of the nation-state.⁸

3. Not history

I began in the first century, but my account will not be historical. The role of Christian thinkers in the formation of international law, in its emergence in something like its modern form, in the sixteenth and seventeenth century is too well-known to require rehearsal here. So: no Vitoria, no Grotius, no Gentili, no Pufendorf; except occasionally. (Gentili will have a cameo role in Lecture 3). This is not that sort of account. When I talk about Christian foundations of international law, I mean foundations in the sense of normative premises: understandings and characterizations that have to do with how *we* ought to regard international law and the claims it makes on us as citizens, voters, lawyers, and perhaps also office-holders. I want to explore the possibility of a normative jurisprudence of international law rooted in Christian premises. So it is not a matter of tracing the historical impact of Christian premises but looking for the actual implications of those premises for international law for people here and now—not in the seventeenth century Netherlands—who take those Christian premises seriously.

But if it is not an historical account, then why *Christian* foundations. How—in the modern world—can that be of any more than historical interest? International law has to work for a world of multiple faiths; how can a normative account specific to one religion be anything other than sectarian and divisive in this regard—pulling us apart when it the mission of international law to bring us together? My answer will depend on some views about public reason and overlapping consensus that I will set out in a moment. But first some history of my own.

4. The Working Group at CTI

In September 2007, a small group of about a dozen jurists and theologians—scholars (some American, some British and European) working in a variety of areas (international law, legal philosophy, legal history, Christian ethics, and

⁸ See, for example, John Inge, *A Christian Theology of Place* (Ashgate, 2003), esp. Ch. 5, quoting Alasdair MacIntyre, Wendell Berry, Daniel Kemmis etc.

systematic theology)—began meeting in Princeton, under the joint chairmanship of me and Professor Robin Lovin, Dean of Southern Methodist University's Perkins School of Theology.⁹ Our group was convened by William Storrar with the resources and institutional facilities of Princeton's Center for Theological Inquiry (CTI).

The motivation for the group arose out of discussions at the seminary in January, 2006 about a response by concerned Christians to issues of torture and detainee abuse by American authorities.¹⁰ Something called the National Religious Campaign against Torture was launched during that conference, under the leadership of George Hunsinger, Professor of Theology at the seminary. It remains an active and important organization.

At that January meeting, a number of us were brought together by Will Storrar, Director of the CTI to explore some shared concern about what we saw as a crisis in the perceived legitimacy in America of international law generally, which was making it difficult for international norms—such as the Geneva Conventions and the UN Convention against Torture—to play their proper part in the debates that were wracking the United States about the appropriate treatment of detainees in the war against terrorism. Many political leaders, some legal scholars, and a large portion of the American population seemed to be dismissive of international norms and believed that the matter should be determined, either by American constitutional and military law or directly on the basis of homeland security policy. The notion that the treatment of detainees should be addressed within a wider framework of legal obligation was not one that found favor with opinion leaders in the community. We wondered why that was and what could be done about this—in general, and not just in regard to this most morally compelling of issues. So, while a number of us remained active on the torture issue—me in the writings and lectures (brought together in my 2010 book *Torture, Terror and Trade-offs*),¹¹ Mary-Ellen O'Connell in her firm and unyielding restatement of the

⁹ The members of the group were Roger Alford (Pepperdine University: Law), Nick Grief (Bournemouth University, U.K.: Law), David Gushee (Mercer University: Christian Ethics), David Hollenbach (Boston College: Theology), Robin Lovin (Southern Methodist University: Theology), Mary Ellen O'Connell (Notre Dame: Law), Amanda Perreau-Saussine (Cambridge University, U.K.: Law), Esther Reed (University of Exeter, U.K.: Theology), Will Storrar (Center for Theological Inquiry, Princeton), Christiane Tietz (Mainz, Germany: Theology), and Jeremy Waldron (New York University: Law and Philosophy).

¹⁰ "Theology, International Law and Torture: A Conference on Human Rights and Religious Commitment," which was held on January 13-16, 2006 at the Princeton Theological Seminary

¹¹ Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," 105 *Columbia Law Review* (2005) and "What Can Christian Teaching Add to the Debate about Torture?" 63 *Theology Today* (2006) reprinted in *Torture, Terror and Trade-Offs; Philosophy for the White House* (Oxford University Press, 2010)

law on the matter as a leading scholar of international law,¹² and David Gushee of Mercer University in his leadership work in producing *An Evangelical Declaration Against Torture*, and securing its acceptance by the National Association of Evangelicals¹³—we dedicated some discussion to more basic and background questions about international order and the normativity and legitimacy of international law. We felt it important not to concentrate just on the substance of the violations (torture and detainee abuse)—of which of course any nation should be ashamed—but also on the damage being done, recklessly or deliberately, to the fabric of international law itself.

Back in the legal academy, we heard reputable scholars—Jack Goldsmith and Eric Posner, for example—arguing that international law “can exert no moral force comparable to the moral force of domestic law.”¹⁴ Of course they were not arguing on religious grounds: they are realists in international relations and legal realists, I think, in their attitude towards the claims of law. Interestingly their statement suggests that they think *domestic* law has moral authority. A lot of Christians will agree with them on that—and they will often cite St. Paul’s *Letter to the Romans* if biblical authority is required. So should Christian scholars follow Goldsmith and Posner in *privileging* law at the domestic level and denying legitimacy to international law? Should we accept that the considerations that give national law its moral standing in the eyes of Christians do not give any equivalent standing to international legal norms and institutions?

Or does international law also have moral standing in its own right as one of the powers that be, ordained by God or ordained by men in response to God’s commandments to do justice, seek peace, and generally order the world? And if it does, how should we as Christians think about some of the distinctive features of this ordering: the absence of a coercive world state that can be, in Paul’s words, “a terror to wrongdoers”; the distinctive sources of international law in treaty and custom; its Faustian pact with the sovereignty of the nation-state; and its conservative attitude towards borders, the residue of history, and existing distributions of power?

Theology has never neglected law. The understanding of law in the natural law tradition and the Pauline consecration of “the powers that be” mean that a rich jurisprudential tradition has developed within Christian theology from Augustine to Niebuhr and Finnis. But international law has been much less thought about in

¹² Mary Ellen O’Connell, “Affirming the Ban on Harsh Interrogation,” *Ohio State Law Journal*, Vol. 66, p. 1231, 2005.

¹³ An Evangelical Declaration against Torture: Human Rights in an Age of Terror, March 2007, available at <http://www.nae.net/government-affairs/endorsed-documents/409-an-evangelical-declaration-against-torture-protecting-human-rights-in-an-age-of-terror>

¹⁴ See Jack Goldsmith & Eric Posner, *The Limits of International Law* (2005) at 199.

the tradition of Christian theology, and the neglect of this subject in religious circles has left Christian theologians somewhat tongue-tied so far as any response to the present crisis of international law is concerned. There are exceptions. I have already mentioned the work of Oliver O'Donovan, and I hope those who know his writing will recognize despite some disagreements my great debt to the luminous and mostly compelling argument of the "International Judgment" chapter, the 12th chapter, of his 2005 book, *The Ways of Judgment*.¹⁵ I have learned much from him and a number of O'Donovanian positions will be apparent in what I say a little later today. But mostly international law has not been a preoccupation of those Christian writers who address law and politics.¹⁶ There is a powerful Christian movement concerned with peace¹⁷ and of course a strong and articulate Christian commitment to human rights. But these are oriented to an understanding of what we might call the substantive goals. What we wanted to consider was the form and character of international legality itself.

These lectures are among the first-fruits of the International Law Working Group. However, please remember that what you are hearing in these lectures is my own analysis, one view of the cathedral, informed by our discussions, but not to be attributed necessarily to the group. In a number of areas I will take up positions that I know are not shared by some of my brothers and sisters who have met over the years at the Center for Theological Inquiry. In various places, I will make these disagreements explicit.

5. Why Christian, not ecumenical?

Our group comprised people from a variety of Christian denominations (Anglican, Roman Catholic, Methodist, Baptist). But there were no members of Jewish, Islamic or other religious communities outside the Christian family. Why was this? We thought long and hard about it. It was not supposed to convey any denigration of ecumenical conversations about international law. We shared the view of one of our leaders, Robin Lovin, that the conclusions we reach when we think together about these questions as Christians must eventually become part of a larger discussion.¹⁸ Inter-faith conversation, important on all topics of religious and public concern, is of course essential on issues of international law (where we are talking about ordering a world that comprises a dazzling array of faiths).

¹⁵ This is not to mention the sections on "Yhwh reigns" and "King over the whole earth" in his earlier book, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge University Press, 1996), pp. 30-73.

¹⁶ Refer to Mark Janis (ed.) *Religion and International Law*, and also to Jean Porter, *Ministers of Law*.

¹⁷ I heartily recommend Willard Swartley's book, *Covenant of Peace: The Missing Peace in New Testament Theology and Ethics*

¹⁸ Lovin, *Christian Ethics*, Kindle Loc. 1680.

Nevertheless we thought it necessary to proceed as a Christian working group for the time being. A search for consensus among faiths on the question of international law will be futile unless each party brings to the table a clear sense of its own doctrinal commitments. Christians, Jews, and Muslim each need to get clear about their own conception of the foundations of international law, not to pre-empt ecumenical discussion but as one of its preconditions. We hope that our matched by the work of similarly constituted groups of Muslim and Jewish scholars is important, and Dr. Storrar has been exploring various possibilities in this regard. But a premature search for consensus might sell short the contribution that each can make. Since there are ideas about world order in the religious tradition of Judaism and certainly in the Islamic tradition that are quite strikingly different from ours, it would be as well to get straight about Christian ideas first before we bring them into relation with either doctrines of the in-gathering of the nations “with the people of the God of Abraham”¹⁹ or the doctrine of an irreconcilable asymmetry between relations within the House of Islam and relations within the domain of war.

6. Public reason.

But why religious foundations of any sort? How can we talk at all about *Christian* foundations of international law given that we share the world with billions of non-Christians? Even if we are talking about America’s attitude to international law, we have to accept that the community we are addressing contains members of all faiths and members of none. Isn’t it—as John Rawls has argued²⁰—inappropriate to think of developing a public reason for community of *this* sort in terms of the creed, teaching, and scriptures of just one religious tradition?

We could see no way round this. We did not accept the position of Rawls and other political liberals that it is inappropriate for contributions to public debate to be founded on religious principles. People have a responsibility to think things through as hard and as deeply as they can and to communicate their thinking to others—if only so that others know the lie of the land and understand something of their fellow citizens’ ultimate commitments. Should non-Christian citizens be under any illusion about Christianity’s view of global legality, given that its position for us does have to be settled—democratically—in a polity that comprises hundreds of millions of Christians? Analogously, would it make sense for believers in a mainly Muslim society to remain silent on this matter, so that their attitude to international law remained a mystery to their non-Muslim fellow

¹⁹ Psalm 47: 9; but cf. *ibid*, verses 2-3: “For the Lord Most High is awesome; He is a great King over all the earth. He will subdue the peoples under us, and the nations under our feet.”

²⁰ Rawls, *Political Liberalism*, on public reason.

citizens? Either way, if our faith has a bearing on this issue, we cannot confine it (in Robin Lovin's words) to church and the family dinner table.²¹ We have to know our own bearings, and it has to be known where we stand. The duty to bear witness is not only a religious one but a civic one as well.

I am firmly of the view that in public debate each person should call it as he sees it and make the utmost effort to convey both the depth and the detail of his position to others while straining at the same time as hard as he can to apprehend the depth and the detail of the positions others are putting forward. As Jürgen Habermas has recently argued, mutual intelligibility in public debate is a two way process: religious citizens must try to make their doctrines intelligible; but also "secular citizens must open their minds to the possible truth content of these presentations and enter into dialogues" from which mutual enrichment of belief might be a possibility.²²

I cannot emphasize too strongly that it is *not* our claim that international law can only have Christian foundations, and we are certainly not proposing that the world should revert to something like the idea of Christendom, the idea of a specifically Christian society of states, analogous to the *dar al-Islam*.²³ International law needs to be a shared enterprise, among all the peoples of the world. But the commitment to it among the peoples of the earth needs to be deep, not shallow, an overlapping consensus anchored for each faith, for each philosophy, for each civilization, and if necessary for each national tradition, in the bowels and innards of its deepest commitments. *There cannot be an overlapping consensus unless there are articulate traditions to overlap*; and so there cannot be an overlapping consensus on international law unless each tradition is articulate about—and can assure others of—its own attitudes on the matter.²⁴

²¹ As Christians in a democratic society, we have to bring our Christianity to bear on these issues—even if we would prefer to live out our faith in the narrower confines of church and family. Lovin, *Christian Ethics*, Ch. VI.

²² Habermas, "Religion in the Public Sphere," 14 *European Journal of Philosophy* 1 (2006), at 11. See also Waldron, "Two-Way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation," available at <http://ssrn.com/abstract=1708113>

²³ Cf. O'Donovan, *Desire of the Nations*, 195

²⁴ Beyond that, it was our view that Christians and indeed all people of faith have a responsibility to bear witness and participate in public debate, on matters of national and international importance. And it is not irresponsible—or, as Rawls thinks, disrespectful of others—to advance specifically religious claims in public life. There might be insights regarding international law available within the Christian tradition which are not accessible on a purely secular basis. And it is important to be open to the possibility that the authority of law (and of international law) requires transcendent foundations, and that a purely pragmatic account of law's authority in this realm may be inadequate. But I say again that nothing in these lectures assumes that Christian insights are indispensable. All I assume is that there is a distinctive Christian attitude towards international law and that this is something of interest to Christians themselves (who may not have thought these matters through), of interest to their fellow-citizens of other faiths or none (so that they are under no misapprehension about how the land lies), and of potential interest to everyone with whom we share the world.

Not only that, but each faith must articulate its own views on these matters of public reason and overlapping consensus. The lofty abstractions and the fifteen word vocabulary, purged of all color and content, with which the Rawlsians approach these matters is neither canonical nor neutral nor Archimedean. We approach even this issue of how we can share structure and order in the midst of diversity, each from our own perspective.

7. Christianity especially

What might a distinctively Christian view of international law involve? In his 1854 Hulsean prize essay from Cambridge on “The Influence of Christianity upon International Law,” Charles Malcolm Kennedy made the following observation:

No belief contains such enlarged views in regard to the different nations of the earth as the Christian Faith; in fact, the catholic spirit and enlarged benevolence which pervade the Christian Religion, and which particularly distinguish it from the erroneous Beliefs prevailing in many parts of the globe, afford one of the most convincing proofs that it proceeds from Him who created and preserves this world and all its inhabitants.²⁵

Kennedy’s evidence was scriptural. He said:

The universal nature of Christ's kingdom is expressly stated in many passages; as also that all nations are of one blood and kindred. Christians are enjoined to render good to all; to love their enemies; to do unto others as they would have others do unto them; and to love their neighbours as themselves; the word "neighbour" being shown to be employed in its widest signification.²⁶

In all these respects, Kennedy concluded, “the tendency of the Christian Faith is to unite all nations in friendship with one another.”²⁷

Similar themes could be multiplied. Though Christian teaching originated in Galilee, on the eastern margins of the Roman Empire, its founder instructed his disciples to go and preach the good news to the whole world and—as I said at the beginning—its earliest practitioners appeared to rely on the structures of law and governance (the *pax Romana*) which made possible the travel, the preaching, and the communications—the epistles!—that this vocation presupposed.

Moreover, not only did Christian doctrine commit its followers to universalism and to a cosmopolitan neighborliness of people of every background,

²⁵ Charles Malcolm Kennedy “The Influence of Christianity upon International Law,” pp. 1-2

²⁶ *Ibid.*, p.2

²⁷ *Idem.*

it also inherited and transformed a doctrine of the in-gathering of the nations of the earth into a single community—beginning with the prophecy of Isaiah that “the Lord's house shall be established in the top of the mountains ... exalted above the hills; and all nations shall flow unto it”²⁸ and ending with the apocalyptic vision of St. John

After this I beheld, and, lo, a great multitude, which no man could number, of all nations, and kindreds, and people, and tongues, stood before the throne, and before the Lamb, clothed with white robes, and palms in their hands; and cried with a loud voice, saying, Salvation to our God which sitteth upon the throne, and unto the Lamb.²⁹

It is possible, in other words, that Christianity, with its explicit commitment to the opening up of a redemptive promise to all nations, can find within that mission a distinctively valuable understanding of the notion of international community.

Before we get too carried away with this, however, we need to remind ourselves of the *otherworldliness* of these Christian ideals. The vision of the community of all nations is apocalyptic: it is a feature of the last days, not the here and now. The vision of God’s judgment of the nations at the end of Matthew 25 is transcendent and has an assurance and finality that no human institution can match. Even the idea of peace, which, as Willard Swartley has shown, pervades the teaching of the New Testament,³⁰ sometimes seems to be little more than a homonym of the aim that pervades our international law. Through the Charter of the United Nations, we look for peace in the negative sense of saving “succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”³¹ But Christians are taught that safety here on earth is not the be-all and end-all, that those who chant “peace and security,” may face sudden destruction,³² and that the peace we should look for is not necessarily peace as the world understands it.

Peace I leave with you, my peace I give unto you: not as the world giveth, give I unto you. ... [T]he time cometh, that whosoever killeth you will think that he doeth God service. ... These things I have spoken unto you, that in

²⁸ Isaiah 2:2

²⁹ Revelation 7:9-10

³⁰ Swartley, *Covenant of Peace: The Missing Peace in New Testament Theology and Ethics*.

³¹ UN Charter, Preamble.

³² 1 Thessalonians 5: 2-3.

me ye might have peace. In the world ye shall have tribulation: but be of good cheer; I have overcome the world.³³

Talk of the Christian foundations of international law can easily become shallow if we look simply for terms and passages in scripture that remind us of the text of legal principles.

There is a deeper sense, too, in which a Christian consideration of the foundations of international law must proceed with caution. The idea of international law invites us to reflect upon the possibility of governance at a global level, the governing of the world. And Christians do have their own image of this: their doctrine of the kingdom of God—“a unified world community under God’s rule.”³⁴ This is not a conception we should ever lose sight of. On the other hand, there is surely millennial arrogance in any suggestion that the international order that is being constructed in the world out of human law and human institutions is an approximation to that divine kingdom. I have found Professor O’Donovan’s observations on this particularly helpful in their insistence that it is not for us in our thinking about international law to anticipate Christ’s kingdom on earth. “Properly understood,” he argues, the kingdom of God in the world is “a theological and eschatological” idea, with Christ exalted “far above all principality and power and might and dominion.”³⁵ But our tasks, says O’Donovan, “are more modest, though no less compelling.”

International authority is not itself an object of faith nor a matter of prophecy.... It is a simple assistance in ordering the agreements and conflicts of peoples, the disasters, the fears and the achievements, the wars and rumors of wars, within a framework of human lawfulness³⁶

—organized here on earth among us, not exalted far above us.

It is the function of the international order to create a human framework of human lawfulness within which human action “may be responsible and coordinated.”³⁷ Ordering the world, sorting out conflict and incoherence; coordinating us and orienting us clearheadedly to the achievement of basic human goods—the call for this sort of order may be a God-given task, but it is a human enterprise that is called for—with all the frailty that that involves—and the authority and laws that can perform these tasks will be human institutions and

³³ John 14: 27 and 16: 2 and 33. And consider also Christ’s hard saying, “Think not that I am come to send peace on earth: I came not to send peace, but a sword.” (Matthew 10:34)

³⁴ O’Donovan, *Ways of Judgment*, 201 (or 210)

³⁵ Ephesians 1: 21.

³⁶ *Ibid.*, 227

³⁷ *Ibid.*, 218

human laws—treaties, customs, earth-bound entities—not human perceptions of God’s laws or at least not directly. I will spend time on this in my third lecture, which is entitled “Why Natural Law is Not Enough.” Suffice for the moment to say that I am a sort of Christian positivist. Our task is to make positive law that can do human work in the midst of human problems, not to anticipate God’s judgments or His rule upon earth, which we will experience in its glory soon enough.

One way of driving this point home is to emphasize that many of the activities to which law brings orders are in fact forms of human sinfulness. I don’t just mean that law condemns sinfulness. Nor do I just mean that law has to respond to man-made evils as well as natural evils. I mean international law actually also regulates sinful conduct and provides a framework for it. Think of the laws and customs of armed conflict—particularly *ius in bello*—which instruct wicked men (among others) how exactly they should proceed in their wickedness. It is as though law gave instructions to murderers: practise your homicidal activity in this way rather than that. I am not condemning this. International law brings some order in the midst of anger, violence and death, but sometimes it is just a way of ordering anger, violence and death, not as God’s rule would have it, abolishing anger, violence and death altogether.

I don’t know that I want to go as far as O’Donovan in his warning, in regard to any exaltation of international law, that the reign of the Antichrist, too, is perfectly expressed the idea of world-rule.³⁸ But O’Donovan is right to emphasize that, like all politics, international law can go badly wrong, and it probably *will* go badly wrong if it is associated with millennial hubris. In some areas, the *best* it can be is *a shabby human response to human shabbiness*,³⁹ and it is as important for that point to be driven home to its dewy-eyed proponents as it is for the cynical critics of international law to bear it in mind when they reproach us with the shortcomings of international institutions.

9. Modest tasks of international order

We should think of the tasks of international law, therefore, as modest, not apocalyptic. It is not our job to usher in the new Jerusalem. True, the international community has to respond to apocalyptic crisis: to war, famine, mass murder, earthquake, tsunamis—disasters, as we sometimes say, of biblical proportions. But the responses are, and have to be, human—sometimes all-too-human in character.

³⁸ O’Donovan, *Desire of the Nations*, 236

³⁹ Cf. Montesquieu on a science of human shabbiness. “As an intelligent being, he incessantly transgresses the laws established by God” (*On the Spirit of the Laws*, I.1) – political science is the study of the history and structures of these transgressions

They are hesitant, ambivalent, formalistic, even legalistic in a bad sense: so that people sometimes say they wish that international action were less a matter of law, more a matter of compassion or at any rate more morally decisive. (The perhaps fatal hesitations that characterized our recent response to events unfolding in Libya attest to this, not least to a certain legalistic recoil born of shame-faced awareness of the unlawfulness of earlier action that was taken against a tyrant in Iraq.)

We are conscious of great global evils that require human cooperation to avert, mitigate, or redress. But I want to emphasize that the importance of international law is not just a function of the importance of addressing these evils; it also turns on our awareness of the various *means* by which these evils might be averted or remedied, and the *particular* place of law among those means. Not everything good about human compassion and cooperation in the international realm is legal in character;⁴⁰ by which I don't mean that some good things are unlawful, but many good things have little or nothing to do with law either way. With regard to war for example, law can mitigate its horrors a bit. But the most important efforts that go into the maintenance of peace are diplomatic, and here law plays at most a background frame-working role.⁴¹

Or consider international aid and relief efforts, in regard to famine, flood, earthquake and tsunami. Like international NGOs and national governments, Christian organizations are already involved in front-line relief efforts all over the world. But again the importance of this work is not determinative of our attitude towards international *law* (except, again, insofar as such efforts presupposes a legal framework for travel, communications, and access).

I believe—and, under the leadership of Robin Lovin, it was one of the early conclusions of our group—that the tasks of international law must be understood primarily under the rubric of order, not just under the rubric of humanitarian concern. I don't mean that to sound formalistic: but I do mean to say that humanitarian engagement needs the background of legal order and when one is writing and talking specifically about religious foundations of international law it is that order that we must focus on, rather than the more dramatic and evident good that can be done by Christian medical aid or Christian famine relief. We mustn't try to brow-beat people into supporting the claims of global legality simply by

⁴⁰ Christians are no doubt aware of Jesus' own explicit teachings in the Sermon on the Mount of the importance of pursuing love of neighbour and indeed love of enemies specifically without recourse to law.) Matthew 5: 40. Also Delahunty, p. 43: "the invocation of law in international affairs can intensify a sense of grievance, embitter a quarrel, and tend to cause rather than to quiet hostilities:"

⁴¹ Cf. Delahunty, p. 45-6: "the conduct of diplomacy is undergirded by international law: without the protections accorded to it by international law, the practice of diplomacy would become far more problematic." I shall say more about diplomacy in Lecture 3.

showing that international aid and cooperation are often urgently necessary. A case for foreign aid is not yet a case for international law.

I know some Christians will say that if we have to choose between according priority to the claims of compassionate action and according priority to the claims of law we should choose the former. “Christ hath redeemed us from the curse of the law.”⁴² Paul’s antinomianism is never far from the surface.⁴³ I don’t mean to take sides on this, nor on the question of whether Paul exhibited a general antinomianism or whether it was purely directed to certain issues raised by the Law of Moses. What I do mean is that international law is one thing among others that work for good in the international realm, and if we seek to justify it with Christian premises we must seek to justify it in its specificity.

Let me run this strand out even more provocatively. A Christian view of the world pays special attention to the cry of those who are wronged—the victims of murder, oppression, torture, confinement, and so on. And the urgency of *that* duty—our duty to minister to those who are in this sense the least of these our brethren—it might seem to be a compelling reason for Christian people to throw in their lot with the lawyers, in particular the international human rights lawyers.⁴⁴ But the work of international law in this regard is not just a matter of protection, remedy, or intervention. The primary work of international law in this area is laying down authoritative standards for nations and organizations to follow in their treatment of those committed to their care. The standards are laid down and as a result certain things become unthinkable, certain ways of life are just structured and sustained: we have rights-affirming communities all over the world. That is the primary work of law: the articulation of human rights standards that can become part of the air we breathe in ordinary modern democracies and part of what it is to aspire to social and political normality in societies that are on the path to democracy.

Some philosophers and human rights scholars—John Rawls and Joseph Raz are two examples—have argued that the primary meaning of calling something a human right is to say that, if it is violated, war or intervention is justified and the claims of sovereignty that would normally stand against intervention are displaced.⁴⁵ But that is over-dramatic. Calling something a human right means that it ought to regulate everyday social and political life in all human societies—so that certain things, like free speech or freedom of worship can be taken for

⁴² Galatians 3:13

⁴³ Cite to JW, “Dead to the Law: Paul’s Antinomianism,” 28 *Cardozo Law Review* (2006), 301-332

⁴⁴ We are told that the nations of the earth will answer for their fulfilment or neglect of this duty when the Son of Man comes in all his glory -- Matthew 25: 31-46.

⁴⁵ Rawls, *The Law of Peoples* and Raz, recent paper e.g. in Besson volume.

granted and other things—like torture or the use of death squads—can become unthinkable. That is what it is for rights to order the world. Certainly it is important that we do something about violations of these norms; but the urgency of that is not in itself the urgency of establishing human rights law. Moreover, if, in this field of human rights, international law is identified solely with humanitarian intervention and the punishment of violators by ad hoc tribunals or by the ICC, then we will have to admit that it presents a sorry spectacle of limitation and failure. But its deeper and more pervasive contribution—prior to dealing with miscreants—is the articulation of shared standards that then normalize themselves in legal and constitutional practice—*ordering* the world, not racing around like a fire-fighter to put out conflagrations.

So: that is part of what I meant when I said that the tasks of international law are modest and mundane. They are modest and mundane in two other respects as well.

One is a point that, in my view, cannot bear repeating enough. Though we all love talking about the exciting topics—humanitarian intervention, war crimes trials, and so on—we should remember that international law does much of its most important work in simply framing and providing for dense networks of ordinary economic cooperation and other forms of cooperation in the world, in areas like trade, travel, migration, and communications. International law includes exciting things like the *ius cogens* condemnation of torture. But it also includes civil aviation conventions and navigation standards, postal conventions, arrangements for intercontinental cables and satellites, rules about passports, rules about sea lanes, canals and railroad bridges, transnational banking arrangements, weights and measures, time zones, and international trade and tariffs.

We should not underestimate the importance of this mundane but indispensable dimension of international order—what I have called elsewhere “the dense thicket of rules that sustain our life together ... not just in any particular society but generally on the face of the earth.”⁴⁶ We should not underestimate it, first, because it enables us to see how international law operates affirmatively to promote public goods as well as responding to great evils. And secondly, we should not underestimate this aspect of business as usual, because it may make us a little more optimistic the prospects for international law. Countries like the United States, which may *seem* to have put themselves beyond the pale in regard to some provisions about water-boarding, may nevertheless disclose themselves as international law’s most faithful adherents when it comes to the thousands of legal obligations that they discharge in the world every day, without fuss, in every aspect of global life.

⁴⁶ Jeremy Waldron, “Cosmopolitan Norms,” in Seyla Benhabib, *Another Cosmopolitanism*, pp. 83-4.

10. The duty to order the world

I have said that a Christian should understand the importance of international law in terms of our duty to order the world, bringing to the chaos of action and impulse coherence and clear-headed orientation to important human goods.⁴⁷ I believe that the ordered framework that international law provides is indispensable, by promulgating, as it does, as points of public global orientation, norms about how prisoners of war are to be treated, what the rules about neutrality require, and what is to happen at national borders, what labor standards are to be upheld, and how environmental catastrophe is to be averted. We are not necessarily good at doing these things, but they have to be done and, unless it can be shown that international law and international institutions will make things much much worse than they are rather than somewhat better, then we have an obligation to try. We mustn't let disappointment that they don't make things a thousand times better motivate a refusal to look for any amelioration at all.

There used to be a tradition in political philosophy that presented the tasks of government as optional. People *if they liked* could form a social contract and set up a government. This, as John Locke put it, “any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature.”⁴⁸ Governance was based on consent, a social contract, and like any contract it was a matter of choice: you could take it or leave it. Well, like Nietzsche in *The Genealogy of Morals*, I believe this fantasy has been done away with.⁴⁹

Governance—the ordering of a community, a land, or a people—is not an option. It is a moral necessity. And it is not an enterprise from which we are entitled to stand aloof because it is not convenient to us to enter into a social contract. As Rawls insisted in *A Theory of Justice*, we have a *natural duty* to play our part in the setting up, the maintenance, and the operation of just institutions; we have an unconditional duty to play our part in making it possible for the

⁴⁷ Ordering the world is partly a matter of ordering ourselves, ordering our communities, and ordering the effects we have on each other—if you like, the externalities we impose on each other. It is a matter of bringing order to anger and conflict as well as an order of humility to our spiritual vanity and our moral self-righteousness. Not all of this is a task for law. Some of the order in our lives is brought there by prayer, worship, friendship and love and the sober self-scrutiny and reconciliation at a personal level. Some of it is the upshot of forms of community among us—often world-wide community—that have little or nothing to do with law. The international community of scholars, the international community of scientists, the literary world, the world of entertainment, and of course the churches, most of which now have a global dimension. Law does little of this work, except provide a framework within which other forms of human community are enabled to act across time and across continents.

⁴⁸ Locke, *Second Treatise*, §95.

⁴⁹ Nietzsche, *On the Genealogy of Morals*, ii, §17: I believe that fantasy has been done away with which sees the beginning of the state in a “contract.”

communities we inhabit to be governed;⁵⁰ and this rather than any fiction of consent is the basis of our obligations to positive law and political institutions. This is the truth in the passage from the *Epistle to the Romans* with which we began. The work of John Rawls, and before him Immanuel Kant, in emphasizing this is of the utmost importance in political philosophy—and so is more recent work along the same lines by John Finnis in *Natural Law and Natural Rights*.

In Rawls's account, the idea of a natural duty to govern and be governed is presented—and it is presented quite briefly in *A Theory of Justice*—solely with reference to national-level political institutions. I don't think there is anything much on this in *The Law of Peoples*. But Kant makes it clear that the duty to move into a situation regulated by positive law applies as much at the level of states moving to an international order as it does to individuals moving out of the state of nature.⁵¹ The duty to create and participate in legal order is inescapable, and there is no respectable moral position from which it may be regarded as an option, to be taken or left at the whim of national policy.

11. Realist scepticism about international law

At the beginning of my remarks today I mentioned a perceived crisis in international law as one of things that impelled the formation of the CTI working group on theology and international law. Many legal scholars in the United States are dismissive of international norms; they believe that the security problems that international norms address—like going to war, like the killing of civilians, and the treatment of detainees in the war against terrorism—should be approached on the basis of national policy and the national interest, and if our activity in the world is to be constrained by law at all (which some of them doubt) it should be constrained by American constitutional law not by a set of international norms imposed on us from Geneva.

⁵⁰ Rawls, TJ on natural duty; JW, on “Special Ties and Natural Duty” paper

⁵¹ On Kant's view, the mere coexistence of nations in a state of nature—like the mere coexistence of individuals in a state of nature—is wrong and demands remedy: “Each of them, may and should for the sake of its own security demand that the others enter with it into a constitution similar to the civil constitution, for under such a constitution each can be secure in his right. This would be a league of nations.” --though, as Kant hastens to add (this is all from the “Second Definitive Article for Perpetual Peace”), “it would not have to be a state consisting of nations.” The only difference, he says, is that it is not appropriate to force states into a juridical condition, “for as states they already have [law] and have thus outgrown compulsion from others to submit to a more extended lawful constitution.” But still entering into the basis of some sort of public global order is an obligation, and an obligation that one would have thought states would be anxious to fulfil, not wanting to be seen as lawless in their sovereign freedom. But instead, Kant laments, “each state places its majesty in being subject to no external juridical restraint,” embracing its failure to play its part in the ordering of the world as a badge of sovereign pride. Go figure. What a way to think about public order!

There is an emerging body of work—quite highly respected in certain circles—of which Eric Posner’s 2009 book, *The Perils of Global Legalism* is a most prominent example,⁵² which approaches international law through the lens of rational choice theory and finds it wanting. (I mean rational choice theory operating now upon the asserted self-interest of individual states rather than the self-interest of individuals) The work is not altogether dismissive of international law, but it is highly sceptical at the point where it strives to operate as a constraint on national interest. Posner is sceptical about any claims of global legality that do not reflect a politically effective and explicit apprehension of a nation-state’s self-interest at a given time.

I use that convoluted formula—“the politically effective and explicit apprehension of a nation interest at a given time”—to furnish some non-trivial content to what might otherwise be read as a tautology. For we all know of supposedly hard-nosed philosophers who attribute every action to self-interest in some shape or form simply because the action is done willingly and on the basis of some reasons that presumably appealed to the agent. We want to avoid the situation—all too common in discussions of this kind—in which self-styled realists equivocate between this tautological definition of self-interest and narrower more troubling versions that they are trying to bamboozle us into accepting. And moreover, although a Christian vision of international law will have no difficulty with the idea that states have a straightforward *duty* to play their part in the ordering of the world—Christians have no problem with deontology—still one way of characterizing our relation or states’ relations to the need for order is that an ordered world is ultimately in everyone’s interest if interest is conceived broadly enough. (I have in mind Niebuhr’s insistence in *Moral Man, Immoral Society*, that the “ultimate interests” of states are usually best promoted rather than, in the long run offset, by acting fairly and lawfully in their dealings with their neighbors.)⁵³ That is why I want to use a more specific formula to characterize the scepticism of scholars like Eric Posner.

Posner is telling us about the clash between global legalism and an avowed, explicit, and politically effective account of a state’s own interest, conceived as something that may in principle oppose itself to the interests of other states or to transcendent moral and political values. He asserts that international law has no

⁵² Eric Posner, *The Perils of Global Legalism* (University Of Chicago Press, 2009).

⁵³ Niebuhr, *Moral Man, Immoral Society*, p. 86. See also: *Reinhold Niebuhr: Theologian of Public Life* (Making of Modern Theology) (Larry Rasmussen) Loc. 1844-46 : “[A] consistent self-interest on the part of a nation will work against its interests because it will fail to do justice to the broader and longer interests, which are involved with the interests of other nations. A narrow national loyalty on our part, for instance, will obscure our long range interests where they are involved with those of a whole alliance of free nations.”

claim on us and no efficacy among us, save to the extent that it is identified as serving national self-interest conceived in this narrow way.

The claim is mainly descriptive: international law has in fact no grip on states except pursuant to a cost-benefit calculation of national interest. But in a way it is normative too, although the normatively-flavoured claim can vary: sometimes what is said is that states should act on the basis of narrow self-interest, that it is unreasonable to expect them to do otherwise, that it makes no sense for states to abide by international law when it is not in their interest to do so; sometimes the claim is simply the denigration of any demand that they ought to submit to international law as fatuous and utopian; sometimes what is said is that the weak (and their apologists among us) should stop complaining about the actions of the strong because they know as well as we do what happens in the real world where, as the Athenians said to the Melians, the strong do what they can and the weak suffer what they must.⁵⁴

The thesis that states always follow narrow self-interest and that it is unreasonable to expect them to do otherwise may be more or less plausible in various areas of foreign and national policy—in trade policy, immigration policy, military alliances, and international aid, for example. But in the domain that we are concerned with, it is made plausible by a number of acknowledged features of international legal arrangements. First, most international law obligations are self-assumed, through bilateral or multilateral treaties. Secondly, there is (or there has been until recently) in the international law, no court with compulsory jurisdiction. Thirdly, there is no over-arching coercive organisation—analogous to a government or the executive force in a state to compel states to subordinate national interest to the common good. And fourthly, such enforcement as there is in the international realm is itself the product of voluntary uncoerced decisions of some members of the international community to act against others perceived as law-breakers. These are among the considerations that have convinced thinkers like Posner that “compliance with international law must be in the rational self-interest of governments, or of the individuals and groups that compel governments to act.” Everything seems to be conditioned on the voluntary actions of national sovereigns. These features of international law seem to indicate that, as it presently conceived by the more modest among its adherents, international law is inherently hospitable to the national selfishness that Posner celebrates.

Of these considerations, the point about treaties is the one that people most often focus on. Opponents of the rational choice approach—including Christian opponents and some members of our Working Group—respond to it by emphasizing that international law is more than just treaty obligations; and they

⁵⁴ Thucydides cite.

place great emphasis on *ius cogens* norms, for example. I shall have something about *ius cogens* norms in Lecture 3. But the skepticism about treaties should be faced head-on.

First, the fact that treaties are entered into—signed and ratified—voluntarily does not so far show that they are artifacts of self-interest in the non-tautological sense. All it means is that states sign treaties for reasons, but those reasons may include moral reasons—the kind of reasons that would naturally be present in a decision to sign on, for example to the Convention against Torture or the International Covenant on Civil and Political Rights. You may say the main reason is reputational. But again this sails steadfastly into the shallows of triviality. A reputational reason for signing on to a covenant like this—the desire to present oneself in the world as a player of a certain respectable sort—has force only because the moral reasons are widely accepted. In a world composed only of what we now call rogue states, voluntarily accepting the convention against torture would simply confirm one’s reputation for foolishness.

In any case, whatever a state’s reason for signing and ratifying a treaty—and I think the reason is often (though perhaps implicitly) exactly the desire for a more ordered world—whatever the reason for undertaking a treaty obligation, what one undertakes is an *obligation*, something which, even if it is adopted for reasons of self-interest, is expected to constrain self-interest in the future. Legal demands may arise out of voluntary commitments but (like all covenants) those commitments bind us even when later generations of statesmen wish they could be repudiated.⁵⁵ The normal situation involves a dilution over time of the enthusiasm with which a treaty obligation was undertaken: the U.S. was in the forefront of negotiating the initial Geneva Conventions governing the treatment of prisoners of war in 1949; but the US government found its obligations under this treaty irksome in the war on terror that began in 2001; nevertheless it grudgingly announced that it would abide by its obligations though it had a narrower view of what those obligations were, and a much narrower view of the field of their application, than certain jurists believed.⁵⁶ I shall say a lot more about the sacredness of treaty obligations in the second part of Lecture 3.

And that brings me to a third point. One of the least credible aspects of the rational choice approach is the monolithic character it attributes to nation-states. Eric Posner is perhaps less guilty of this than others are: like Reinhold Niebuhr, but for different reasons, he notes the presence in the nations he is describing of

⁵⁵ True, there is provision for treaties to be repudiated, when circumstances change radically. I have written elsewhere on the doctrine of *rebus sic stantibus*. But this doctrine has very limited operation. See JW, “The Half-Life of Treaties: Waitangi and *Rebus Sic Stantibus*,” 11 OTAGO LAW REVIEW (2006), 161.

⁵⁶ See, e.g., John Yoo and Robert J. Delahunty, Application of Treaties and Laws to Al Qaeda and Taliban Detainees, Memorandum for William J. Haynes, General Counsel, Department of Defense, January 9, 2002.

intellectual elites who stand up for the demands of global law even when less elevated factions in the polity are howling for them to be repudiated.⁵⁷ This is not just a matter of scholars versus political office-holders. In most countries, chanceries, departments of state, ministries of foreign affairs are infested with lawyers who are committed utterly and clear-headedly to the fulfilment of the demands of international law. It is what they do for a living. They have made it a vocation to find out what the law requires and advise their masters accordingly. In order to get government lawyers to denigrate the demands of legality, you have to actually import people like John Yoo from our law schools. No professional lawyer in a career government post would ever adopt such an attitude.

12. Christian views of interest and order

What finally can a Christian add to this debate about rational choice? Two things.

First, we are likely to be quite suspicious of the assertion of any bright line between self-interested behaviour and moral or idealistic behaviour. Awareness of what is sometimes called original sin, or even just humility in the face of moral vanity, necessarily leaves us open to the idea that there are important elements of self-interest present even when one thinks of oneself as responding righteously to the demands of law and justice. But this caution is by no means one-sided. For equally, when humans are at their most cynical, hard-headed or avowedly selfish, they often in spite of themselves pay tribute to strands of normativity and even righteousness in their dealings with others: they do this in their hypocrisy, or in the points about reputation that I mentioned a moment ago, or in the way their self-interest is conceived, or even just in the restraints they unthinkingly adopt when they are at their most ferocious. These strands of normativity and legality discernible in even the most distressing of human interactions—that is where international law in a sense began. It was the mission of thinkers like Grotius and Gentili to sift through the historical evidence of hard-headed war-mongering and discern the elements of restraint that were there anyway—half-hearted, no doubt, and often insincere; but that is how human legality enters the world.

That is a first Christian perspective on these points about realism and rational choice. A second takes us in a different direction, and it is the last observation I will make today, though it points us towards the discussion we will in my second lecture next week have about nations and sovereignty.

I have said that a Christian approach to law at any level starts from the need for order in the world. O'Donovan quotes St Paul to the Corinthians: "For God is not a God of disorder, but of peace."⁵⁸ There is to be order; there is to be justice

⁵⁷ Cites: passage from Posner; passage from Niebuhr.

⁵⁸ 1 Corinthians 14: 33 -- quoted by O'Donovan at 227 (WJ?)

(human justice); the vulnerable are to be protected and their claims of right vindicated. Or, as an older prophetic tradition told us,

Bring no more futile sacrifices; incense is an abomination to me. ... Your new moons and your appointed feasts my soul hates; they are a trouble to me.... I will hide my eyes from you ... I will not hear. Your hands are full of blood. Wash yourselves, make yourselves clean.... Cease to do evil, learn to do good; seek justice, rebuke the oppressor; defend the fatherless, plead for the widow. Come now ... let us reason together, says the Lord.⁵⁹

These simple and categorical demands play out at every level, and the force of these demands is continuous in scale, from family, to neighbourhood, to nation, to the world. The nation-state and national law have as their mission the doing of justice, the rebuking of oppression, the defence of the widows and the fatherless, and the vindication of the rights of the poor within the boundaries of a national territory and among a delineated section of the world's population. They have as their mission the ordering of France or New Zealand or Argentina or the United States. And this, at its best, national law does—though of course it is seldom at its best. But this, at its best, national law does with a density and an intricacy and a power that international law, global legality, cannot match. This can be acknowledged. *But the effectiveness with which the laws of nations order their own realms does not make the challenge of ordering the world go away.* There too there is justice to be done; there are poor and vulnerable people to be protected, norms of right and righteousness to be proclaimed, conflict to be resolved, evils to be mitigated, human goods to be provided. If there is this need for a law of nations as well as for the particular laws of nations, then we cannot set up the demands of the one as a way of precluding the other. Nations and national law have their mission and their dignity, but a Christian will not see any religious foundation for setting up national self-interest, or the exigencies of national policy, in opposition to the tasks of international governance. There is no basis in Christian thought for any consecration of national sovereigns that would obstruct or interfere with the ordering of the international realm. As I said the tasks of order are continuous. The only claim that can be made in behalf of a national sovereign is that it is already ordering a part of the world. But that is not a claim that can be set up against the necessity of ordering the world as a whole. I will turn to this issue of sovereignty in Monday's lecture. But this is more than enough for today.

⁵⁹ Isaiah 1: 13-18.

Lecture Two: Monday, March 28, 2011
SOVEREIGNS, BORDERS, AND RESPONSIBILITY FOR THE WORLD

1. Paul on the nations

My topic today is the division of the world into nations and the responsibilities of national sovereigns in the international realm. To start us off, we begin—as we began last Wednesday—with a story about the Apostle Paul.

It is a cosmopolitan story. Paul, a Jew from Asia Minor, is waiting in Athens for his fellow evangelists (mostly from the Jerusalem community) to join him, in his mission to preach a message to the peoples of what we would call Turkey, Greece, and Italy that originated in the eastern margins of the Roman Empire, in Palestine in the hills and seaside cities of Galilee. While he waits in Athens, Paul engages in conversation and debate with Jewish Athenians, with non-Jewish worshipers at the Jewish synagogue, and with Athenian philosophers, some Stoics and Epicureans. Though the latter complain half-heartedly about his propaganda for foreign deities, they are mostly curious to hear him—“What will this babblers say?”—for, as we are told by the author of the Acts of the Apostles, “all the Athenians and strangers which were there spent their time in nothing else, but either telling, or hearing some new thing.”

Their curiosity is evidently matched by Paul’s, for when he is not preaching and debating, he is examining inscriptions on local shrines and altars. One inscription actually indicates the Athenians’ openness to foreign religious ideas, and Paul takes this as the starting point of an address he gives on Mars Hill, which was a Roman name for the Areopagus—a large rocky area near the Acropolis. “Ye men of Athens,” he begins

as I passed by, and beheld your devotions, I found an altar with this inscription, TO THE UNKNOWN GOD. Whom therefore ye ignorantly worship, him declare I unto you.⁶⁰

It’s a wonderful phrase; I know it from its inscription in great letters around the inside of the central rotunda in St. Paul’s Chapel at Columbia University: “Whom therefore ye ignorantly worship, him declare I unto you.” The whole story is an excellent image of cosmopolitan encounter.⁶¹

⁶⁰ Acts 17: 17-23.

⁶¹ I have explored it as such in JW, “Teaching Cosmopolitan Right,” in *Education and Citizenship in Liberal-Democratic Societies: Cosmopolitan Values and Cultural Identities*, Kevin McDonough and Walter Feinberg eds. (Oxford University Press, 2003).

So Paul continued, on that spot, preaching to the gentiles, an address that was met with a fascinated mixture of mockery, curiosity, and—at least among a few men and women—acceptance and conversion. One of the things he spoke about was the division of the world into nations. He said:

God that made the world and all things therein ... hath made of one blood all nations of men for to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation.

Two crucial ideas: *first*, God has determined the bounds of the separate habitations, the lands allotted to the various nations of the earth; but *secondly*, although they are separated, with their separate habitations, all the nations of men are, ultimately, of one blood. He has made the nations all of one blood. Through the Hebrew scriptures, we find the same pair of ideas—the allotment of separate lands, sometimes even the henotheistic idea of the allotment of separate gods,⁶² to separate nations, but the allotment taking place to people who are, in effect, kindred—to, or the seed of Abraham, for example, who is told that he will be “a father of many nations,”⁶³ or the sons of Noah, or, as a last resort, the sons of Adam:

the Most High divided their inheritance to the nations, when He separated the sons of Adam, He set the boundaries of the peoples according to the number of the children of Israel.^{64 65}

Well, *internationalism is not cosmopolitanism* and it is no part of the ambition of international law to erase the significance of nations, national communities, municipal legal systems, or borders between states. I think the same

⁶² Deuteronomy 32: 8ff. I am grateful to Oliver O’Donovan, *Desire of the Nations*, p. 67, for this reference and for observations concerning what he calls the fossilized traces of Canaanite ‘henotheism’ that it contains. Henotheism, I am told, is a term coined by Max Müller, to mean worshipping a single god while accepting the existence or possible existence of other deities

⁶³ Genesis 17: 4-6

⁶⁴ Deuteronomy 32: 8

⁶⁵ Or, more brutally, we have the idea of the allotment to the nations as a punishment, a diaspora, or smiting of Promethean hubris or imperial ambition, in the story of the Tower of Babel. Though the whole earth was originally

“of one language, and of one speech, they set about building themselves a city, with a tower that reaches to the heavens, so that we may make a name for ourselves. But the Lord came down to see the city and the tower the people were building. The Lord said, ‘If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them. Come, let us go down and confuse their language so they will not understand each other.’ So the Lord ... confused the language of the whole world. From there the Lord scattered them over the face of the whole earth.

A scattering that, on some accounts, the great in-gathering of the nations, eventually, is supposed to reverse.

can be said of Christian attitudes to international law. True, that body of law depends on a particular attitude to nation-states, or rather it depends on the absence of a particular attitude towards nation-states – i.e. the absence of any attitude that takes national interest as all-consuming or that presents the exigencies of international order as something that exerts moral force only at the sufferance of national leadership. It depends in other words on a particular view of sovereignty. And I am going to say a lot about that in today’s lecture.

But whatever we think about sovereignty, we must start from the point that nations are the units of international law.

2. A Christian sense of place

The members of the nations of the earth are all of one blood; they are like brothers and sisters to each other, whichever national community they belong to. They are divided into nations. But their common blood, their kinship, matters more than any historical, national, ethnic, or linguistic distinction.

This has to be the Christian premise—though in the Gospels it is arrived at agonistically in Christ’s encounter with two foreign women, one, a woman of Samaria, of whom Jesus asked a drink of water, and who responded to him puzzled: “How is it that thou, being a Jew, askest drink of me, which am a woman of Samaria? for the Jews have no dealings with the Samaritans.”⁶⁶ – and the other a foreign woman whose daughter was disturbed and who asked him to help her:

The woman was a Greek, a Syrophenician by nation; and she besought him that he would cast forth the devil out of her daughter. But Jesus said unto her, Let the children first be filled: for it is not meet to take the children's bread, and to cast it unto the dogs.

—“the children” being the children of Israel—

And she answered and said unto him, Yea, Lord: yet the dogs under the table eat of the children's crumbs. And he said unto her, For this saying go thy way; the devil is gone out of thy daughter.

We are all kin, all one people, across all boundaries, each of us created in the image of God. We all make our demands on God, and God makes his demands on us. That’s the starting point.

Nation is not just people; it is territory. Some have been concerned about the failure to develop an appropriate sense of place in the midst of Christian cosmopolitanism. They defend a Christian emphasis on locality, emphasizing, for example, the “this,” “there,” and “then” particularity of the incarnation. The Word

⁶⁶ John 4: 7-29

became flesh and dwelt among us, not among all peoples or at all places but in one place in particular. No doubt. And that place, that people—a holy people—had been prepared specially for his incarnation for millennia.

But Jesus was at pains to *universalize* his locality. He came from Nazareth, but his reception there led him to observe that “[a] prophet is not without honour, save in his own country.”⁶⁷ He was itinerant; he often turned his back on his own kindred and commanded his disciples to do the same. The Samaritan woman I mentioned, when she figured that she was dealing at least with a prophet (and maybe something more) immediately set about testing him with a conundrum: “Our ancestors, the Samaritans, worshipped on this mountain; and yet you Jews say that in Jerusalem—Mount Zion—is the place where worship ought to take place.” Christ’s response is immediately dismissive of preoccupations with place: “Woman, believe me, the hour cometh, when ye shall neither in this mountain, nor yet at Jerusalem, worship the Father. . . . [T]he hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth.”

Christians *do* have a hard job hanging on to a sense of place and thus comprehending any special force attached to the territorial aspect of nationhood. As Oliver O’Donovan puts it:

The Old Testament is full of the sense of place, but the New Testament is indifferent to it. The Old Testament is the story of a love affair between a tribe and its God, and a piece of land is the token of their affection and disaffection. The New Testament is the charter of a world faith with eternity in view, where neither race nor territory intervenes between God and mankind.⁶⁸

It is ultimately a rootless vision, though O’Donovan is right to emphasize that this involves not an evaporation of place altogether but an acknowledgement of its contingency.

[H]uman beings are not stationery, like trees. They do not affirm their place by standing still in it. They have patterns of going out and coming in, of departure and return, identifying places as our own and other people’s and identifying themselves and others as belonging to them . . . They move about and among each other, wending their ways in and out and around each other’s places....

As I have argued elsewhere, Christian universalism remains rooted but the rootedness now is just the contingency of happening to be together in one another’s

⁶⁷ Matthew 13:57

⁶⁸ Oliver and Joan O’Donovan, *Bonds of Imperfection*, p. 307

proximity. It is the contingency of the encounters in the story of the Good Samaritan⁶⁹—another Samaritan! (The occurrence of Samaritans in the Gospels is almost always a reminder that gospel teaching steps resolutely across traditional barriers of blood, history, and ethnicity.) That great parable in Luke’s gospel is certainly intended to shake up our sense of place: there are, as O’Donovan notes, “many societies where the rebuke of the parable strikes like a meteor against the complacency of racial or class love,” or, as I have argued elsewhere, against the complacency of community.⁷⁰ But far from making us indifferent to place, it makes spatial proximity the issue.

A man is in need in a particular place, on the road, as it happens, to Jericho. “[A] certain Samaritan, as he journeyed, came where he was.” When he saw the man who had been attacked by thieves, he simply went to him and helped him. He invoked no checklist of community, no list of priorities for family over strangers, co-nationals over the other inhabitants of the world. A man was in need right there, in front of him; that was all he needed to know to recognize the man as a neighbor. There is in this story, as Professor O’Donovan points out, “a nearness of contingency, a chancing upon, . . . pure place, unqualified by any relation or connection, but simply finding yourself next to somebody.”⁷¹ Seeing the parable as a story of immediate focused concern for a particular person who happens to be in a particular place is enormously important, politically as well as ethically. Let me explain.

3. The basis of political community

We divide into nations, and it is among our fellow citizens that we take our first steps of responsibility for large-scale social order. Now there is a question about whether Christians should associate themselves with nationalistic theories of political community or with theories of political community based simply on proximity, people happening to be, in the words of Immanuel Kant, “unavoidably side-by-side.”⁷²

On the one view, we look for those we already like and trust—those who are like us in language, custom or ethnicity and form a political community to house and nourish the basis of our affinity. We form a nation amongst our kin or

⁶⁹ Luke 10: 25-37. See also JW, “Who is my Neighbor?—Proximity and Humanity,” 86 *The Monist* (2003), 333 and JW, “On the Road: Good Samaritans and Compelling Duties,” 40 *Santa Clara Law Review* (2000), 1053.

⁷⁰ JW, “Secularism and the Limits of Community: a Response to George Rupp,” in George Rupp, *Globalization Challenged: Conviction, Conflict, Community* (Columbia University Press, 2006), 52-67. Also available at <http://ssrn.com/abstract=1722780>

⁷¹ Oliver O’Donovan, “The Loss of a Sense of Place,” in Oliver O’Donovan and Joan Lockwood O’Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Eerdmans, 2004).

⁷² Kant, *The Metaphysics of Morals*, §42.

brethren, to the exclusion of those who are of other lines of human descent. On the other view—associated with Kant and also with Hobbes—we organize ourselves into political communities in order to establish justice among those to whom there is a danger that we will act unjustly, or to resolve conflicts among those to whom our proximity is likely to generate tangled and endemic conflict. On the one view, we form a community among those we have reason to trust and love. On the other view—again a Hobbesian view—we join in community from fear of each other, with those whom we would otherwise fight.⁷³

On the one view, boundaries are set by the limits of a distinct people's immemorial presence in a land, following lines of clear separation from strangers. On the other view, boundaries are haphazard and arbitrary—the residue of history or providence—representing nothing much more significant than the place where the efforts of one group of people to do justice and resolve conflict among themselves ran up against the efforts of another group of people to do justice and resolve conflict among *themselves*—each group consisting of an array of people who, happening to find themselves in one another's vicinity, had no choice but to try and order their relations. In O'Donovan's words, people are always coming in and going out; for a time they just happen to be where others are; that is the basis of political community

I think it is well-known which of these alternatives I favor.⁷⁴ I said in my lecture last week that entering into political community is a duty, not an option; and I believe the same is true with the choice of who we enter into political community with. We are not to pick and choose. We have a duty to enter into political community with those who happen to be in our vicinity—and our relatedness to one another in a nation is initially nothing much thicker than that.

This is not in itself necessarily a Christian position; it is not dictated by scripture and it can be reached by other routes. But it is supported by Christian teaching in two ways. It is supported, first, in the rebuttal of any claim that ties of (say) ethnic affinity matter more than the common humanity evinced in simple proximity. It is supported, secondly, in Christian conceptions about the transcendence of grievance and the renunciation of nurtured distrust of strangers. I mean Christian theses about forgiveness and about safety in the face of enmity—

⁷³ Hobbes associates political community among humans with conflict. What interests him is “how and by what stages, in the passion for self-preservation, a number of natural persons from fear of each other have coalesced into one civil person to which we have given the name of commonwealth” (Hobbes, *De Cive*, CUP edition, p. 74). “From fear of each other,” that's the point—diffidence, suspicion, conflict, and the possibility of a war of all against all (individually or in small scale factions) that is likely to result from that – that's the basis of political community.

⁷⁴ I have defended it in a paper called “The Principle of Proximity,” available at <http://ssrn.com/abstract=1742413>

that it is possible to love an enemy,⁷⁵ and bring enmity and distrust to an end; that it is possible to recognize something in common even with those you have a grudge of injustice against (“I say to you, love your enemies, ... that you may be sons of your Father in heaven; for He makes His sun rise on the evil and on the good, and sends rain on the just and on the unjust”); that it is possible to prove neighbor—good neighbor—to someone with whom there have been the strongest grounds of historical and ethnic antagonism.

4. Self-determination

Does this mean that Christians shouldn’t care about self-determination? – one of the foundations of modern conceptions of international law? Well, it didn’t seem to bother Augustine, who wrote, in his meditations on empire

[A]s far as this life of mortals is concerned, which is spent and ended in a few days, what does it matter under whose government a dying man lives, if they who govern do not force him to impiety and iniquity? Did the Romans ... harm those nations, on whom ... they imposed their laws, except in as far as that [i.e., their subjection] was accomplished with great slaughter in war?⁷⁶

If self-determination *is* important, it is important not as a property of peoples defined antecedently. On a Christian view it is a mistake, bordering on pagan idolatry, to elevate ethnic or national identity to make it the be-all and end-all of legitimate government.⁷⁷ So I think in terms of a thin theory of self-determination, as opposed to the thicker theories that people like Will Kymlicka and Joseph Raz and Avishai Margalit have posited.⁷⁸ Self-determination is an artifact of proximity. It should be seen as simply the fixed responsibility of those who happen to live

⁷⁵ Matthew 5: 43-47: “You have heard that it was said, ‘You shall love your neighbor and hate your enemy.’ But I say to you, love your enemies, ... that you may be sons of your Father in heaven; for He makes His sun rise on the evil and on the good, and sends rain on the just and on the unjust. For if you love those who love you, what reward have you? Do not even the tax collectors do the same? And if you greet your brethren only, what do you do more than others? Do not even the tax collectors do so? Therefore you shall be perfect, just as your Father in heaven is perfect.

⁷⁶ CG 5:17

⁷⁷ Though Oliver O’Donovan is right in his oft-repeated denunciation of the hubris of Christian cosmopolitanism, he is also right in his more muted warnings against any people’s intoxication with or worship of itself or its identity. And Joan Lockwood O’Donovan has also warned against extrapolating any nationalist generalization from what we know of “the absolute historic uniqueness” of God’s special mission for the nation of Israel. See her “Nation, State and Civil Society in the Western Biblical Tradition,” in Bonds of Imperfection, esp. p. 285.

⁷⁸ See the contrasting positions of Jeremy Waldron and Will Kymlicka on self-determination in Besson & Tasioulas (eds.) The Philosophy of International law (OUP, 2010). For another version of the thicker view, see also Avishai Margalit & Joseph Raz, “National Self-Determination,” Journal of Philosophy, 87 (1990), 439.

side-by-side with one another for constituting and sustaining order in the territory they happen to inhabit.

Let me explain that a little more. I have indicated in these lectures that governance in any time or place is a matter of moral responsibility. The primary or primal responsibility for good governance falls upon those who are to be governed: it is for them, in the first instance, as moral beings, with the dignity of moral capacity and self-direction, to comport themselves in their relations with others in a way that makes justice, judgment, and the pursuit of the common good possible. To the extent that people need governance and order it is their responsibility, in the first instance, to provide this for themselves—whoever they are, whoever they may be in the array of relations that needs ordering—it is their responsibility to make themselves governable and to take active responsibility for ensuring that their relations with others are subjected to institutions and political processes.⁷⁹

5. Internal sovereignty

Now it is time to talk about sovereignty—the legal and political expression of the unity and decisiveness of a community’s life together. Everyone knows that sovereignty has two aspects: internal and external. Though our interest is in international law, we have to talk about both.

Internally, sovereignty is the attribute of some person or entity in the state that embodies the overall unity, force, and superiority of state and law. *Externally*, the sovereign is the entity entitled to act decisively for a whole country in its dealings with entities outside the country, particularly other governments and international organizations. When the US signs a treaty or joins something like the WTO, it exercises sovereignty. (External sovereignty may be exercised by a particular entity within the government, such as the executive (or the executive-plus-the Senate) or by the federal government as opposed to the state governments. But often we say that the country as a whole is sovereign—in the way that it presents itself to other entities in the outside world.

It was once believed that no legal system could exist without an internal legal sovereign⁸⁰—so that man, who needed law, needed sovereignty. But this is now widely rejected among modern legal philosophers, who accept the argument of H.L.A. Hart that sovereignty is itself a structure of legal rules and that the fundamental structure of legal rules in a polity can also have a shape that need not

⁷⁹ (Of course, most of us wake to find ourselves already compassed about with such institutions and processes; and in that case, as I have already emphasized, our prime responsibility is not to disrupt those processes, but render unto them whatever they legitimately require in the way of our cooperation and forbearance to perform their necessary tasks.)

⁸⁰ Jeremy Bentham, John Austin, etc.

be characterized in terms of sovereignty at all.⁸¹ It also used to be the belief of some political philosophers, notably Thomas Hobbes, that the elementary conditions of peace and order required internal sovereignty. But again, modern political science has shown that there can be law and good order in a constitutional state, which is not predicated on sovereign absolutism. Hannah Arendt remarked that American constitutionalism represented the comprehensive abolition of sovereignty from governance in the US.⁸² There is in the US Constitution no one body with decisive overall power (as there was in the UK in Dicey's time, for example). The American constitutional system is designed specifically to preclude that.

This means we can be agnostic about internal sovereignty. Some political systems have it; others don't. The Christian has no dog in this fight.⁸³ Everything depends on whether, in the circumstances, a given structure of constitution is capable of performing responsibly the tasks of governance that have to be performed in a given community. As Robin Lovin put it in a memo to our Theology and International law Working Group: "We seek theories in which sovereignty also fixes responsibility"⁸⁴ A sovereign parliament, even a sovereign monarch may perform the tasks of governance and order; but so may a non-sovereign structure of republican constitutionalism.

No doubt, there are certain *theories* of internal sovereignty that Christians *are* bound to reject. We must reject any idea that persons or peoples should bind up their whole identity in the state. We have a higher destiny than that: "here have we no continuing city, but we seek one to come."⁸⁵ Also no Christian can accept

⁸¹ See H.L.A. Hart, *The Concept of Law*, Ch. 4.

⁸² Arendt, *On Revolution*, p. 153: "[T]he greatest American innovation in politics ... was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs, sovereignty and tyranny are the same." quote

⁸³ Like monarchy perhaps, internal sovereignty is an option for a Christian polity. True, monarchy has had a venerable existence in the history of Christendom. It is not ruled out, but it is not required. Ancient Israel had a monarchy, given but not ordained by God: God specifically warned the Israelites about its dangers when they asked Him for a king, and Israel's experience with monarchy was decidedly mixed. (I Samuel 8: 9-18.) I am aware that sovereignty ≠ monarchy, but I use the examples in this paragraph just to illustrate the inconclusiveness of Christian arguments about particular political forms. We recognize the kingship of Christ after His ascension and exaltation and we expect Him to come again on earth in great glory as king and judge. But we are not required to model our political systems on the kingship of Christ or mimic the sovereignty of the Almighty.

⁸⁴ Lovin memo: "If sovereignty begins as an absolute power deemed essential to the creation of political order, then rethinking sovereignty in terms of responsibility is simply deciding to talk about something else, to see if we can build a political order on that. If, however, the political order exists as part of a moral and theological order, even before it is expressed in modern political forms, then sovereignty (or any other concept used to explain political power) becomes a more elastic term, subject to redefinition not only in light of changing circumstances, but also in relation to the more comprehensive moral and theological order. Political positivism, almost by definition, starts where it starts. Moral and theological realism tries to figure out where we are, so as to begin (again) from there."

⁸⁵ Hebrews 13: 14.

the Hobbesian position that, as part of our subjection to an earthly sovereign, we are to use the sovereign's commands and only sovereign's commands as our only guide to right and wrong.⁸⁶ We have other imprescriptible sources of moral insight.

6. Democracy

What about democracy? Is that also something we should be agnostic about, recognizing that the responsibilities of governing and ordering a given society can be fulfilled democratically or undemocratically, depending on the practice and history of a given regime? Some have thought so. John Finnis, in the excellent chapter on political authority in *Natural Law and Natural Rights* argued that we should not condition the performance of our duty to play our part in governance around here on the government's having any particular credentials of consent or democratic support. His view is that "[a]uthority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively settle coordination problems for that community,"⁸⁷ no matter who they are or how popular they are.

Finnis is half-right, I think. There are compelling tasks to be performed, and they must be performed whether there are democratic mechanisms to perform them or not. One way or another, responsibility must be taken within a country for the overall discharge of the proper tasks of order and justice in that country. *The same is true of the tasks of order in the international realm.* In America, scholarly critics of international law assail it for its undemocratic character, and they think this is an irremediable fault, since no one can see how there can be any other than the most attenuated democratic mechanisms for the ordering of the world.⁸⁸ But they are wrong in the conclusion they infer. Just because democracy is unavailable in this realm, doesn't mean that the tasks of international governance evaporate. At both levels, national and international, the tasks are urgent, in the sense of immediately compelling. If we do not quickly organize to get them performed, great loss or harm or injustice may result. This affects how we regard the powers that *be*—i.e. that actually exist—however imperfect we may judge them. We have a responsibility to play our part in and not to obstruct the ordering of the world whether democratic mechanisms are available for doing so or not.

⁸⁶ Hobbes, *Leviathan*, Ch. 26: "Civil law is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong"

⁸⁷ NLNR (p. 246). "Consent, transmission, contract, custom—none of these is needed to constitute the state of affairs which (presumptively) justifies someone in claiming and others in acknowledging his authority to settle coordination problems for a whole community by creating authoritative rules or issuing authoritative orders and determinations." *Ibid.*, pp. 248-9.

⁸⁸ See e.g. McGinnis and Soman, "Should international law be part of our law?" 59 *Stanford L. Rev.* 1175 (2007)

On the other hand, Finnis it seems to me pushes the issue of democracy aside too lightly. If democracy *is* a possibility, in a given political setting, then Christian political thought is far from indifferent to it. Christian attitudes to democracy should be informed by attention to the connection between God's commandment to order the world and the special dignity of the active political intellect of each person. Our church leaders may be called pastors, but our destiny is not to be sheep-like, in either ecclesiastical or political affairs. The National Association of Evangelicals has affirmed, in its statement on civic responsibility that

We engage in public life because God created our first parents in his image and gave them dominion over the earth (Gen. 1:27-28). ... The responsibilities that emerge from that mandate are many, and in a modern society those responsibilities rightly flow to many different institutions, including governments, families, churches, schools, businesses, and labor unions. Just governance is part of our calling in creation.⁸⁹

And democracy is a way in which that vocation is exercised responsibly and fairly among millions of individuals.⁹⁰

7. International Responsibility

I have suggested that, with this reservation about democracy, Christians are largely agnostic on particular forms of political power. Parliamentary sovereignty, constitutional democracy, responsible monarchy when democracy is not available—these can all be ways of discharging the tasks of governance and order that descend upon the ordinary nation-state.

I believe a similar agnosticism is justified in international affairs. I do not mean agnosticism about the tasks of order incumbent on those who inhabit the world. Those tasks include the securing of peace, the relief of famine and natural disaster, the sheltering of refugees, the regulation of armed conflict, and where necessary the organized opposition to violence and aggression; and they also include the less dramatic but affirmative tasks of international cooperation—trade, communications, travel, migration etc., that I spoke about last week. Some of these challenges arise mainly out of the interaction of nation-states. Others—like

⁸⁹ National Association of Evangelicals (NAE), *For the Health of the Nation: An Evangelical Call to Civic Responsibility* (available at http://www.nae.net/images/civic_responsibility.pdf), p. 2. See also David P. Gushee, "Evangelicals and Politics: A Rethinking," *J. Law & Religion*, 23 (2007-8), 1.

⁹⁰ Some biblical scholars note that the Genesis account of imago Dei turned its back deliberately on the ancient Babylonian proposition that the king alone was created in the image of God and that this status underwrote his exercise of regal power. We now see this regal image in every man. So, to the extent that it is exercised politically, the image of God is necessarily represented by the participation of millions in a polity not just one person.

the challenge of climate change—might arise anyway, irrespective of our forms of mid-level political organization. As I said, many of these tasks are urgent, in the sense of immediately compelling. If we do not quickly organize to get them performed, they will not be performed: and great loss or harm may result. Responding to these challenges, I believe, requires some sort of cooperation through the medium of law and institutions, on an international scale.⁹¹ One way or another, attention has to be paid to their performance. Responsibility must be taken for the overall discharge of the proper tasks of governance in the world at large, including the governing of relations between the entities that are taking responsibility for discharging the proper tasks of government in each particular country. That is the major premise.

But my view is that a Christian will be in principle agnostic about the institutional facilities through which law operates to frame our discharge of these responsibilities.

8. World government

But should we not dismiss out of hand the prospect of world government? I wonder. If it turned out that order in the world could be secured, *and could only be secured*, under the auspices of empire, or a world state, or under the auspices of an international rule of law that preempted and crowded out national sovereignty, then we should presumably render unto Caesar (now in a more or less literal sense) whatever is necessary for Caesar to do the requisite work (unless that is incompatible with rendering unto God that which is God's).

Oliver O'Donovan maintains that Christians should oppose any such idea of world government. "In securing the total tradition of humanity, we are in a context in which it is out of place to invoke the commanding role of government," though not, he adds, the commanding role of law.⁹² But the reasons he produces seems to me to add little to familiar Kantian apprehensions, in *Perpetual Peace* and elsewhere, about the extent of empire and possible global despotism.⁹³

Professor O'Donovan says that every government, however, imperial, loses its identity if it cannot contrast itself with others. "Whatever their claim to universality, in practice all empires need [to] define their identity by excluding people who live beyond them."⁹⁴ But why should this sort of definition of identity be judged desirable, given what he has said elsewhere about the connection

⁹¹ We have talked about the Christian basis of this assumption at our earlier sessions.

⁹² O'Donovan, *Desire of the Nations*, 73

⁹³ Kant, *Toward Perpetual Peace* (1795), and ___ [?]

⁹⁴ O'Donovan, *The Ways of Judgment*, 214.

between pride and faction and the formation of communal identities?⁹⁵

O'Donovan also says that

it is essential to our humanity that there should always be foreigners, human beings from another community who have an alternative way of organizing the task and privilege of being human, so that our imaginations are refreshed and our sense of cultural possibilities renewed.⁹⁶

But he does not explain why that sense of renewal cannot be nourished by the vast diversity of minds and practices, the vast civil society, that would exist within an integrated world community.

He does worry, quite rightly, about the hubris of empire: “The titanic temptation which besets collectives needs the check of a perpetual plurality at the universal level.” And he tells us that, whatever Paul’s acquiescence in or appeal to the pax Romana, the biblical tradition is fundamentally one that sees empire on a world scale as a “bestial deformation.” The biblical tradition awaits the collapse of the titans, and the emergence, as he puts it, of “[a] family of humble nations [creeping] out from the wreckage of empire.”⁹⁷ The humility of nationhood compared to world empire is his strongest suit. This is part and parcel of O'Donovan’s consistent counsel in favor of modesty in our aspirations for international law. As I said last week, in ordering the world we are not building the new Jerusalem. That point is well taken.

The idea of world government is frightening to most people: black helicopters, blue helmets, and comprehensive disenfranchisement of everyone except the bureaucrats in Geneva or at the easternmost end of 42nd Street in New York. We should recall, however, that the idea of a world state is in many respects an ambiguous phrase, and along several possible dimensions it is a matter of degree.

So let us ask: is any movement at all in the direction of world government inappropriate? If we define states in Weberian terms, then we can think of a continuum between a world government having no armed forces of its own all the way through to a tightly controlled organization exercising a monopoly of force in the world.⁹⁸ We are so close to the left-hand pole of this spectrum—for as things stand international institutions barely have the wherewithal to exercise force at all in the world, let alone monopolize it, though the UN Charter does seek a degree of

⁹⁵ Ibid., 212. See also *The Desire of the Nations*, 235.

⁹⁶ O'Donovan, *Desire of the Nations*, p. 268.

⁹⁷ Ibid., p. 71.

⁹⁸ I am thinking of the definition of “state” in Max Weber, “Politics as a Vocation,” as an organized entity that possesses a monopoly on the forms of legitimated violence.

control. We are so close to minimalism in this respect that it would be a little hysterical to oppose any movement along the spectrum at all on the grounds of titanic totalitarianism. And as for other definitions of the state—Kelsenian definitions in terms of law, or institutional definitions, it is not at all clear that O'Donovan has provided any reason for concern about initiatives that look for the improvement and improved coherence of the institutional apparatus that already exists.

There are and need to be international legal institutions and processes—ranging from the UN and its affiliates, the ICJ, international arbitration arrangements, treaty regimes, diplomatic conventions, even the WTO and GATT, not to mention various *ad hoc* agencies and tribunals. Each of these in its way takes responsibility for some aspects of global governance. But—and this is important—these processes and agencies have *not* been organized in a way that ensures that overall responsibility will be taken for every aspect of necessary global governance, i.e. in a way that ensures nothing will fall through the cracks, as it were. These processes have *not* been organized in the image of comprehensive state sovereign responsibility, in the way that the institutions and processes of a national government are supposed to have been organized.

Every so often international organizations and jurists undertake some initiative to fill these gaps. The setting up of the International Criminal Court, for example, was an attempt by the international community to begin replacing the haphazard *ad hoc* character of entities like the International Criminal Tribunal for the Former Yugoslavia (ICTFY) with some more comprehensive and legitimately-grounded system of criminal law accountability.⁹⁹ And similarly the attempt since 1945 to develop an overall framework for regulating the use of armed force, under the auspices of the UN Charter and the Security Council, has made much progress in a Weberian direction—by which I mean, not that it has put together an overwhelming armed force, but that it at least purports to *monopolize the legitimation* of the deployment of armed force in the international arena. There is—in these various contexts—an active sense of general responsibility that begins to answer to principle of international responsibility. And further improvement in that direction should surely be welcomed.

The strongest suit of those who oppose world government in any more robust sense is the simple pragmatic point that *it ain't going to happen*. For the time being, and in present circumstances, primary responsibility for the existence, integrity, comprehensive coverage, and overall effectiveness of global governance rests with the community of independent states, acting as multilateral law-makers,

⁹⁹ For concerns about the legitimacy of ICTFY, see the discussion of the jurisdictional objection in the *Tadic* case, in James Crawford, “The Rule of Law in International Law,” 24 *Adelaide LR* 3 (2003).

occasional enforcers, custom-generators, and sponsors of international courts and other institutions.

Some say we live in a ‘post-sovereignty’ world. The reality of national sovereignty is undermined to a considerable extent by global developments, by regional political organization, by international institutions (to a certain extent) as well as by the growing disparity of power among nation-states themselves. Maybe this means sovereignty no longer exists. Robin Lovin said in a memo to our working group:

If the economic requirements of a global market or established practices of international intervention create inherent limits on the exercise of sovereign power, does this mean that sovereignty no longer exists? Or only that the scope of sovereign power has changed?¹⁰⁰

I am not sure how to answer Robin’s question. But I *am* sure that not every move away from sovereignty enhances the prospects for international order. *Some make order and justice less likely* as global markets replace whatever shreds of conscience a convention of empowered sovereigns might once have possessed.

9. Strong but self-limiting sovereignty

Whether we like it or not, the situation is that, *at best*, we are stuck with O’Donovan’s vision of law, at the international level, without state at the international level. “The appropriate unifying element in international order is law rather than government.”¹⁰¹ For the time being, it is the responsibility of nation-states—jointly and severally—to make international law and to make it work; and to create international institutions and to make them work.

So: can the responsibility for global order be discharged by nations, acting together, if a little willfully and in a prickly way that is jealous of their sovereignty? Can it be done under the auspices of a strong doctrine of sovereignty? I think it can, provided that the prickly foot-stamping mantra of sovereign independence—“We’re not going to be bound unless *we* say so!”—is matched by a studied awareness of the point that unless we, the nations of the earth, voluntarily take responsibility for doing this, it probably won’t be done.

¹⁰⁰ To: CTI WORKING GROUP ON INTERNATIONAL LAW From: 11/10/2008

¹⁰¹ *The Desire of the Nations*, p. 72. See also *ibid.*, 236: “Law holds equal and independent subjects together without allowing one to master the other. The last and greatest of the accomplishments of Christendom was the conception that there exists, not merely as an ideal but in fact, an international law, dependent on no regime ... but on the Natural Law implanted in human minds by God and given effect by international custom and convention.”

10. God-like sovereignty; God-like limitation

It is sometimes said that the modern sovereign state was conceived in the image of a sovereign God, and that doctrines of sovereign illimitability must therefore be combatted by conceptions of a self-limiting God. That is, sovereign illimitability needs to be countered by a conception of God's sovereignty that downplays theological voluntarism and emphasizes the covenantal redemptive ways in which God might be thought to have bound or limited himself. God created this dangerous role model, therefore God has to get us out of it by presenting Himself in a more moderate light. Or, as Robin Lovin put it, "just as theology contributed much to the idea of sovereignty as absolute authority at the beginning of the modern period, theology may here be useful in understanding self-limitation."¹⁰² Members of our working group were very taken with the second of these ideas. In my view it is all a big distraction. Let me briefly explain why.

First of all, it does not seem to me to be true that the modern or even the early-modern sovereign state can be understood as an image of the divine sovereignty of late medieval voluntarist theology, in which God acts with absolute freedom, unrestrained by reason, God's own nature, or the order of goods which God has created.¹⁰³ Early modern theorists did not model their conceptions of absolute sovereignty on what they thought was the sovereignty of God.¹⁰⁴ Apart from some occasional decorative remarks to this effect—Hobbes's remarks about a "mortall god"—the argument for internal sovereignty in Bodin and Hobbes (and their argument for absolutist) was utterly functional and pragmatic, not theological.

Also, if it *were* true, it would be true at most about *internal* sovereignty—absolute internal sovereignty along the lines of Hobbes's or Bodin's conception. That's certainly where Hobbes used the rhetoric of a "mortall God." But how could the analogy possibly work for external sovereignty in the international sphere?—the conception of god-like sovereignty would have to be polytheistic.

I don't doubt that there have been instances of idolatrous sovereignty-worship, and I shall say something more about them at the very end of this lecture. But actually the main problem with sovereignty in the international realm has not been with getting people to embrace the idea of a self-limiting sovereign. In fact that is something which I think all modern defenders of state sovereignty accept. They all accept that states may enter into covenants and treaties and that they are

¹⁰² To: CTI WORKING GROUP ON INTERNATIONAL LAW From: Robin Lovin 11/10/2008

¹⁰³ The language here is adapted from Jean Bethke Elshtain, *Sovereignty: God, State, and Self* (New York: Basic Books, 2008). Elshtain holds the position I am criticising here.

¹⁰⁴ The mistake usually involves carelessly cobbling together three or four different political themes that have "God" in them: divine right of kings; sacral (anointed) aspect of kingship; and the medieval doctrine of the king's two bodies. None of these by itself intimates any analogy between the king's sovereignty and God's sovereignty; and the combination of them does not do so either.

bound by them. The problem is getting them to accept the idea of a nation being bound by an international norm that does not reflect voluntary self-limitation—by some other source of international law such as *ius cogens* or customary international law. For that problem any theological work that we do on the idea of a voluntarily self-limiting God is useless.

So—although it is theologically fascinating to consider the idea of a self-limiting God—self-limitation through covenant in God’s dealings with His chosen people and in His redemptive promises declared unto mankind in Christ Jesus our Lord—and although it is interesting to consider Luther’s distinction between *deus revelatus*, God as revealed in his covenants, and *deus absconditus*, the real sovereign God that lies hidden beyond, who is always capable of acting arbitrarily, and although we might want to applaud Karl Barth for his denunciation of that distinction, his assertion God’s sovereignty *is* his word, in which he has bound himself in Jesus Christ¹⁰⁵—although all of this is of staggering theological interest, it is of very little use and relevance in the theory of international law, where, as I said, the sovereign is not conceived in the image of God in the first place, and in the second place the possibility of sovereign self-limitation is freely conceded.

I own that there is a little bit more to say about this. Certainly our understanding of the sanctity of treaties can be enhanced by an understanding of a covenantal God. I will talk at length about the sacredness and solemnity of treaties on Wednesday. We will have some fun with this, with everyone from Abram to Nietzsche. But the idea of self-limitation *per se* is not itself the problem—though the seriousness of the resultant obligations may be.

11. Sovereignty and national interest.

A much more intractable problem has to do with the issue of national self-interest. Christians with their sense of universal obligation will be particularly alert to the tendency of nations to sluice—this is Reinhold Niebuhr’s phrase, from his 1932 classic, *Moral Man and Immoral Society*—to sluice the entirety of a people’s altruism into the reservoir of nationalism.¹⁰⁶ Niebuhr said this about the paradox of patriotism,

The paradox is that patriotism transmutes individual unselfishness into national egoism. Loyalty to the nation is a high form of altruism when compared to lesser loyalties and more parochial interest. It therefore becomes the vehicle of all the altruistic impulses, and express itself, on occasion, with such fervor that the critical attitude of the individual toward

¹⁰⁵ Get cites from Christiane Tietz’s paper.

¹⁰⁶ Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics*

the nation is almost completely destroyed. The unqualified character of this devotion is the very basis of the nation's power and of the freedom to use the power without moral restraint. Thus the unselfishness of individuals makes for the selfishness of nations. That is why the hope of solving the larger social problems of mankind, merely by extending the social sympathies of individuals, is so vain.

George Kateb has said something similar in his essay on patriotism.¹⁰⁷ And we are familiar too with a similar phenomenon in the case of devotion to family which, as David Hume noted, may be a “noble ... affection,” yet “instead of fitting men for large societies, is almost as contrary to them as the most narrow selfishness.”¹⁰⁸

Niebuhr is doubtful that this paradox can be resolved. I suspect that if it can, the key will lie as much in the rather thin and diffident sense of nationhood (among potential enemies) that I defended at the beginning of this lecture as in any thesis of Christian love for neighbour that transcends national boundaries.

12. Sovereignty and Human Rights

This brings me to the final thing that I want to discuss this afternoon. One of the key issues in the confrontation between sovereignty and international law is the issue of a sovereign state being constrained from the outside by international human rights law in the way it treats its own citizens or subjects.

The response from many dictatorial regimes when they are reproached in this way is to: “This is none of the world's business. This is an internal matter between us and our citizens.” And some non-dictatorial regimes say this as well. There was a furious denunciation in these terms from within the United States when foreign and international law were appealed to, a few years ago, to justify a judicial court decision banning the juvenile death penalty—that is, the execution of young men for crimes committed while they were children.¹⁰⁹ And a dispute in similar terms is raging in the United Kingdom as we speak, over a decision by Grand Chamber of the European Court of Human Rights, telling the British government that it is not permitted to continue its blanket ban on prisoners' voting, because that is at odds with the terms of the First Protocol to the European Convention on Human Rights.¹¹⁰

One immediate answer to the sovereign response is to say, “Well, it may once not have been the world's business,” but it has been made the world's

¹⁰⁷ Kateb, “Patriotism and other Mistakes,” in a book with the same title.

¹⁰⁸ Hume, *Treatise*, III, ii

¹⁰⁹ *Roper v. Simmons* (2005)

¹¹⁰ Cite to *Hirst, No. 2* decision, and various consultative documents from HMG.

business by treaties that the offending nation has entered into, in the case of the United Kingdom on prisoners' voting by the treaty that established the European Convention of Human Rights (ECHR), both of which were signed and ratified by the UK. Article 46 of the ECHR represents an undertaking by the UK, like all other "High Contracting Parties, "to abide by the final judgment of the Court in any case to which they are parties." This is a treaty obligation, voluntarily assumed, and owed to all the other states that are party to the relevant conventions and covenants as a matter of contractual good faith.

But it is not a sufficient answer—because many international jurists would say that states are bound by the fundamentals of human rights law, irrespective of their treaty undertakings. Some regard human rights conventions as "declaratory of universally binding international custom,"¹¹¹ perhaps understood as *ius cogens* norms—and some have suggested even that these norms are legally binding simply as natural law or divine decrees—a position I shall consider in detail on Wednesday. Maybe there is no *ius cogens* norm against the juvenile death penalty or felony disenfranchisement, but there are *ius cogens* or natural law-based norms against torture, the use of death squads, and aggressive war. So we have to consider the possibility that states may be bound on some of these matters against their will.

In terms of the framework that I have been using, we have questions to ask about global responsibility. Is the issue of human rights—so far as it relates to the way sovereigns treat their own subjects—is this something on which we *need* global governance? I take it that no one doubts that governments ought to be constrained by fundamental rights within their own community: leaders are answerable to God for their violations and to their own people, and *in extremis* their own people, who have the responsibility for constituting just government in their territory, are authorized and perhaps required to resist or overthrow a regime that is oppressive in these ways. The responsibility is primarily internal. This is a point that has been made many times by Michael Walzer concerning humanitarian intervention¹¹² and it's a point that can be made about human rights generally. But why is it a matter of global concern?

Some will say: it is because the relevant standards (or rights) that ought to be enforced in each country are universal and objective. The Christian can certainly accept that, and it is surely important for the world as a whole to bear witness to the fundamental requirements of decent treatment of people, the fundamental

¹¹¹ According to my NYU colleague, Ted Meron, in his book *Human Rights and Humanitarian Norms*, p. 35, "many of the provisions of these Conventions [he meant the Geneva Conventions] , following as they do from compelling considerations of humanity, are declaratory of universally binding international custom"

¹¹² *Thinking Politically: Essays in Political Theory* by Michael Walzer, selected, edited, and with an introduction by David Miller, pp. __.

requirements of human dignity—to communicate loudly and publicly to every sovereign that these demands are not just the perverse contentions of impudent troublemakers but a normative heritage that stands now, in the broad recognition and solemn agreement of the whole world.

Some will say that, even if we accept this, it doesn't follow that a global consensus on the meaning of particular human rights is correct and that the law of any individual nation is wrong to the extent that it is at odds with that. Considered as moral propositions, human rights are universal. But universalism is not a consensus notion; it is an objective truth notion; it says that the *truth* is the same everywhere, whatever people happen to believe. Uniformity doesn't guarantee that we have all got the right answer; all it means is that we have the same answer. Certainly this is something that humility compels us to recognize on questions like (say) the juvenile death penalty. The outliers may be right and the consensus may be wrong. If God or nature countenances the death penalty at all, it may be better for it to be administered in the case of young murderers like Christopher Simmons on the basis of case-by-case decision-making by juries rather than by the per se rule that the international community seems to favour. At least for these cases where good faith disagreement seems possible, it is not clear why, in the words of the preamble to The Universal Declaration of Human Rights that “a common understanding of these rights and freedoms is of the greatest importance for the full realization” of the pledge that Member States have given to one another, to promote universal respect for human rights.

You might think that is a culpably conservative position, selling short our liberal convictions in the name of fallibility. So be it. There is more to be said about the value of treating like cases alike in the world, in the realm of human rights: I have tried to say some of it in a forthcoming book based on my 2007 Storrs Lecture at Yale, entitled *Partly Laws Common to All Mankind*.

Let me mitigate by saying this. One thing that I hope will not be controversial is that whatever attitude we take towards fallibility and commonality in this area, we cannot any longer accept the old-fashioned contention that respect for sovereignty, in and of itself, requires us to *mute* or *suppress* our respect for the individual victims of sovereignty—our respect for the people whose fundamental rights we judge are clearly being violated by their government. We may counsel “hands-off” for reasons of prudence, or out of respect for the differences revealed as between democratic decision-making in our country and democratic decision-making in another country on issues where we know there is room for good faith disagreement. But we must not abandon our concern for the victims of tyranny — our public and lawful concern—or deafen ourselves to the cries of the oppressed simply on account of our respect for the tyrant's sovereignty.

Formalistically, some jurists still say that the only subjects of international law are national sovereigns—international law is about sovereigns’ rights against one another, not the rights of natural individuals. They say that the people of the world are rather like livestock belonging to the sovereigns or chattels, objects whose interests are of no inherent concern to international law. I take it that nobody today wants to be associated with that sort of offensive pedantry, at least outside the towers of narrow scholasticism. Certainly a Christian conception of international law will never lose sight of the fact that, ultimately, the subjects of real concern are individual men and women, billions of them, for whose interests sovereigns are at best trustees (both internally and externally). As trustees, they are supposed to operate lawfully. They are supposed to operate in a way that is mindful that the peaceful and ordered world that we seek in international law is something sought not for the sake of national sovereigns themselves, but for the sake of the millions of men, women, communities, and businesses who are committed to their care. These millions are the ones who are likely to suffer if the international order is disrupted; they are the ones whose prosperity is secure when the international order is secure. Their well-being, not the well-being of sovereign nation-states, is the ultimate *raison d’être*.

The cry of the oppressed is not something that can properly be drowned out by the proud majesty of a sovereign, or something that can be dismissed as impudent and troublesome by a realist’s enthusiasm to flatter a sovereign with the shock and awe of his power. Sovereign dignity is no doubt important, but Emeric de Vattel spoke nonsense when he said once that it is founded on the same principle as individual dignity. Sovereigns have great responsibilities and they should be credited for those when they discharge them. But ultimately, in the Christian ontology, the dignity of a sovereign is minuscule, compared to the dignity of one human individual. It is individual men, women, and children who are—each of them—created in the image of God. (I believe that Christians should have nothing to do with the view put forward by the young Rawls and others that it is communities that are created in the image of God, because the godhead itself—the Holy Trinity—is a community.)¹¹³ Human individuals—from the Queen and the Archbishop of Canterbury to Colonel Rainborough’s “poorest he that is in England”—are created in the image of God and, as Justice McLean said famously, in his dissent in the *Dred Scott* case, they are nobody’s chattel: each of them “bears the impress of his maker and is destined to an endless existence.”¹¹⁴

¹¹³ Rawls, *A Brief Inquiry into the Meaning of Sin and Faith* (2010). See also JW, “Persons, Community, and the Image of God in Rawls’s Brief Inquiry,” presented at APA December 2010, available at <http://ssrn.com/abstract=1726128>

¹¹⁴ *Dred Scott v. Sanford*.

Compared to that, the lives of sovereign entities are like those of insects, the flies of a summer. The image is not from Edmund Burke, but from C.S. Lewis's book, *The Weight of Glory*. Lewis gives us wonderful language to embrace the point that, on the Christian view, human individuals are entitled to recognition as immortals—people whose actions and whose treatment will resonate forever, long after the empires and sovereigns that mistreated them have crumbled to dust. It is a serious thing, said Lewis,

[t]o remember that the dullest, most uninteresting person you talked to today may one day be a creature which, if you saw it now, you will be strongly tempted to worship, or else a horror in the corruption, such as you now meet, if at all, only in your nightmares. All day long, we are in some degree helping each other on to one of these destinations. There are no ordinary people. You have never talked to a mere mortal. Nations, cultures, arts, civilizations: these are mortal, and their life is to ours as the life of a gnat. But it is immortals with whom we joke, work with, marry, snub and exploit: immortal horrors or everlasting splendors.¹¹⁵

That is the Christian view of the comparison between sovereign and individual in point of dignity—mortal functionary, on the one hand, and, on the other hand, someone who bears the impress of his maker and is destined to an endless existence.

I don't claim that there is no other way of arriving at this comparison. I refer back to what I said at the beginning of Lecture 1. We are talking here about overlapping consensus. There are other lines of reasoning that overlaps with the Christian conception of the overwhelming dignity of the human individual—from the Stoic to the Kantian tradition. As I said last week, the point is not to claim Christian insight as indispensable. It is to assure our fellow citizens that we too can come to this point of consensus, and that the impression conveyed to the contrary by those who corrupt their Christian moral ontology with a heretical patriotism should be disregarded. Or rather, not disregarded, but understood in this light: that when Christians claim (as some do, in this country) that their loyalty to country must deafen themselves to the cries of the victims of torture and other violations—when they claim this, they may make an exhibition of themselves as good Americans in their denigration of internationally-recognized human rights, but there isn't a shred of scripture or a patch of human doctrine to support this order of priorities.

¹¹⁵ CS Lewis, *The Weight of Glory*, 14-15.

Lecture 3: Wednesday, March 30, 2011
THE SOURCES OF ORDER: WHY NATURAL LAW
IS NOT ENOUGH

1. Christian positivism

We started with St. Paul in Romans 13. Let's finish with him too. When Paul counselled submission to the powers that be, including powers of world government exercised from Rome, he said that rulers are a terror not to good works, but to evil. The earthly ruler, Caesar,

is the minister of God ... for good. ... [I]f thou do that which is evil, be afraid; for he beareth not the sword in vain: ... he is ... a revenger to execute wrath upon him that doeth evil.¹¹⁶

A jurist would say that this is the classic bet both ways—betting on positivism and betting on natural law. Like a good positivist, Paul talks about the ruler bearing the sword, issuing his commands, and imposing his sanctions. But like a good natural lawyer, he says the ruler does God's work in this, supporting the good and punishing evil, categories that are—in the logic of Paul's teaching here—established by God and not by the will of man. It leaves out of the picture the possibility that Caesar may permit what is evil, and forbid what is good or morally necessary. It is exactly like the Blackstonian eclecticism that exasperated Jeremy Bentham some seventeen hundred years later. Municipal law, said William Blackstone in his *Commentaries on the Laws of England*, is properly defined to be “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”¹¹⁷ A rule of civil conduct prescribed by the supreme power in a state—that's the positivist element. Commanding what is right and prohibiting what is wrong—that's the element of natural law, suggesting that civil law necessarily conforms to natural law categories of good and evil.

Well, as I said in my first lecture, I am a sort of Christian positivist. And in these lectures I take myself to be giving a religious account of the positive law that operates in the international realm. Today, I am going to talk a lot about treaties, for treaties are by far the most important positive source of international legal obligation. But first let's talk about natural law.

There is an old, old dispute about whether international law is composed exclusively of positive law, based on human will and human agreement, or

¹¹⁶ Romans 13: 3-4.

¹¹⁷ Cite to Blackstone and Bentham.

whether some of it is derived directly from (or is even identical with) the law of nature.¹¹⁸ By natural law, I mean that part of God's law that is accessible to reason and doesn't require revelation. People think, for example, that the rules against killing and torture and rape are like this: their wrongness can be figured out, from reflection on human nature without reference to law-books, statutes, or precedents; and without reference to Bible either. So in the international realm, the natural-law position would be that there are certain principles that apply to states and restrict what it is right or permissible for them to do—like the principle forbidding aggressive war—which we can access simply by figuring things out, without having to appeal to the text of a treaty or the content of a custom. God wills that we should not engage in aggressive war; this is part of God's will that we can figure out by moral reasoning; and the conclusion applies directly as international law without the mediation of custom, treaty, or any form of positivity.

That's the natural law position. The title of today's lecture suggests that I think natural law is not enough for a working body of international law. I think everyone agrees with that. There have to be treaties as well and there have to be customs. But actually I want to defend a more aggressive position. I want to argue that there is no area of international jurisprudence where natural law, standing nakedly as such, can operate directly as law, without the mediation of treaty or custom. And I want to argue that there is something theologically significant in that fact.

It may seem puzzling this position is being adopted in the context of a religious account. The idea of natural law is clearly associated with Christian tradition, in the thinking of Thomas Aquinas and others: it is, as I said, that part of the eternal law of God that is accessible to human reason. So surely a Christian account would want to give greater prominence than others to natural law as a source of international obligation. In fact many secular jurists, like Hersch Lauterpacht, accord a significant place to natural law in international jurisprudence.¹¹⁹ They say it necessarily plays a greater role there than it does in

¹¹⁸ This language is taken from a characterization of the debate in Noel Malcolm, *Aspects of Hobbes*, p. 439.

¹¹⁹ Lauterpacht stated: "The significance of the law of nature in [Grotius'] treatise is that it is the ever-present source for supplementing the voluntary law of nations." --- Lauterpacht, "The Grotian Tradition in International Law," *23 British Yearbook of International Law* 1, 21-22 (1946). Also Lauterpacht: "The fact is that while within the state it is not essential to give to the ideas of a higher law-of natural law-a function superior to that of providing the inarticulate ethical premiss underlying judicial decisions or, in the last resort, of the philosophical and political justification of the right of resistance, in the international society the position is radically different. There-in a society deprived of normal legislative and judicial organs—the function of natural law, whatever may be its form, must approximate more closely to that of a direct source of law. In the absence of the overriding authority of the judicial and legislative organs of the state there must assert itself-unless anarchy or stagnation are to ensue-the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of states. This explains the pertinacity, in the international sphere, of the idea of natural law as a legal source." (ibid. 22-3)

municipal law. Lauterpacht's saying that is not necessarily born of any religious commitment. So if even the secular jurists can say this, isn't there something odd about this Christian thinker, who has been talking all week and last Wednesday too about God's command to order the world, refusing to countenance natural law as the touchstone of global legality?

2. Varieties of natural law jurisprudence.

I am conscious that in this I am talking a position different from that of my brothers and sisters in the Theology and International Law Working Group that has been meeting at the Center for Theological Inquiry these past five years. There is pretty much a consensus in the Working Group on natural law as a major constituent of international law.

And it is not just the natural law of secular rationalism either—i.e., the natural law that Grotius said in his *Prolegomena* we could accept even if (*etiamsi*) we were to grant—what cannot be granted without the greatest wickedness—that there is no God or that he takes no interest in human affairs. Members of the International Law Working Group were convinced that the version of natural law on which international law's doctrines and authority are (partly) based is a jurisprudence that is religious in its spirit and provenance. Even if not based directly on revelation, it is best understood (and may be intelligible only) as a part of God's law, accessible to reason imbued with respect for His order—and indeed fulfilled in the coming of Jesus of Nazareth, the “light of the nations,” in whom God the Father has enabled humankind to share in the divine law. The group spent a lot of time embracing a Christological account of natural law.

Well, with great respect, I don't buy it—not the Christology (in this context),¹²⁰ not the view that identifies global legality with natural law generally. I am not denying the existence of natural law. Lassa Oppenheim, one of the grand old men of international law, repudiated it. He acknowledged that international law needed natural law as a set of trainer wheels in its infant stages. But now it has grown up: “We know nowadays that a Law of Nature does not exist.”¹²¹ I share with Oppenheim an enthusiasm for “a positive Law of Nations” but not on account of any ontological scepticism. Natural law is there, it is ordained by God, it is not going to go away, and it helps to make sense of what we do (and what we ought to) so far as order in the world is concerned.

¹²⁰ For suspicions about the Christological aspect, consider the view of that 1854 Hulsean Lecturer from Cambridge whom I quoted in the first of these lectures: “[O]ur Religion as it came out of the hands of its Founder and His apostles ‘being completely abstracted from all views either of ecclesiastical or civil policy,’ can be expected to contain but few precepts immediately applicable as maxims of international Law.” Kennedy, p. 7.

¹²¹ Oppenheim, *International Law*, 9th edition, p. 92.

It does help explain the importance of having positive law. Indeed this has always been one of the most important things that natural law theory does. The contribution that natural law makes to global legality is to explain the need for it to take the form of positive law, and explain the ways in which different sources of positive law (treaty, practice, custom, judgment) resonate with deeper moral, spiritual and ontological concerns. (Indeed natural lawyers are usually better at explaining the indispensability of positive law than positivists are. The latter are afraid of seeming to be interested in any element of value when they wear their jurisprudential fools-cap.) But it cannot apply directly, as international law, without the mediation of treaty and custom.

Nor is my scepticism born of any realist suspicion of the idealistic character of the aspirations of natural law. Marti Koskenniemi once wrote that international law “should not be thought of in terms of utopian principles, emanating from God's will.”¹²² There is no reason to suppose that natural law is “utopian.” Much of the natural law tradition is quite modest in its aspirations, not leading us on to the new Jerusalem of peace and light, nor offering us Christ-like counsels of perfection (which Grotius for example specifically contrasted with natural law, saying that in the New Testament “a greater sanctity is enjoined [upon] us, than the mere Law of Nature in itself requires”).¹²³ So mine is not a concern about natural law being unrealistic. On the contrary, those who take the position I oppose, those who think we can apply natural law precepts directly, usually do so carefully and judiciously focusing mainly on just a few fundamental norms. But they are still wrong.

I accept that natural law furnishes a number of the substantial concepts that positive law makes use of: *human dignity*, which we talked about on Monday, is a good example, and the correlative ideas of inhumanity and degradation. The positive laws that we have in the international realm give prominent place to this concept, so we can't do international positive law without engaging in moral thinking about dignity. So any positivism here is necessarily a soft or inclusive positivism, in Jules Coleman's sense.¹²⁴

I accept too that natural law helps explain the limits on law in general. There comes a point when an oppressive edict may be too unjust or too deformed in its character to be accorded legal authority. And that will apply in the international realm as much as in the governance of particular communities. I shall come back to that at the very end of today's lecture.

¹²² Martti Koskenniemi, "International Law in a Post-Realist Era" (1995) 16 *Australian Year Book of International Law* 1, at p. 3.

¹²³ Preliminary Discourse in Book I of *The Rights of War and Peace*, §51 (Liberty Fund edition, p. 126). As Robin Lovin has said, natural law does not lead us to ultimate value: it “provides us with human goods, but not with the Good.” (Lovin, “Natural Law and Human Goods” for CTI, Jan 24-5, 2008.)

¹²⁴ Cite to Jules Coleman.

But let me isolate this one view that I reject: it is the view that natural law propositions can constrain states directly in international law without the mediation of treaty or custom. The law we apply is a law that we have to *share*—and the fact is that natural law, for all that has been said so far, does not disclose itself to us on earth in uncontroversial forms. It’s an argument I made in an essay published in a volume edited by Robert George years ago:¹²⁵ the volume was called *Natural Law Theory: Contemporary Essays* and my chapter was called “The Irrelevance of Moral Objectivity,” (It also appeared as one of the central chapters of *Law and Disagreement*.) The idea is that natural law in itself may very well be universal and objective, it may descend from God, it may be consummated in Christ. But we disagree on earth about what it is. And we need positive legal structures that can supersede that disagreement and stand, clearly identified, among us.

3. Hobbes and men that mediate peace

It is not even clear what it would be for natural law to be directly operative in the international realm. I suppose we do have the view of Thomas Hobbes, who said—at the end of Chapter 30 of *Leviathan*—that “the offices of one sovereign to another” are comprehended in the law of nature.¹²⁶ He believed that “Kings, and Persons of Sovereigne authority” are in a state of nature which is a state of war or potential war. They are

in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; ... which is a posture of War.¹²⁷

And, Hobbes said ,

the same law that dictateth to men that have no civil government what they ought to do, and what to avoid in regard of one another, dictateth the same to Commonwealths; that is, to the consciences of sovereign princes and sovereign assemblies

Unfortunately, however, there is “no court of natural justice.” And it has usually been supposed that the Hobbesian governance of nations by natural law is really nothing but anarchy, because it is not safe to follow any of the peaceable recommendations of the law of nature without security, and security is just what

¹²⁵ JW, “The Irrelevance of Moral Objectivity,” in *Natural Law Theory: Contemporary Essays*, Robert George ed. (OUP Clarendon Press, 1992), 158.

¹²⁶ *Leviathan*, Ch. 30. Actually he said they comprehended in the law of nations; but then he added “I need not say anything [about that] in this place, because the law of nations and the law of nature is the same thing.” I will deal with similar equations of these two ideas in section __, below.

¹²⁷ *Leviathan*, Ch. 13.

we do not have in the state of nature.¹²⁸ No doubt, as a matter of desire, “every man, ought to endeavour Peace.” But when he has no hope of obtaining it, “he may seek and use all helps and advantages of war.”¹²⁹ Charles Beitz’s exploration of this Hobbesian position in Chapters 2 and 3 of *Political Theory and International Relations* is extremely helpful.¹³⁰

Of course, Hobbes’s view of what the law of nature requires is not necessarily correct. Others have postulated a less survivalist account. (In general we should resist the fashion of identifying the law of nature with the pronouncements of any philosophical, scholastic or ecclesiastical authority. This is most common in Catholic natural law theory, where invoking natural law often just means quoting Aquinas. What a philosopher writes, even a sainted philosopher, is not itself natural law; what it records is that philosopher’s opinion about what natural law is (which opinion may be wrong)—a point that is probably easier for some to accept in the case of Aquinas than it is in the case of Hobbes. But it applies to both of them).

On the other hand, my fellow fellow at All Souls College, Oxford, Noel Malcolm, has argued that, anyway, Hobbesian natural law is not entirely ineffective in the international realm.¹³¹ He cites the third Law of Nature on Hobbes’s list—“That men performe their Covenants made.” And he points out that, although Hobbes also said that covenants without the sword are but words, he also believed that anyone who made an agreement in circumstances where the other party showed himself willing to abide by it, even in a state of nature, would be a fool not also to abide by it himself. (It is actually one of the most philosophically interesting arguments in *Leviathan*.) Dr. Malcolm also mentions other Hobbesian principles of natural law that seem to apply directly, and in their own right. There are the principles about free trade that are discussed in *The Elements of Law*, and the seventh law of nature in *Leviathan*, limiting the demand for revenge and reparations. And he adds this observation:

There is something very implausible about the claim that Hobbes's laws of nature cannot apply at the international level, given that one of them relates directly to diplomatic practice: his fifteenth law is “That all men that mediate Peace, be allowed safe Conduct.” ... [T]he point of the inclusion of this rule in Hobbes's list was evidently to settle the long-standing dispute about the status of ‘*ius feciale*,’ the special area of international law relating

¹²⁸ Hobbes, *Leviathan*, Chs. 14-15.

¹²⁹ *Ibid.*, Ch. 14.

¹³⁰ Cite to Beitz, *Political Theory and International Relations*

¹³¹ Noel Malcolm, *Aspects of Hobbes*, pp. ____.

to envoys and mediators, by showing how the basic principle of such law could be located within the natural law.¹³²

But there—right there in Malcolm’s last observation—is the rub. The “*basic principle*” of the law relating to envoys and mediators can “be located in natural law.” Fair enough. That is like saying the basic principle of the law relating to homicide can be located within natural law. But the operation of law in the world depends on details. We say the devil is in the details, I want to say God commands us to attend to the details as positive law-makers. That the basic principles *behind* law—national and international – are given to us in our moral thinking, is no doubt true. But the details are all important, and they are man’s work not God’s.¹³³

You see, natural law in the world is never just an application of natural law or moral ideas; it involves specification, or, as the natural lawyers called it since Aquinas, *determinatio*.¹³⁴ Finnis talks about this; so does Robbie George in his essay “Natural Law and International Order,” in his volume *In Defense of Natural Law*.¹³⁵ Moral ideas do not initially present themselves in law-like form, if what we mean by law-like is something that can really work like a law. Real-life laws are complex bodies of articulate doctrine and technical criteria. The layman sometimes

¹³² In all this, Malcolm takes himself to be criticizing Beitz’s book, cited above in the last note but one. But Beitz is addressing a well-known construct called Hobbesianism, which is not necessarily the same as Thomas Hobbes’s own particular views.

¹³³ For further elaboration of this theme of devils and details, think of the lines attributed to Thomas More in Robert Bolt’s play, *A Man for all Seasons*:

MORE ... The law, Roper, the law. I know what's legal not what's right. I'll stick to what's legal.

ROPER Then you set man's law above God's!

MORE No, far below; but let me draw your attention to a fact -- I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. ... But in the thickets of the law, oh, there I'm a forester. I doubt if there's a man alive who could follow me there, thank God . . . (*He says the last to himself*)

ALICE (*Exasperated, pointing after RICH*) While you talk, he's gone!

MORE And go he should, if he was the Devil himself, until he broke the law!

ROPER So now you'd give the Devil benefit of law!

MORE Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER I'd cut down every law in England to do that!

MORE (Roused and excited) Oh? (*Advances on ROPER*) And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat? (He leaves him) This country's planted thick with laws from coast to coast—man's laws, not God's -- and if you cut them down -- and you're just the man to do it -- d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake.

¹³⁴ Aquinas cite.

¹³⁵ George, *In Defense of Natural Law* OUP 1999. Finnis in NLNR; JW in “Torture, Suicide and Determinatio,” *American Journal of Jurisprudence* (2010).

complains that cases in law are won or lost on “technicalities.” But law-making is largely a technical matter, with all sorts of devices that look counter-intuitive to the layman but which are necessary in order to ensure administrability, in order to take into account issues of procedure and fairness, and in order to allow any given norm to take its place in a coherent *corpus juris*, the complex and multi-faceted body of law as a whole.

So, for example, in the rule against killing, details have to be settled; elements of the offense defined, degrees of homicide distinguished, excuses and justifications laid out, rules of evidence stipulated, , presumptions and burdens of proof laid down; bright lines drawn; operationalized criteria established; and so on. As Professor Finnis has rightly observed: that is why ‘Thou shalt not kill ...’ is “legally so defective a formulation.”¹³⁶

And so equally for Noel Malcolm’s Hobbesian example: the principle of allowing safe conduct to men that mediate Peace. Hobbes’s 15th principle may be what lies behind the usages and practices of diplomacy. But *what* it lies behind is a complex manifold of positions.

The idea of envoys and mediators may be given by natural law, but the details of heraldry, diplomacy, and the safe-conduct of men that mediate peace are highly technical and technical for a reason—namely, that they have to do their work in an environment which ranges from suspicion, through mutual incomprehensibility all the way to outright hostility. So we have all sorts of technical rules about flags of truce and their color and we norms outlawing their treacherous deployment and their perfidious violation.

For diplomacy, we have the great 1961 Vienna Convention on Diplomatic Relations with its details of the offering and the acceptance of diplomatic missions, the size of missions, the niceties of diplomatic rank (ambassadors, nuncios, internuncios, high commissioners, and so on), the status of diplomatic bags, various forms of diplomatic immunity, the category of *persona non grata*, and so on. Indeed, this convention, together with its predecessor, the Havana Convention of 1928, does not just add detail and determination to a Hobbesian principle, but codifies centuries of custom and practice that have been slowly and patiently adding juridical flesh to the bare bones of natural law insight.

4. Positivism and Custom

Clear thinking about all of this is sometimes impeded by the particular connotations that the word “positivism” has acquired in international law. It tends to be used as a mildly derogatory term, to denote those who limit international law to treaties and who present law in this arena as utterly the product of sovereign will

¹³⁶ Finnis, NLNR, p. __

or at best sovereign consent.¹³⁷ I don't want to denigrate treaties—I have so much more to say about them this afternoon—but in fact the category of positive law is much more capacious than this. It has always included custom as well as statute in the municipal realm—indeed it is orthodox doctrine among municipal-law positivists that the fundamental rules of any legal system must be like customs¹³⁸—and custom as well as treaty in the international realm. The jurisprudence of customary law is a fabulous topic in itself and immensely important for understanding global legality.¹³⁹

So: we have a category of customary international law, and I also want to argue that something like custom plays a pervasive role in understanding other categories of international law as well.

Let's first consider the formal category. I will focus on a well-known case called *The Paquete Habana*—that's the name of a boat—decided by the U.S. Supreme Court in 1899.¹⁴⁰ The context was the American blockade of Cuba in 1898 in the Spanish-American war: two fishing vessels were seized by an American ship, towed to Key West, and condemned to be auctioned as prizes of war. On an appeal by the boat's owners against condemnation, the Supreme Court accepted that it was the custom of the world to protect coastal fishing vessels from become prizes of war in naval warfare. The Court found indications of this principle in the practice of various nations—Spain, Britain, France—and diplomatic and juridical acknowledgment of it as a normative custom going back to the time of Henry IV. Even if it was not in the strict sense immemorial, it had grown into legal authority. Using the words of Sir James MacKintosh, the Supreme Court observed that what may have started out simply as a humane concession to a poor and industrious order men—coastal fisher-folk—slowly and silently mitigating the practice of war, “has received the sanction of time, [and] is raised from the rank of mere usage ... [to] become part of the law of nations.”¹⁴¹ No doubt, over this history, it has been a fragile custom, occasionally disputed, often honoured only in the breach. Still, the Supreme Court saw it as its task to gather and recover the traces of this custom from historical and contemporary practice and precedents, and to consider what juridical authority could be imputed to it in

¹³⁷ Though notice Kelsen's drift away from an initial view which held that international law was founded on *pacta sunt servanda* to a later view that identifies the grundnorm of international law as acceptance.

¹³⁸ Cite to Hart on secondary rules.

¹³⁹ For two fine works, see Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard UP, 1990) and Amanda Perreau-Saussine and James Bernard Murphy, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (CUP, 2007).

¹⁴⁰ *The Paquete Habana; The Lola*, 175 U.S. 677 (1900).

¹⁴¹ Cite.

light of that evidence. Maybe in some such cases, the practice is too fickle or too widely challenged to generate a principle of the law of nations. But among sinful and fallible humanity, no custom will ever be accepted with unanimity or followed invariably in each situation to which it applies. Even in the midst of this inconsistency, one sometimes finds what I called earlier a discernable pattern of normative practice. One country in one conflict may ride roughshod over the rule that the practice is supposed to embody. But if it does so—to some extent—shamefacedly or if its violation is treated by other countries as a matter of criticism, then again we seem to see some normativity emerging. And we should take that seriously as an emergent aspect of global order.

Opinions differ among jurists as to what exactly the formal requirements are for recognizing customary international law—the rule of recognition, if you like—and they may differ too about whether *The Paquete Habana* was rightly decided. But the importance of this category of law is denied only by those who are impatient with every idea of order and restraint in world affairs. And from a religious point of view, it seems to me that this mode of emerging order is particularly significant. Human custom, emerging in the form of scattered beacons of order amidst the sinful and chaotic practices of mankind might, in all humility, be regarded by us as a sturdier and (based on the redemptive circumstances of its emergence) a holier source of law than the supposedly pure insights of a sainted natural lawyer speculating philosophically on the human condition in a way that is closeted from the ways of the world.

5. Natural law and the law of nations

This brings me to the broader and less formal influence that custom and practice has in international law. Sometimes when jurists talk about natural law, what they really seem to have in mind is not philosophical speculation of the kind that Aquinas engaged in, but the discernment of moral observances visibly entrenched in the practice and opinion of mankind.

I said last Wednesday, that this would not be an historical inquiry. But since it is often said that the foundations of international law were laid in the 16th and 17th centuries by natural law thinkers, I think we should look carefully at the use of that term. Sometimes what is called an inquiry into “natural law” is really an investigation of the positive customs and practices of mankind under the heading of the law of nations, *ius gentium*. Often this was regarded as a more reliable guide to natural law than the solitary speculations of philosophers or theologians.¹⁴²

¹⁴² The paragraphs that follow are taken from Jeremy Waldron, “*Ius Gentium*: A Defense of Gentili’s Equation of the Law of Nations and the Law of Nature,” in *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Benedict Kingsbury and Benjamin Straumann eds. (OUP 2011)

So, for example, Alberico Gentili, writing in 1589, explicitly identified the two concepts.

[T]hey say that the law of nations is that which is in use among all the nations of men, which native reason has established among all human beings, and which is equally observed by all mankind. Such a law is natural law. “The agreement of all nations about a matter must be regarded as a law of nature.”¹⁴³

(That last quotation is attributed by Gentili to Cicero.) According to Gentili, we find out what the law of nations is by diligently investigating the laws and customs that are in use in the world; we ask traders, for example, for stories about foreign lands; or we look at history books or bible accounts. What Gentili equates with the law of nature are the laws and customs that have seemed acceptable to all or to most nations, laws and customs which have established themselves in the world not necessarily all at once by any explicit convention, but nation by nation, “successively,” coming to seem acceptable to most men. That’s how we establish what the *ius gentium* is, and to the extent that international law has a natural law component, that is often what the natural law component involves.

I don’t mean to exaggerate. Gentili’s positive inquiry into the law of nations—conceived simply as a body of human law in the world—may certainly also implicate an element of what we would call moral inquiry. Gentili’s position is that we can find out what the law of nations is by inquiring into what has become established successively as law among the different nations of the world. The global practice we discern doesn’t have to be universal. “When one speaks of the usage of all nations,” it doesn’t have to be read as meaning “absolutely every nation.”

[A]s the rule of a state and the making of its laws are in the hands of majority of its citizens, just so is the rule of the world in the hands of the aggregation of the greater part of the world.¹⁴⁴

So it is a sort of majoritarian conception. This is partly because some nations remain unknown to us, and partly because the practice of some nations may have to be regarded as depraved outliers relative to a more general consensus. Gentili’s analogy to the majoritarian practice of municipal law-making makes it sound as though this could be done purely on the numbers. But this is surely not the case. On any given topic, we may have to choose between one partial consensus and

¹⁴³ The attribution is to Cicero, *Tusculan Disputations*, I [xiii.30].

¹⁴⁴ *Ibid.*, __

another, and that choice may be guided by some independent sense of the moral quality of the consensus.

In a stylized case, we may find that 45% of nations allow a successful siege to end in the slaughter of a city's defenders if they were offered, at a late stage in the siege, an opportunity to surrender the city with impunity, while 40% of countries may in these circumstances prohibit the slaughter of defenders who ask for quarter after the city's walls have been breached. Both consensuses are partial. But we may regard the latter as the law of nations, even though it is numerically inferior on account of its embodying a morally superior standard. We trade off the extent of support against the moral quality of the position. At an extremity, of course, this becomes pure natural law moralizing. But in the stylized case I have mentioned, it is more like Rawlsian reflective equilibrium or Dworkinian interpretation of global practice.¹⁴⁵

That's Gentili in the late 16th century. Much the same is true of Hugo Grotius, writing a generation later. Grotius too made progress in the international realm not by asking (as a moral philosopher might) what the natural law values and principles are, but by asking what people have taken them to be and what they have done in the world with the answers that they happen to have come up with. He too was interested in the way something like positive law emerged from the practice of nations, more particularly from those aspects of national practice where nations could be seen to have been asking themselves scrupulously and honorably what is right and wrong (so far as war and peace are concerned). True, his understanding of all this was leavened by his own strong first-order moral sense (his own direct natural law enquiries); but it was never dominated by that sense to the exclusion of any consideration of actual practice and custom. Grotius took practice, custom, and opinion seriously in the way that a pure natural law enquiry cannot. And for that reason he was far better positioned to understand, from a natural law point of view, how positive law might come into existence and flourish in this realm.

We can reflect on all this from a jurisprudential, a moral, and a theological perspective. Jurisprudentially, I come back to something I said in Lecture One. Sometimes when humans are at their most ferocious and hard-hearted, they still manage—perhaps in spite of themselves—to pay homage in their practice to strands of normativity and restraint. It was, I said, the mission of thinkers like Grotius and Gentili to sift through the historical evidence of war-mongering to discern, recover, and make articulate as law, elements of restraint that were there anyway—half-hearted, haphazard, no doubt, impure, certainly, and sometimes insincere. Still that is how legality enters the world.

¹⁴⁵ Rawls, TJ, ___ and Dworkin, *Law's Empire*, ___.

Morally, we say (as philosophers) that we value the purity of moral thought, uncontaminated by the contingencies of history or the vagaries of human practice.¹⁴⁶ But I believe there are reasons for giving the empirical or positive or practice element a more prominent place in moral reasoning than this.

One thing is that, as we develop principles that are to be used normatively, we want to be assured that they are viable. By that I mean that the principles can provide a stable basis of social order and one that it is reasonable (in the sense of not inhumanly demanding). What has actually shown itself to work in the established laws and practices can be very important in this regard. I guess some thought about viability (in the sense of stability or reasonableness) might be attempted by the philosopher from his armchair: Rawls's discussion of stability in *A Theory of Justice* is rather like this.¹⁴⁷ But think of the circumstances that international law sometimes has to deal with. I have in mind particularly the laws of war, where the circumstances in which principles have to operate are quite outside the experience of present generations of moral philosophers. If we are trying to think about codes and principles for application in time of war, we are thinking about situations (and pressures and fears and emotional stresses) with which the armchair philosopher may be utterly unfamiliar. Nothing but a sensitive account of what has actually been tried and what has actually worked in the relevant circumstances will do. I don't mean that the moralist must pander to the lowest common denominator among warriors; but he must be sensitive to what warriors have shown themselves able to bear in the way of restraint in order to determine what the upper bound of duty should be.

More generally, we philosophers may overestimate the value of pure moral thought or pure natural law thinking. It has not always been considered a safe way of proceeding concerning important matters. Many thinkers have grave doubts about isolating it entirely from a proper appreciation of historical experience. As Edmund Burke put it,

We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.¹⁴⁸

¹⁴⁶ (except to the extent that empirical considerations are made relevant by principles which have been themselves established by pure moral reason)

¹⁴⁷ Rawls, TJ, rev. ed., p. 398 ff.

¹⁴⁸ Burke, *Reflections on Revolution in France*

Similar misgivings help explain why, for many jurists, the claim to be engaged in natural law reasoning has so often been a cipher for exploring the law of nations.¹⁴⁹ They thought there were significant limits on what we can learn from “untutored nature,” and the idea that our choices of positive law should be guided and evaluated by moral standards that have been kept pure of any association with (or origin out of) actually existing human legal experience—the idea that they should be guided by natural law in that sense of extreme abstraction—struck them as preposterous.

As for a theological perspective. If I were more skilled in pneumatology, I would suggest that what we have, in the modest appeal to human practice, is an appeal to the Holy Spirit as it has lived and worked among us. I would compare it with the way we understand the history of the church, with the experience of various ecclesiastical forms, and the accreted layering of liturgy, phrase, and ceremony. In both cases, we do God’s work by paying attention to the history of mankind, not by trying to figure everything out for ourselves.

Once again I am heartened to find that I am following here a path pioneered by Oliver O’Donovan, who talks of the consecration by God of “the time-honoured customs and usages of states in their dealings with one another.” The role of international law, he says, “is to help the peoples shape their common inheritance of customary practice and universal moral conviction into a functioning international practice.”¹⁵⁰

6. *Ius cogens* norms

The contrary case, the case of pure natural law as a significant element of global legality, is made most plausible in the case of the peremptory norms we call *ius cogens*. The case is presented powerfully in a new book by Mary-Ellen O’Connell, a member of our working group: the book is called *The Power and Purpose of International Law*. Professor O’Connell concedes that “most of international law is based on positive acts of consent.”¹⁵¹ However, she notes that “positive rules are ultimately limited by *ius cogens* norms.” Examples she gives include the rules against torture, piracy, genocide, terrorism, and aggressive war; no treaty provision is valid if appears to promote acts like these. These norms, says O’Connell, “cannot be changed through positive law methods and must, therefore, be explained by a theory outside the positive law. Natural law provides such a

¹⁴⁹ See the discussion in Tuck, *Natural Rights Theories*, 33-7.

¹⁵⁰ (WJ -? 218-9)

¹⁵¹ Mary-Ellen O’Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (OUP 2008), p. 9

theory.”¹⁵² The application of *ius cogens* norms in international law is, therefore, best understood as the direct application in international affairs of natural law principles.

Mary-Ellen acknowledges that there is a problem of subjectivity: “How do we avoid ... natural law ... being the subjective opinion of any one person—scholar, judge, world leader?”¹⁵³ The text of a treaty at least is identifiable. But natural law is problematic and controversial. “The fact that natural law is derived from revelation and/or reason presents a problem about reaching consensus as to what the law is, once the authority of priest or pope was lost.”¹⁵⁴ Mary Ellen believes that this problem can be mitigated by the work of courts, sifting and developing a common consensus as to what these *ius cogens* norms really are.¹⁵⁵ But of course the further we go in this direction, the more we lose touch with the idea that natural itself operates directly in the international realm.

In fact, conventional wisdom in international law does not identify *ius cogens* norms with natural law. According to Marti Koskenniemi,

[a] norm is *jus cogens*, we think, not because it was so decreed by God, or because according to this or that theory it is necessary for the survival of the human species. It is *jus cogens* if and inasmuch as, to quote Article 53 of the Vienna Convention on the Law of Treaties, it “is a norm accepted and recognised by the international community of States as a whole.” *Jus cogens*, like any other norm, emerges from social life, the observable interaction between States, the meeting of their wills and interests.¹⁵⁶

Even Jean Porter, O’Connell’s colleague at Notre Dame, in her new book, *Ministers of the Law*, which makes a strong case for natural law reasoning, recognizes the importance of a sort of dialogue back and forth between custom and direct moral insight. Though she insists, with O’Connell, that “the common consent of humanity [can] not do away with fundamental rights, or sanitize certain kinds of atrocious conduct,”¹⁵⁷ she accepts that the basic principles that are involved here “are necessarily specified to some degree through the generally

¹⁵² Ibid., 132.

¹⁵³ Ibid., 132.

¹⁵⁴ Ibid., 137.

¹⁵⁵ She says, of “[t]he move to courts to ascertain international law’s higher principles,” that “[s]tates and organizations have established courts for decision-making and empowered them to decide” (138-9), and she cites the transparency of their reasoning as a way of avoiding “[o]verly subjective decision-making” (139).

¹⁵⁶ Martti Koskenniemi, “International Law in a Post-Realist Era,” (1995) 16 *Australian Year Book of International Law* 1, at p. 3.

¹⁵⁷ Porter, *Ministers of the Law*, p. 343.

accepted customary practices of the nations.”¹⁵⁸ In this sense “the law of nations is a product of human reflection, and thus not, strictly speaking, pre-conventional, as the natural law properly so-called is,”¹⁵⁹ or as she also puts it, “the authority of international law ... reflects the authority of humanity as articulated through an ongoing history.”¹⁶⁰ But still the norms that grow up amongst us in this way come to have some of the force that natural law norms would have if they did apply directly: “[N]ow that these norms are, so to speak, in the possession of the human race, we can no longer consider them to be justifiable or reversible through any sound, normatively defensible procedures.”¹⁶¹

I know that Mary Ellen O’Connell and others want to reserve some space in international law that is not just about treaties, and the power of their conception of *ius cogens* norms as natural law is a tribute to the depth of that concern. But what worries me about the position is the implicit assumption that there is something unworthy about a jurisprudence based positively on treaties, on such voluntary undertakings as sovereigns have chosen in their discretion to give to the international community. That’s just contract, is what people seem to be saying here. The assumption seems to be that in a religious account of international law, we ought to be looking for something more elevated. But this may be a mistake, and for the last twenty minutes of the lecture, I want to talk in unapologetically religious terms about the sacredness of treaties.

7. The sacredness of treaties

One initial point to get out of the way. Natural lawyers often point to the very principle of treaties—*pacta sunt servanda*— as evidence of natural law’s pervasive force in international obligation. The positive terms of treaties may generate particular obligations but, they say, the very idea of this sort of obligation seems to be a natural law principle. This is half right. Certainly *pacta sunt servanda* can be seen as a normative proposition of natural law. But it plays the role it does in international jurisprudence because of its wide acceptance among sovereigns. What might have been established in the world was a destructive principle that although promises bind ordinary mortals, they don’t bind sovereigns, because sovereigns have responsibilities that cannot be limited in this way. Or a principle might have gotten itself established—the popes tried to secure it for centuries—that faith need not be kept with infidels or heretics. But the principle that *in fact* got accepted was the general and largely unqualified principle of treaty-keeping,

¹⁵⁸ Ibid., 345.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid., 342.

¹⁶¹ Ibid., 349.

and it is the fact of its broad and emergent acceptance in the affairs of mankind that underpins our respect now for treaties, not the bare natural law principle.

So let's talk about treaties and how we secure them. Are treaties just bargains, just contracts? Alexander Hamilton seemed to think so: he defined treaties in *The Federalist Papers* as "contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith."¹⁶² Well, the wisdom of international jurisprudence has tended to associate with treaty obligations a force that goes well beyond the ordinary sanctity of contracts. WE don't go to war for breach of contract. A contract-breaker may acquire the reputation of a deadbeat and lose his credit; but he doesn't become *humanis hostis generis*, an enemy of mankind. I am thinking of this passage from Vattel's *The Law of Nations*:

As all nations are interested in maintaining the faith of treaties, and causing it to be everywhere considered as sacred and inviolable, so likewise they are justif[ied] in forming a confederacy for the purpose of repressing him who testifies a disregard for it—who openly sports with it—who violates and tramples it under foot. Such a man is a public enemy who saps the foundations of the peace and common safety of nations"

Though we use this hackneyed term "sanctity" indifferently for both contracts and treaties, there is a seriousness to its use in international law that goes way beyond what it evokes in the municipal law of contract. In a way we have to get this much more serious about faith being kept between nations, precisely because we lack ordinary means of enforcement. In other words it is particularly in the realm of international relations that elements of the sacred tend to persist, precisely because "it is in this realm ... that adequate legal procedures ... for enforcing promises are most difficult to find."¹⁶³

It is worth considering the actual practices of sanctification that treaties and treaty-making in our tradition have involved. Until relatively recently, treaties between nations—especially important ones--were accompanied by oaths and laid upon altars so that, in the words of Charles Kennedy, in his 1854 Hulsean Lecture, "a religious obligation to their observance was added to the moral duty of truthfulness," an obligation which the Catholic Church often enhanced by holding out the penalty of excommunication against those who refused to comply."¹⁶⁴ They were often prefaced by invocations to the almighty. For example, in the Peace of Westphalia, the Treaty of Münster (a Peace Treaty between the Holy Roman Emperor and the King of France and their respective allies), began "In the name of

¹⁶² *Federalist* # 75.

¹⁶³ Who is this?

¹⁶⁴ Kennedy, cited in Lecture One, p. 75.

the most holy and individual Trinity...” and so does the Treaty of Osnabrück (between Emperor Ferdinand III and Queen Christina of Sweden and their respective allies). It began in the same way, and went on:

In the Name of the most Holy and Indivisible Trinity. Amen ... the ambassadors and plenipotentiaries of both sides appeared at the established time and place. ... Having prayed for God’s help and duly exchanged their credentials ..., for the glory of God and the security of Christendom, [they have] agreed to the following articles of peace and friendship.

In ancient history: “religious rites [were] the cardinal feature of [the] conclusion” of treaties.¹⁶⁵ Among the Romans, for example, “sacramental forms were absolutely necessary for their validity.”¹⁶⁶ Scholars have speculated that “the impressive ceremonies performed for the faithful execution of treaties, the solemn oath taken by ... the Consuls; the deposit of the instruments in the sacred temple of Jupiter at the Capitol,”—all this was intended to have “a powerful influence on the minds of the Roman people.”¹⁶⁷ And that’s an important point: the aim was to impress not just the high contracting parties with the seriousness of the business, but also their people, who might otherwise be tempted to pressure their leaders for the repudiation of the treaty. The provisions for temple deposit were particularly important: the treaty was placed into the most sacred shrines of the chief gods of the two lands involved so that the gods themselves could read it and be reminded from time to time of the provisions of the oath sworn in their presence.¹⁶⁸

These elements of ceremonial are particularly visible in biblical covenanting—both between God and man and between Israel and other nations—described in the Old Testament. Think of the sacrificial from of God’s covenant with Abram in Genesis 15-17. The Lord promised Abram the land “from the river of Egypt unto the great river, the river Euphrates,” and Abram asked for some assurance, particularly because God was saying this was going to happen only after a nightmare of generations of servitude. “How can I be sure this will happen?” Here’s how the Lord signalled this assurance:

He said unto him, Take me an heifer of three years old, and a she goat of three years old, and a ram of three years old, and a turtledove, and a young

¹⁶⁵ Theodore P. Ion, “Sanctity of Treaties” *Yale Law Journal*, 20 (1911) 268. For a seminal account, see

¹⁶⁶ In Aeneas’ treaty with Latinus, Latinus swore: “by Earth, Sea, Sky, and the twin brood of Laton and Janus the double-facing, and the might of the nether gods and grim Pluto’s shrine; this let our father [Jupiter] hear, who seals treaties with his thunderbolt. I touch the altars, I take to witness the fires and the gods between us; no time shall break this peace and truce in Italy, howsoever fortune fall; nor shall any force turn my will aside, not if it dissolve land into water in turmoil of deluge, or melt heaven in hell.” (Bederman in Janis, p. 14)

¹⁶⁷ Ibid. [??], pp. 269-70

¹⁶⁸ Delbert R. Hillers, *Covenant: The History of a Biblical Idea* 6 (1969).

pigeon. And he took unto him all these, and divided them in the midst, and laid each piece one against another: but the birds divided he not. And when the fowls came down upon the carcasses, Abram drove them away. And when the sun was going down, a deep sleep fell upon Abram; and, lo, an horror of great darkness fell upon him. And it came to pass, that, when the sun went down, and it was dark, behold a smoking furnace, and a burning lamp that passed between those pieces.

We can barely begin to grasp the elements of archaic sanctification here.

Human covenants often involved livestock. The treaty between Abraham and Abimelech, King of the Philistines, in Genesis 21, involved the transfer of livestock, as well as the digging of wells, planting of groves. There was often ceremony to associate a sense of place with the making of treaties: something that we still observe by citing treaties by the place they were made. So the treaty between Jacob and Laban the Syrian in Genesis 31 involved setting up of permanent cairns of stones:

[C]ome thou, let us make a covenant, I and thou. ... And Jacob said unto his brethren, Gather stones; and they took stones, and made an heap: and they did eat there upon the heap. ... And Jacob said, This heap is a witness between me and thee this day. ... The Lord watch between me and thee, when we are absent one from another. ... And Laban said to Jacob, Behold this heap, and behold this pillar, which I have cast betwixt me and thee: this heap be witness, and this pillar be witness, that I will not pass over this heap to thee, and that thou shalt not pass over this heap and this pillar unto me, for harm. The God of Abraham, and the God of Nahor, the God of their father, judge betwixt us.¹⁶⁹

Or consider the use of stones as a witness of covenant in Joshua 24: “So Joshua made a covenant with the people that day ... and took a great stone, and set it up there under an oak, that was by the sanctuary of the Lord. And Joshua said unto all the people, Behold, this stone shall be a witness unto us; for it hath heard all the words of the Lord which he spake unto us: it shall be therefore a witness unto you, lest ye deny your God.”¹⁷⁰

All this was matched with a terrifying sense of divine punishment for treaty-breaking—the choicest biblical example of which is the curse upon Edom (a kingdom of southern Jordan) for breaking its treaty with Judah, set out by Isaiah. It goes on for a whole hideous chapter, with people being delivered to the slaughter:

¹⁶⁹ Genesis 31: 44ff.

¹⁷⁰ Joshua 24: 25-27

[A] sword bathed in heaven ... shall come down upon ... the people of my curse....Their slain ... shall be cast out, and their stink shall come up out of their carcasses, and the mountains shall be melted with their blood. ... And the streams thereof shall be turned into pitch, and the dust ... into brimstone.

And on and on. But there's a point here also that David Bederman makes—Bederman is the author of *International Law in the Ancient World*—which is that the content of these curses and the conditional self-cursing embodied in oaths (a sort of liquidate damages clause) reflects not just a need for sanctions, but also a primal fear of desolation and chaos. Human covenant and human fidelity are all that lie between us and an utterly disordered world.¹⁷¹ The terrible retribution wrought upon Edom is effectively the break-up of all order on which it and other nations depended: “from generation to generation [Edom] shall lie waste; none shall pass through it for ever and ever. ... and [the Lord] shall stretch out upon it the line of confusion, and the stones of emptiness.”

On Monday, I promised you not just Abram but Nietzsche. A lot of this is reminiscent of Nietzsche's discussion at the beginning of the Second Essay of his book *The Genealogy of Morals*, of what was *necessary* to breed among humanity “an animal that *is entitled to make promises*,” to bring into being a person with a memory, who can remember and stand by what he promised, someone

who [can make] promises like a sovereign, seriously, rarely, and slowly, who is sparing with his trust, who *honours* another when he does trust, who gives his word as something reliable, because he knows he is strong enough to remain upright even when opposed by misfortune....¹⁷²

And Nietzsche went on to say that “there is perhaps nothing more fearful and more terrible in the entire prehistory of human beings than the *technique for developing his memory*” and his promise-keeping:

We burn something in so that it remains in the memory. ... When the human being considered it necessary to make a memory for himself, it never happened without blood, the most terrible sacrifices and pledges ..., the most repulsive self-mutilations ... , the cruellest forms of ritual in all the religious cults.¹⁷³

Well, as the modern era dawned, sacrament and invocation died away. But the sacramental aspect was still taken seriously by some of those we entered into treaties with. Among indigenous peoples, e.g. native Americans: “Many tribes

¹⁷¹ Bederman in Janis, p. 21.

¹⁷² Nietzsche, *Genealogy of Morals*, §§1-2.

¹⁷³ *Ibid.*, §3.

solemnized treaty agreements with rituals including gift-giving, smoking a sacred pipe, historical orations, and naming ceremonies.”¹⁷⁴ And they tended to reproach the white man for taking so lightly what for them were such solemn undertakings. I mean things like the Cherokee address to Congress of 1871, as the lands promised to them were taken:

In our ignorance we have supposed that Treaties were contracts entered into under the most solemn forms, and the most sacred pledges of human faith, and that they could be abrogated only by mutual consent. We are now taught differently.

Something sacred is taken away, but something worldly is lost with it.

Emeric Vattel, writing in the eighteenth century, considered that oaths—which by then had become what George Meldenhall called an “ancient ruin still standing”—were no longer important for treaty-making. They were supererogatory. An oath is personal, but a treaty survives death of him who made it.¹⁷⁵ Vattel had a pragmatic reason for trying to persuade us to minimize the element of oath-making:

The custom generally received in former times, of swearing to the observance of treaties, had furnished the popes with a pretext for claiming the power of breaking them, by absolving the contracting parties from their oaths.¹⁷⁶

So we no longer invoke the holy trinity, or threaten divine havoc, or light fires or split heifers or build cairns at the places where treaties are concluded. But we still talk about *solemn* treaties and covenants. And Nietzsche is right:

everywhere on earth nowadays where there is still solemnity, something of the terror continues its work, the fear with which in earlier times everywhere on earth people made promises, pledged their word, made a vow. The past, the longest, deepest, most severe past, breathes on us and surfaces in us when we become “solemn.”¹⁷⁷

We live in a disenchanted world. Treaty making is just like contract. No doubt. But we know some contracts are more momentous than others. Sometimes we just check a little box in an internet transaction. But sometimes our contracts can transform our situation permanently and comprehensively, which is why we

¹⁷⁴ Kristen A. Carpenter, “Interpretive Sovereignty: A Research Agenda,” *American Indian Law Review*, 33 (2008-9), 111

¹⁷⁵ Vattel Bk. 2, § 226.

¹⁷⁶ *Ibid.*, § 225.

¹⁷⁷ *Genealogy* §3

still associate some contracts with changes of status—marriage, for example—and subject them to the special supervision of the law. We even consecrate them—or some of them—on the altars of our faith.

Treaty-making is just a form of law-making. No doubt. But again, some laws are more momentous than others. Some are like temporary decrees; others are more like constitutions that have to be built strong enough to endure for generations. And perhaps some treaties—like the great human rights covenants—take on the same aspect of “scared text” as constitutions do. With a constitution, its power among us, its sanctity, is partly a function of how much went into the making of it and how much was at stake: the creation of something legal, a legalized political order, out of nothing. The same sense of what is at stake may be important for treaties also. The great nineteenth century jurist James Lorimer put it this way:

The greater treaties are justly regarded as summing up the international experience of the epochs of history to which they belong: and when we consider the frightful cost at which they were purchased, it would be sad indeed if they taught us nothing. To regard them simply as monuments of objectless effort and fruitless suffering would be to disbelieve in the wisdom not of man but of God.¹⁷⁸

I talked in my first lecture, about public reason about our ability if we strain and listen to ancient texts and religious creeds and doctrines—to distil and translate things of importance from theistic traditions that we (or that you) may not necessary still accept. So the biblical tradition warns us to pay solemn attention to the chaos and desolation of a world without good faith, a world where treaties are entered into lightly and discarded wilfully. *We* may not look for the destruction of Edom, but the biblical tradition may still give us pause, give a deeper sense to what might otherwise appear to be the rather bland words of Vattel that

There would be no longer any security among men, nor any intercourse possible, if they did not consider themselves bound to keep faith with each other and stand by their word.¹⁷⁹

Or: “the Lord shall stretch out upon us the line of confusion, and the stones of emptiness.” Take your pick.

So there is this *alternative* to a preoccupation with natural law. We can pay attention also to God’s sanctification or our consecration of positive law, of the solemnity of treaties, the authority of covenants, the endurance of custom against

¹⁷⁸ James Lorimer, *The Institutes of the Law of Nations*, I, p. 39.

¹⁷⁹ (II, xii, §163)

all the odds. We shouldn't assume that the sacred and the religious go out the window when positivism is in the air.

11. Respect for law in the midst of disagreement

I want to finish with one function of natural law that I do recognise. Natural law, as I said at the beginning, may tell us a little about the limits of international law's claims upon us.

In the discussion at the end of Lecture One, George Kateb emphasized that not every barbaric edict issued by a tyrant in possession of the apparatus of power counts as law or has the authority of law. There comes a point when an oppressive edict may be too unjust or too deformed in its character to be accorded legal authority. And that will apply in the international realm as much as in the governance of particular communities.

This may be particularly important in cases where international law seems to prohibit doing what justice and morality urgently require—coming to the aid of a people who are being slaughtered without mercy, for example. The point is important and George was right to reproach me for neglecting it. I hadn't wanted to linger on such pathological cases, terrible though they may be. I took as my subject for these lectures the normality, not the pathology of international law: the sanctity of business as usual.

Let me explain, using an analogy with national law. We know that, as a result of ordinary political life, values are often enacted into national law which are not our values. National law does some things which we (some of us) think it ought not to do, and it leaves undone some things which some of us think it ought to have done. This disagreement about content is part of the normal life of national law, whether it is taxes, criminal law, welfare, commerce, or property. And everyone has to come to terms with it. We share a national legal system with people with whom, in good faith, we disagree on these matters of policy, right and justice. And still law has to have a univocal place among us.

Now Christian thinking has certainly been important for helping us develop our various ideas about *content*: what law ought to be, the principles it ought to embody and the values it ought to serve. It is clear though that Christians do disagree both among themselves and with their fellow citizens on many of these issues. So, *in addition*, we have developed a Christian attitude which accords some respect to law and the Rule of Law, as such, quite apart from our opinions or views about its content. We say, sometimes, that the law commands our respect and compliance even when we disagree with its content, even when we wish its content were otherwise. And we develop theories which explain that requirement of respect and compliance—theories which represent Christian views on the Rule of Law as such. That's the force of Romans 13: submit yourselves to the powers

that be, whether or not they are doing exactly what you would do if you were in charge.

Few Christians would take the view that the duty of respect or compliance for national law is unlimited. Most of us would hold something like a theory of natural law which says that certain so-called human laws may be so abominable in their requirements, so offensive to human dignity or to religion as to forfeit all claim to general respect and compliance. And we develop theories of civil disobedience and Christian resistance for these cases. But we do not take this view of each and every law that we disagree with, because we understand that we share the realm of law with persons, enfranchised just like us, who in good faith take the opposite view. Some laws we put up with and even respect, even though we disagree. So: respect for law *as such*, operates in a middle realm between (i) the area where law exactly coincides with one's own values and (ii) the area where law becomes some abominable as to forfeit all our support.

Well, *likewise*, I think we need an understanding of international law which can also occupy that intermediate space and use it to inform our thinking about global legality and the ordering of the world. Of course we have our ideals for international law, and it is an important part of Christian jurisprudence to contribute to the articulation of those ideals: human dignity, peace, international aid, compassion for the poorer nations, and so on. And certainly we also can imagine that what presents itself as international ordering may be so destructive of important values that it forfeits all title to our respect; and we expect a Christian theory of natural law to help us understand when it would be appropriate for a Christian nation to reject it and resist it on that basis. But above all, we want to develop a Christian understanding of international law for the middle area: the area where the international ordering has some claim to our respect—simply as an ordering—even though its content doesn't necessarily coincide with our ideals. After all, we share the world with 200 other nations and six billion other opinionated individuals. So that is what I have been trying to do – to understand from a Christian perspective the claim that international law has upon us *as such*, apart from the claims of its particular content.

That's all I want to say, except for two things. I want to thank you for your attention over three long lectures. And I want to finish with the words that Hugo Grotius used to end the Prolegomena to his great treatise on *The Laws of War and Peace*:

So now if anything has been here said by me inconsistent with piety, with good morals, with Holy Writ, with the concord of the Christian Church, or with any aspect of truth, let it be as if unsaid.