# WHY A JOURNAL OF INTERNATIONAL LAW AT REGENT UNIVERSITY SCHOOL OF LAW?

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I am pleased to introduce the first issue of the *Regent Journal of International Law*. The *Journal* was born out of the vision and diligence of a dedicated group of students, assisted by able faculty. These students understand that the legal profession's future is global in nature. They have recognized that whether or not they have an international law practice, their careers will ultimately intersect with and be impacted by international law in many ways. It is their desire to better understand and shape that law.

It is particularly appropriate that students undertake this venture at Regent University School of Law. The school was created in 1986 out of the conviction that there are eternal principles of justice that have influenced and should influence both the practice of law and the law itself. Regent's mission calls for it to seek "the biblical foundations of law, legal institutions, and the processes of conflict resolution."[1] The founders of this *Journal* have taken on that mission wholeheartedly. Their goal is to bring a Judeo-Christian perspective to bear on international law.

This is a timely project. A decade ago, Professor Mark Janus of the University of Connecticut School of Law edited *The Influence of Religion on the Development of International Law,* noting that there were few scholarly writings in the late nineteenth and twentieth centuries that considered the connection between religion and international law. Janus expressed hope that his book would "stimulate jurists, political scientists, theologians, and scholars in related fields to continue to explore the influence of religion on international law."[2]

The gap in scholarly thinking in this area has not always existed. The first systematic treatise of international law was *De Jure Belli Ac Pacis* (1625; *On the Law of War and Peace*) by the Dutch jurist Hugo de Groot (1583-1645) (more commonly known as Grotius).[3] Grotius, often described as "the Father of International Law," was a scholar in several fields, including theology. In *On the Law of War and Peace*, Grotius set forth a framework for international law, placing particular emphasis on the legitimacy of warfare. Deeply affected by the wars of religion going on in Europe, Grotius propounded a theory of the "just war" rooted explicitly in religious principle. Professor Cornelius Murphy of the Duquesne University School of Law, succinctly summarizes Grotius' view: "In warfare, unwritten laws were enforced between enemies. The laws were those of nature and nations, and the precepts of Judeo Christian charity."[4] Grotius insisted that all nations are subject to natural law, "a 'common law' of States backed up by religious and philosophical principles of good faith and good will between men and nations."[5] Grotius was not alone. Other leading scholars such as Alberico Gentili (1552-1608)

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[1] Regent University, http://www.regent.edu/acad/schlaw/admit/misstate.html (last visited Sept. 18, 2002.)

[2] THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW (Mark Janus ed., 1991).

[3] David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis*, 10 EMORY INT'L L. REV. 2 (1996).

[4] Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L LAW 480 (1982).

[5] DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 3 (Foundation Press 2001).

and Samuel Pufendorf (1632-1694) looked to natural law and religious principles in considering the law that should be applied between nations.[6]

After the seventeenth century, there was much debate on the proper foundation for international law. In the nineteenth and early twentieth century, positivist theories of international law reigned supreme, eclipsing religious and natural theories. The positivist approach emphasized "State sovereignty and the necessity of ascertaining State consent for new rules of international conduct."[7] However, the twentieth century has seen the pendulum return. The current debate features discussion of both positivist and natural/moral approaches to international law.

This *Journal* is perfectly suited to further this dialogue. The *Journal's* Judeo-Christian approach invites both an historic analysis of the influence of Christian theology on the development of international law and a consideration of the role transcendent principles of justice should play in modern enforcement and development of international law.

An obvious area for further exploration is the law of international human rights. Indeed, one of the great reasons for the renewed consideration of natural and moral theories of international law in the second-half of the twentieth century was the rise of the international human rights movement. A theological perspective on law is particularly appropriate here. Although the human rights movement has historical antecedents, the current movement took shape largely in response to atrocities committed just prior to and during World War II. The nations of the world came to a consensus that certain universal principles of justice exist and that individuals should be protected from violations of these principles—even violations from their own governments.

Interestingly, international instruments codifying and seeking to enforce these principles of justice do not articulate a particular moral or philosophical basis—nor do the parties to the instruments uniformly embrace any particular underlying philosophy. The instruments have arisen from a basic notion of human dignity and a belief that certain rights must be protected. Louis Henkin, University Professor Emeritus of Columbia Law School, has observed this lack of moral justification:

> ...developed during the decades following the second World War, international human rights are not the work of philosophers, but of politicians and citizens, and philosophers have only begun to try to build conceptual justifications for them. The international expressions of rights themselves claim no philosophical foundation, nor do they reflect any clear philosophical assumptions, they articulate no particular moral principles or any single, comprehensive theory of the relationship of the individual to society.[8]

The advantage in not attempting to reach philosophical agreement is that it has enabled nations committed to diverse religious, political, and economic systems to reach a consensus to protect certain vital rights. The obvious danger is that, without an underlying basis, recognition of these rights will last no longer than the current political will to enforce them. A basic statement of rights without an underlying philosophical basis also gives no firm basis to determine precisely what rights should be recognized or how they should be enforced.[9]

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[6] *Id.*

[7] *Id.* at 4.

[8] LOUIS HENKIN, THE AGE OF RIGHTS 6 (1990).

[9] One sees in international instruments a potpourri of rights that varies wildly, with rights sometimes existing in tension with each other. There is a degree of tension for example between so-called first generation rights that strongly limit governmental authority (for example equal protection of the law,

It is here that a Judeo-Christian perspective has much to say. Take the basic intuition of human dignity. Where does it come from? What does it mean? Christian and Jewish theologies teach that human dignity is rooted not in human will or the protection of any state or any coalition of states. It is rooted in the uniqueness of human beings specially created in the image of God.[10] As Archbishop Desmond Tutu has stated, there is a "unique worth of persons that does not hinge on their economic, social, or political status but simply on the fact that they are persons created in God's image. That is what invests them with their preciousness and from this stems all kinds of rights."[11]

This is an important claim. First, human dignity and the rights which flow from it are not based on the political will of human rulers or states. They *precede* the state. They exist and should be enforced even against the state. They come from God. Only with such a transcendent source can these rights truly be said to be inalienable.

Second, if rights come from God, we can look to transcendent principles to determine their content and how best to enforce them. Consider property rights. There is great disagreement in the human rights community over whether the right to own private property is a universal human right. Regional human rights systems such as the American Convention on Human Rights[12] and the European Convention for the Protection of Human Rights and Fundamental Freedoms Protocol No. 1[13] expressly protect the right to own property. But many global United Nations human rights instruments do not. If certain human rights are rooted in divine creation, we should be able to look to creation principles to consider both the existence and scope of a right to own private property. Writers such as John Locke and William Blackstone did just this, contending an inalienable right to own private property was based on transcendent principle.[14]

Similarly, a Judeo-Christian prospective would be very useful in determining how best to enforce existing rights. All human rights instruments protect the right to life. Clearly this right prohibits murder and genocide, but what about abortion or euthanasia? Looking to eternal principles of justice to answer such questions provides a hope of real answers and does not root a vital liberty like the right to life in the shifting sands of political will.

We have seen but one example of why a journal such as this, dedicated to exploring the religious foundations of international law and human rights, can contribute to the recognition, protection and enforcement of fundamental rights. But this normative use of a theological perspective—looking to eternal principles to determine what the law should be—is not the only role the *Journal* can and will play. This *Journal* also is uniquely poised to apply descriptively a theological perspective to international human rights law—considering the influence of religion to help understand the law as it is.

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prohibitions on cruel and inhuman punishment, and arbitrary arrest) and second generation rights that demand greater government authority to enforce (for example the right to rest, leisure, free compulsory education).

[10] *See, e.g., Genesis* 1:24-28 (New International Version) [hereinafter "NIV"]; 9:5-6; *James* 3:9 (NIV).

[11] Desmond M. Tutu, *Religious Human Rights in the World Today*, 10 EMORY INT'L L. REV. 63, at 68 (1996).

[12] *See generally* American Convention on Human Rights, July 18, 1978, O.A.S.T.S. No. 36, OEA/Ser. K/XVI/I.I, doc. 65, Rev. 1 (1970) (signed but not ratified by the United States), reprinted in 9 I.L.M. 673, 676 (1970).

[13] *See generally* European Convention on Human Rights and Fundamental Freedoms, Sept. 3, 1953, Protocol 1, 213 U.N.T.S. 221, 262.

[14] *See, e.g.*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 9 (Harvard Univ. Press 1985); WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND, 1-9 (University of Chicago Press 1979).

While modern human rights law has no agreed upon philosophical basis, it unquestionably has historical antecedents. These include natural law theory, the French Declaration of the Rights of Man and of the Citizen, and the Anglo-American tradition of constitutionalism (developed in part through such documents as the Magna Carta, the Petition of Right, the English Bill of Rights, the United States' Declaration of Independence, and the United States' Constitution).[15] Given that these antecedents have helped to shape existing human rights protections, it is useful to explore the underlying principles that shaped them. For example, one of the core principles taken from the Anglo-American constitutional tradition that is embraced internationally today (and which remains crucial to any protection of human rights) is a commitment to the rule of law. But to attempt to understand the Anglo-American commitment to the rule of law without considering its theological basis is to miss much. Historically, this commitment was rooted in two key theological principles. First, it was founded in a biblical view of human nature. As noted above, scripture teaches that humans are created uniquely in the image of God. Biblically, this demands a dignity and an equality of treatment before God and under the law.[16] The English common law from its earliest days stood for the proposition that all individuals—even the King—are subject to law.[17] Scripture also teaches that humankind has sinned and does not perfectly mirror the righteousness of God.[18] This knowledge creates—and historically did create—a powerful incentive to place limits on government power. Knowing that all individuals sin warns us not to put too much power in the hands of any person or government authority.[19] While power must be exercised to maintain order, it must be limited under law.

Another key religious principle that has historically supported the rule of law is the belief that God has delegated only limited authority to human government in the first place.[20] Thus, limited government is not simply based on a prudential determination that we ought to limit the power of government officials, legitimate government authority is in fact limited. Government officials are servants of God exercising limited power delegated by God.[21] Historically, both of these religious principles have helped shape the rule of law and its protection. Knowing this helps us better understand the rule of law and perhaps guides us as to how it should be applied in a modern world that has come to embrace it.

This is just a taste of the types of issues ripe for discussion in a forum such as this *Journal*. I believe that the years to come will find the *Journal* at the forefront of the debate on international law, particularly the intersection of law and theology. I commend to you this *Journal* and the fine students and faculty who have made it a reality.

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[15] LOUIS HENKIN ET AL., HUMAN RIGHTS 10-12 (Foundation Press 1999).

[16] *See Job* 34:17-19 (NIV); *Deuteronomy* 1:16-17 (NIV); *Leviticus* 19:15 (NIV).

[17] *See, e.g.*, HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS 39, 41 (William S. Hein & Co 1990); 1 BLACKSTONE, *supra* n. 11, at 226-27.

[18] *See, e.g., Isaiah* 53:6; 64:6 (NIV), *Romans* 3:10-18 (NIV); *Ephesians* 2:1-3 (NIV).

[19] This principle was fully embraced in both English and American constitutional history. *See e.g.* EPSTEIN, *supra* n. 14 at 9-10 (discussing the political and theological thinking of John Locke). JAMES MADISON, THE FEDERALIST 51, at 262 (Bantam 1982).

[20] Puritan theology regarding the sinfulness of mankind and the limited delegation of authority by God was particularly influential during the 17th century battles between King and Parliament in England. The theology, which had a strong impact on both English and American political philosophy and government, was well summarized by Samuel Rutherford in *Lex Rex* (*The Law and the Prince*). SAMUEL RUTHERFORD, LEX REX, 1-9, 99-106 (Sprinkle Publications 1982).

[21] *See, e.g., Romans* 13:1-5 (NIV), *Matthew* 22:21 (NIV); *Isaiah* 40:17-24 (NIV); *Daniel* 4:28-37 (NIV); *Acts* 12:21-23 (NIV).