

Human Rights and International Law

Political Legitimacy

Political obligation holds only under certain conditions. The government of a political community is legitimate when it meets those conditions. Legitimacy has two dimensions: it depends on both how a purported government has acquired its power and how it uses that power. I discuss the acquisition dimension elsewhere and the exercise dimension here.

Legitimacy is a different matter from justice. Governments have a sovereign responsibility to treat each person in their power with equal concern and respect. They achieve justice to the extent they succeed. But it is controversial what success means: nations, political parties, and political philosophers disagree about justice. Governments may be legitimate, however—their citizens may have, in principle, an obligation to obey their laws—even though they are not fully, or even largely, just. They can be legitimate if their laws and policies can nevertheless reasonably be interpreted as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life. A government can be legitimate, that is, if it strives for its citizens' full dignity so understood even if it follows a defective conception of what that requires.

Evaluating legitimacy therefore requires a distinct interpretive judgment that will often be difficult. Do we make better sense of some piece of injustice by taking it to express a flawed understanding of what equal concern and respect requires? Or rather as an outright rejection of that responsibility? Naked tyrannies—Nazi Germany and Stalin's Soviet Union—fall plainly into the second hole, but states less openly unjust present harder cases. The interpretive judgment must be sensitive to time and place: it must take into account prevailing ideas within the political community. When it was near-universally accepted that everyone's fate is better protected, and his dignity better expressed, when he is governed by royal or ecclesiastical appointees of a god and when a state religion is established as canonical, the interpretive case for the legitimacy of a

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genuine monarchy or theocracy was stronger than it now is. In any case, the interpretive judgment must take into account the full range of a government's laws and practices. Does the monarchy in fact work for the good of everyone it purports to govern, or only for some privileged group or to perpetuate and expand its own power? Does the theocracy try to convert dissenters only by persuasion? Or does it punish them for their opinions and coerce their conversion? It may be impossible to sustain some government's trumpeted claim to equal concern when the policies it hopes to defend are placed in a larger context.

Justice is, of course, a matter of degree. No state is fully just, but several satisfy reasonably well most of the conditions I defend in *Justice for Hedgehogs*. Is legitimacy also a matter of degree? Yes, because though a state's laws and policies may in the main show a good-faith attempt to protect citizens' dignity, according to some good-faith understanding of what that means, it may be impossible to reconcile some discrete laws and policies with that understanding. A state may have an established democracy, provide for free speech and press, offer constitutional tests through judicial review, and provide adequate police service and an economic system that enables most of its citizens to choose their own lives and prosper reasonably. Yet it might pursue other policies that cannot be understood other than as a flat denial of the principles on which that attractive general structure is based. It may exclude some particular minority—of race or economic class—from benefits its policies assume to be requisite for others. Or it may adopt coercive laws that threaten liberty in misperceived emergencies or to enforce some cultural imperative: to improve the sexual ethics of the community, for example. These particular policies may stain the state's legitimacy without destroying it altogether. Its legitimacy then becomes a matter of degree: how deep or dark is that stain? If it is contained, and political processes of correction are available, then citizens can protect their dignity—avoid becoming tyrants themselves—by refusing so far as possible to be party to the injustice, working in politics to erase it, and contesting it through civil disobedience when this is appropriate. The state remains legitimate, and they retain political obligation, to a degree that may be substantial. If the stain is dark and very widespread, however, and if it is protected from cleansing through

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politics, then political obligation lapses entirely. The unfortunate citizens must contemplate, as I said, not just civil disobedience but revolution.

Human Rights

What Are They?

Human rights have had a good press since the Second World War. Dozens of human rights conventions and treaties have been signed, among them the Universal Declaration of Human Rights enacted by the United Nations General Assembly in 1948, the European Convention on Human Rights, and the Cairo Declaration of Human Rights. Hundreds of books, monographs, and studies on the subject have been published. Some people and some institutions use the phrase casually and even hyperbolically. Campaigners declare a human right when they mean that some policy goal—some way of making the world better—is particularly important or urgent. They announce, for instance, a human right that no nuclear power plants be built or that no food be genetically modified or that workers have a stipulated vacation each year. I use the phrase in a stronger way that matches the strong sense of a political right: to designate a trump.

But how shall we then distinguish human rights from other political rights that also act as trumps? It seems widely agreed that not all political rights are human rights. People who all accept that government must show equal concern for all its members disagree about what economic system that requires. An unfettered free market? Socialism? Redistribution according to some standard or goal? Which standard or goal? Egalitarians, libertarians, and utilitarians each present their opinion as indispensable to genuine freedom and equality. But almost none of them would suggest that the many nations that disagree with his opinion are guilty of human rights violations: libertarians argue that taxation is theft, but few claim that it is a violation of a human right. Why not? Human rights are widely thought to be special and, according to most commentators and to political practice, more important and fundamental. In what way?

This is in the first instance only a classificatory question. It asks for a standard that a right must meet to count as a human right, though it need not supply or even point to a suitable test of

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what rights meet that standard. But, as Charles Beitz has emphasized, our classification cannot be arbitrary.¹ It must be drawn from an interpretation of what he calls the “discursive” practice of human rights that now includes claims in treaties and other international documents and by political officials, international associations of states, judicial bodies, nongovernmental organizations, and academic discussants. Our classification must fit that practice sufficiently well to make our discussion pertinent to it, though it should not prejudge whether the particular rights widely recognized in the practice should in fact be accepted as human rights.

A number of writers have suggested the following classificatory strategy.² Human rights are those that trump not merely collective national goals but also national sovereignty understood in a particular way. (This is often called the Westphalian conception of sovereignty because it was prominent in the understanding of the system of nation-states that the Treaties of Westphalia achieved.) According to this conception, one nation or group of nations must not interfere in the internal affairs of another nation. Nations must not attempt, by actual force or threats of force or other sanction, to dictate another nation’s policy or choose its rulers. These writers suggest that we should classify as human rights only those rights important enough to trump national sovereignty on that conception. If those who claim authority over any territory violate these human rights of people in their power, then other nations are permitted to attempt to stop them by means that would otherwise not be permitted—by economic sanctions or even military invasion.

If we accepted that classification and consequence, we would then have to decide, on other grounds, which political rights are sufficiently important to justify sanctions. Important provisos would also be necessary. Any proposed military incursion or severe economic sanction would have to meet two further tests. First, the organization or state proposing such sanction must be

¹ Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 96ff.

² See, e.g., John Rawls, *The Law of Peoples*, 2d ed. (Cambridge, Mass.: Harvard University Press, 1999); Joseph Raz, “Human Rights without Foundations,” in Samantha Besson and John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 321ff.; John Skorupski, “Human Rights,” in Besson and Tasioulas, *Philosophy of International Law*, 357.

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authorized to do so under international law. Many international lawyers believe that only a single international institution, the Security Council of the United Nations, can authorize such action; other international lawyers disagree. The second condition is equally important: any such sanction must reasonably be expected to do significantly more good than harm. Even if the invasion of Iraq in 2003, led by the United States, had been licensed under international law, it would nevertheless have failed that second stipulation.

Still, even when we take due account of these further conditions, the trumps-over-sovereignty idea seems to set too high a bar. Human rights conventions describe a variety of rights as human rights that would not justify even economic sanctions, let alone military force. The Universal Declaration of Human Rights lists, as human rights, a right to education, to adequate housing and health care, to marriage, to adequate compensation for work, to equal pay for equal work, and to a presumption of innocence in criminal trials. A protocol to the European Convention on Human Rights prohibits capital punishment. It would nevertheless be wrong for the community of nations, even if licensed by the Security Council and likely to be successful, to march into any nation to establish equal pay for women or more adequate primary schools or to invade Florida to shut down its gas chambers or establish gay marriage there. Economic or military sanctions that inevitably inflict great suffering—most often on the most vulnerable members of the target state—are justified only to stop truly barbaric acts: mass killing or jailing or torturing of political opponents or widespread and savage discrimination.

If you are drawn to the trump-over-sovereignty classification, you might respond to that objection by insisting that the human rights conventions have greatly inflated the category of human rights: that only rights whose violation would be truly barbaric should count in that category, that the rest should be downgraded to some different category. That would seem a shame, however, because it has proved valuable, for international political activists and organizations and, particularly, domestic and international courts developing international customary law, to treat the large variety of rights designated in such documents as having the kind of universal authority the idea of human rights suggests. If we shrunk the category, we would have to invent a new one for rights suitable for recognition and enforcement in those other

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contexts. It would be better, therefore, to use a more encompassing classification; this need not require us to recognize all the rights set out in the more extravagant conventions, but it should at least explain why nations and groups have been tempted to include such rights.

Other writers have tried a different way to mark off human rights from other political rights: focusing not on the force of human rights to license sanctions but on their substantive content. They seek formulas that show why human rights are in some way particularly important among political rights. These formulas have proved elusive, however, because it has proved difficult to frame a distinction in that way. All political rights are particularly important. If I think that a state denies equal concern, on the right conception of that requirement, because it does not sufficiently redistribute the economic result of free-market transactions to its poor, then I think it denies some people the lives they are entitled to have. It condemns some of them to unjust poverty. What could be more fundamental or important than that? How could we identify, in demarcating human rights, a more fundamental level of support than what people's dignity requires? As that question suggests, scholarly attempts to define some more fundamental and more sternly required level have proved arbitrary.

In *On Human Rights*, James Griffin makes what he calls "personhood" the touchstone of human rights; he says that respect for personhood requires guarantees of welfare, liberty, and autonomy, and that these are therefore human rights (149). He accepts the challenge described in the text: to explain why human rights differ from other political rights. But he believes the challenge can be met by a more refined description of what personhood itself requires. "On the personhood account .°. the cut-off point is when the proximate necessary conditions for normative agency are met .°. there will be hard interpretive work to be done on the idea of 'proximate necessary conditions for normative agency' to make it sharper edged" (183). But, as Joseph Raz has pointed out, this is unhelpful. On the one hand, if the conditions Griffin has in mind are those necessary for a very limited autonomy, they are too easily met. Even slaves make some decisions. On the other hand, if the conditions are taken to be those necessary for a substantial degree of welfare, liberty, and autonomy, then the problem remains of distinguishing between human rights and other political rights. Where is the line to be drawn? See Raz, "Human

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Rights without Foundations.” Griffin’s response seems only to confirm Raz’s complaint. He suggests that “practicalities” will help us to determine the “threshold” of autonomy that human rights protect, but that “considerable work” is necessary to find the right threshold (347–49).

Charles Beitz believes that human rights should be identified not through some “top down” principle, like respect for personhood, but through interpretation of human rights practice, guided, as it must be, by a sense of the point of that institution (Beitz, *The Idea of Human Rights*). But as we noticed throughout Part 2 of this book, interpretation of that kind requires general principles that can fix the best justification of the raw data of that practice, and these must be “top down” principles of the kind Beitz wants to avoid. He recognizes the need to distinguish human rights from other political rights; he says that human rights are narrower than the political rights that define a just society (142). But his suggested standards for the necessary distinction seem unpromising. He says that some requirements of justice are less urgent than others, that some purported rights would be harder than others to enforce internationally, and that some requirements of justice can sensibly be thought to vary among societies with different economic, social, and cultural backgrounds (143). The second of these standards mixes the question whether it would be permissible for the international community to intervene, if it could do so effectively, with the different question whether it can indeed do so effectively. These speak to different conditions for intervention that are best kept distinct and, in any case, are irrelevant to all cases except barbarism, because only these justify intervention. His first standard requires a metric for urgency that, when supplied, may not produce the right results. How should we rank in urgency, for instance, rights to expression of racist opinion, abortion, expensive lifesaving renal dialysis, same-sex marriage, and no imprisonment without a fair trial? The third standard does not discriminate between justice and human rights; concrete statements of either vary to some degree with national background, and the standard does not tell us why human rights vary more than justice does.

I suggest a different strategy, one based on the distinction I introduced in the remarks just made about legitimacy. We disagree, across nations and among ourselves, about what political rights people have. We disagree, as we just noticed, about what economic system the right conception

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of equal respect requires. We also disagree about what counts as the proper respect for people's individual ethical responsibility: some nations make a particular religion the official religion of the state, while others, including the United States, regard religious establishment as unconstitutional. We disagree about political rights in countless other ways as well. We must therefore insist that though people do have a political right to equal concern and respect on the right conception, they have a more fundamental, because more abstract, right. They have a right to be treated with the attitude that these debates presuppose and reflect—a right to be treated as a human being whose dignity fundamentally matters.

That more abstract right—the right to an attitude—is the basic human right. Government may respect that basic human right even when it fails to achieve what we believe to be the soundest more concrete political rights—even when its tax structure is, as we think, unjust. We distinguish and deploy that basic human right through the interpretive question described in our discussion of legitimacy. We ask: Can the laws and policies of a particular political community sensibly be interpreted as an attempt, even if finally a failed attempt, to respect the dignity of those in its power? Or must at least some of its laws and policies be understood as a rejection of those responsibilities, toward either its subjects at large or some group within them? The latter laws or policies violate a human right.

That distinction between human rights and other political rights is of great practical importance and theoretical significance. It is the distinction between mistake and contempt. The test, I emphasize, is interpretive; it cannot be satisfied simply by a nation's pronouncement of good faith. It is satisfied only when a government's overall behavior is defensible under an intelligible, even if unconvincing, conception of what our two principles of dignity require. Nations and lawyers will of course disagree even about how and where the that should be drawn. But some judgments—those that match the world's consensus about the most basic human rights—will be obvious. Nothing could be a plainer violation of the first principle of dignity than acts that exhibit blatant prejudice—assumptions of supposed superiority of one caste over another or of believers over infidels or Aryans over Semites or whites over blacks. These are the attitudes most horribly evident in genocide. Sometimes the contempt is more personal: people in

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power sometimes humiliate, rape, or torture their victims just as a demonstration of contempt or, what comes to the same thing, just for amusement. No nation that supposes that some people are of inferior stock or that condones humiliation and torture for amusement can claim that it is embraces an intelligible conception of human dignity.

Now look quickly at the second principle: that individuals have a personal responsibility to define success in their own lives. That principle supports the traditional liberal rights of free speech and expression, conscience, political activity, and religion that most human rights documents include. Different nations and cultures take different views about how those liberal rights should be defined and protected in detail. Societies also differ about what we might call surface paternalism. Most of us think that compulsory education until late adolescence and mandatory seat belts are permissible forms of paternalism, because the first unqualifiedly enhances rather than diminishes a person's capacity to take charge of his own life and the second helps people achieve what they actually want in spite of moments of acknowledged weakness. Some societies indulge more serious paternalism, but they do not violate human rights unless that level of interference could not plausibly be understood in one of these ways. Different political cultures, we might say, take different views about how the personal responsibility of individuals is to be protected.

But once again some acts of government express not a good-faith effort to define and enforce that responsibility but rather a denial of personal responsibility altogether. Governments that forbid the exercise of any but a designated religion or that punish heresy or blasphemy or deny in principle the right of free speech or of the press violate human rights for that reason. So do governments that intimidate or kill or torture people because they hate or fear their political opinions. The right not to be tortured has long been thought the paradigm human right, first on everyone's list. Offering inducements like a reduced sentence to an accused criminal in exchange for information, however objectionable it might seem on other grounds, leaves a prisoner's ability intact to weigh costs and consequences. Torture is designed to extinguish that power, to reduce its victim to an animal for whom decision is no longer possible. That is the most profound

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insult to his dignity as conceived in our two principles. It is the most profound outrage to his human rights.

The case for other human rights on this test is equally compelling. Respect for the importance of any life forbids harming (as distinct from failing to aid) some people for the benefit of others. It is therefore a violation of human rights deliberately to punish people who have committed no crime, even when this is supposedly for the general good; it is also flatly inconsistent with human rights to punish except through procedures reasonably well calculated to protect the innocent. It is controversial which form of trial, subject to which procedures and safeguards, is necessary, but it is not controversial that some form of trial is required, and imprisonment without trial is therefore a violation of a human right. Some forms of paternalism are at least arguably consistent with personal responsibility, as I said. But in our age, laws that forbid property, profession, or political power to women cannot be reconciled with women's responsibility for their own destiny. These are the clear, indisputable cases. Some such acts may be sufficiently serious as to require formal economic and even, if barbaric, military intervention, provided the two crucial conditions I described earlier are met. In less grave and more controversial cases the proper forum of enforcement is not an economic or military battleground but the chambers of international courts and tribunals that rely on treaties, international law, or more informal international pressure to secure compliance.

This understanding of human rights helps explain the abstract character of the human rights treaties and documents I mentioned earlier. The preamble to the Universal Declaration begins with a reference to the "inherent dignity . . . of all members of the human family," and many of the rights it specifies seem simply to restate that perfectly abstract idea. Even the relatively concrete provisions—about education, work, and equal pay, for instance—require interpretation aimed at limiting their scope before they become applicable in practice. We should understand these provisions and comparable provisions in other treaties and documents not as attempts to define human rights in any detail but rather as directions pointing to sensitive areas in which a nation's practices might well reveal the unacceptable attitude that violates the basic human right. They invite interpretive questions. Does a nation's record of regulation of political speech or

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journalism, or its provision of health care or public education, or its broad economic policy, show a good-faith attempt to respect the dignity called for in the Declaration's preamble? Or does it rather show an indifference to or contempt for that dignity? In the latter case, the Declaration declares, that nation has violated a human right. On this understanding human rights treaties and conventions pose questions that await interpretive answers.

Our understanding is also helpful in answering a familiar question of human rights theory. Are human rights truly universal? Or is any list only parochial? Do human rights depend on features of local culture or history that universal declarations ignore? Or are some human rights, at least, independent of such circumstance? We answer each of these questions: yes and no. The interpretive judgment must in its nature be sensitive to different economic conditions and political and cultural profiles and histories. It must be sensitive to such differences because these plainly affect which of the available interpretations—an effort to realize equal concern and respect or indifference to these ideals—is more accurate, all things considered. A health or education policy that would show good-faith effort in a poor country would show contempt in a rich one. But the abstract standard itself—the basic understanding that dignity requires equal concern for the fate of all and full respect for personal responsibility—is not relative. It is genuinely universal.

I do not mean that that abstract standard has been or is universally endorsed. On the contrary, it plainly has not and is not. But if we believe in human rights at all—or in any other rights, for that matter—we must take a stand on the true basis of such rights. My understanding of human dignity might be defective. You must judge for yourself and, if necessary, correct my account. But unless you are tempted by a global skepticism about human and political rights, you must find a basis for such rights in some formulation of that kind, and you must embrace that formulation not because you find it embedded in some culture or shared by all or most nations but because you believe it to be true. You must make applications of your basic premise sensitive to a variety of circumstance that vary across regions and nations. But your judgments must be grounded finally in something that is not relative: your judgment about the conditions of human dignity and the threats that coercive power offers to that dignity.

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You might worry that it is both arrogant and impolitic to claim absolute truth as the basis of a theory of human rights. One critic calls my account of dignity “theological or dogmatic” and argues that because different cultures embrace different values, it is wrong to ground a theory of human rights on any single one of these.³ But we must do that—not to prefer one culture to another, but to prefer truth as we judge it. We have no option. If we proceed in any other way—by seeking some common denominator across cultures, for instance—we still need a justification for picking that strategy, and our justification for that choice must claim not popularity but truth. An ecumenicist strategy, all the way down, is deep logical confusion.

No doubt we must take pluralism into account in deciding what account of human rights could possibly be agreed upon in treaties and enforced in practice. Perhaps—though this is far from evident—it would be wise tactics not to stress the principled foundations of our views when we know others would reject those foundations. But we need to know what we ourselves believe about human rights before we begin to negotiate or persuade. Otherwise we can have no proper aim in view.

The Role of Religion

Our practical and diplomatic difficulties have been pointlessly magnified, however, because so many people in Europe and America insist on connecting human rights with some religious tradition. If we insist that human rights have finally a religious source and ground, then our appeal to those rights will inflame people whose religious traditions and convictions are very different from our own, particularly those who believe that their religion commands the very acts that we decry and try to punish. If we insist that human rights rest on religion, we also confront a paradox in our own values. We believe that religious tolerance is among the most basic of human rights, and we therefore think that it violates people’s rights to force upon them religious doctrines and practices that they do not accept. But is not that exactly what we do when our invading armies march under a religious banner of rhetoric?

³ Robert D. Sloane, “Human Rights for Hedgehogs? Global Value Pluralism, International Law, and Some Reservations of the Fox,” *Boston University Law Review*, April 2010, 975.

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The idea that generates these difficulties—that human rights have a religious foundation—is a very old one. Human rights are widely thought to descend from natural rights; these in turn were supposed to be deliverances of natural law, which, at least in the central expository tradition of that idea, was understood to be divine law. Thomas Jefferson may well have been an atheist—there is a dispute among historians about that—but he was only reporting received ideas and common rhetoric when he declared it self-evident that a human being is “endowed by his Creator with inalienable rights to life, liberty and the pursuit of happiness.” Former president George W. Bush often announced that “freedom is God’s gift to everyone,” as if our freedom were an act of divine charity. The religious origin of human rights is even more manifest in Islamic countries. Article 24 of the 1990 Cairo Declaration of Human Rights, for example, states, “All rights and freedoms mentioned in this statement are subject to the Islamic Shari’a,” and Article 25 adds, “The Islamic Shari’a is the only source for the interpretation or explanation of each individual article of this statement.”

In fact, however, no divine authority can provide a ground for basic human rights. On the contrary, the logic of argument runs the other way: we must assume the independent and logically prior existence of human rights in order to accept the idea of divine moral authority. I assume no particular view about the existence or character of a god or gods in making that perhaps radical claim. I do not base my rejection of ungrounded divine authority on atheism or any other form of skepticism. In fact I shall assume, for the purpose of this chapter, that a single anthropomorphic god as conceived in traditional monotheistic religions has existed and will exist forever; that that god has created the universe and all forms of life in it; that he has in particular created human beings in his own image; that he is, moreover, an all-powerful creator and destroyer; and that he is all-knowing and all-foreseeing. I know that many people who regard themselves as religious do not accept this traditional picture. They express their faith differently and in my view more mysteriously: in the declarations I mentioned in Chapter 9 that the universe contains a higher force or that it houses something bigger than we are or that we can glimpse the divine nature only through a glass darkly and hence must not suppose an anthropomorphic god

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of which we are an image. But it will be easier for me to put the argument I intend if I assume a more traditional supernatural cosmology.

I said nothing about goodness or morality in that crude account of a god. I supposed that a god is an all-powerful creator, but that is not to say—or to deny—that that god is good. Or that he has moral authority, by which I mean that his commands impose genuine moral obligations. Of course, the Abrahamic religions attribute moral virtue and authority as well as omnipotence and omniscience to their god, but I mean to separate those these two components of an overall religious view. Religions commonly have two parts: cosmological and evaluative. First, they answer the question of what there is and why. How did the world and its parts, including life and human life, come to exist? What or who determines how the world will go? Is there a soul? If so, what happens to the soul after death? Second, religions also—but separately—answer the question of what there should be and why. What is right and what wrong? What is important and not important? What must I do with my life? When must I sacrifice it, for example? How must I treat other people? When, if ever, may or should I kill?

Many theologians and some philosophers find this distinction between two parts of a religion illegitimate. They think that goodness is an inherent quality of a god, so that imagining his extraordinary power without also imagining his goodness is impossible. Indeed, some versions of the still-robust ontological argument for a god's existence include goodness as a necessary property. But the ancient Greek conception of the gods was very different; this shows at least the conceptual possibility of separating omnipotence from goodness, and that is all I am assuming. Moreover, to repeat, I do not deny that the god I am assuming, the all-powerful and omniscient creature who has created everything, really is good, and that his commands do have moral authority. I only ask what the source of that goodness and moral authority is.

Hume's principle holds that these moral properties cannot follow directly from a god's omnipotence and omniscience: we cannot derive an ought from an is. You can sensibly declare that a god is good and that his commands should be obeyed only if you accept some further background premise about value on which you rely. You may suppose that a god created the universe and created you as well. You may suppose that he has issued commands like those of

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the Ten Commandments. But you cannot infer just from those facts that you have any moral reason to obey those commands or that the commands will conduce to a morally good state of affairs or, indeed, a state of affairs desirable in any other way. You need an additional premise to draw God's moral authority from his power and knowledge. Consider the analogy to governments. Terrestrial rulers are legitimate only if they satisfy certain procedural and substantive principles of legitimacy. That philosophical requirement holds for divine as well as mundane rule.

I am taking sides in an ancient theological controversy.⁴ Is a god good because he obeys moral laws, or are certain laws moral laws only because a god had commanded them? This is sometimes presented as a dilemma. If a god is bound by moral laws, he is not all-powerful because he cannot change what is finally right or wrong, good or bad. If, on the other hand, his commands create morality, then he is good only in a trivial, tautological sense. The dilemma is a false one: the proposition that someone's power is less than it might be because he cannot turn bad into good is just another way of violating Hume's principle. No exercise of creative power, however great, can shift fundamental moral truth. So the familiar idea that a god is the ultimate source of morality is confused: the old churchmen who said that his goodness reflects some independent moral law or truth had the better of the argument.

It does not follow, of course, that a god cannot have moral authority: that he cannot create genuine moral duties through his commands. Parliaments have no moral authority unless they act in accordance with fundamental principles of political morality, but they nevertheless can create new moral obligations when they do. I have a moral duty to pay taxes at a certain rate only because a parliament has declared that I must. So the fact that a god has no automatic moral authority does not refute the claim that he is responsible for human rights. These rights may be morally imperative only because a god has commanded us to respect them. If that is so, however,

⁴The puzzle is as old as Plato's *Euthyphro* (Plato, *The Last Days of Socrates*, trans. Hugh Tredennick and Harold Tarrant (Harmondsworth: Penguin Books, 1993). For more modern treatments, see, e.g., Ralph Cudworth, *A Treatise concerning Eternal and Immutable Morality* (1731; New York: Cambridge University Press, 1996); Mark Schroeder, "Cudworth and Normative Explanations," *Journal of Ethics and Social Philosophy* 1 (2005): 1–27.

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then it is because some more basic principle has endowed god with the moral authority to create new moral rights. What could that more basic principle be?

The god I am imagining, who has unlimited creative and destructive capacities, enjoys stick-and-carrot power over all human beings. He can send an AIDS epidemic to Greenwich Village to punish homosexuals or provide a battalion of virgins in heaven for murderous suicides. Many people credit their god's moral authority to these powers of punishment and reward. But threats and bribes do not supply legitimacy. Others credit their god's moral authority to the fact that he created them.⁵ There is a widespread opinion that someone who created something—a sculptor who mixes his labor with a marble block—owns what he has created and therefore has moral authority, though no doubt limited, over what happens to it. But blocks of marble have no moral duty to obey their creator, and people are in any case not blocks of marble. Children do owe duties to their parents, and these include, though only for a limited time, some limited obligation to do what their parents direct. But so far as this authority includes the power to create moral obligation—an obligation to participate in some joint family project, for instance—it depends on a host of social practices and understandings of the kind we reviewed in the last chapter. Parental authority does not in any case stem from mere creation: adoptive parents have the same moral authority as biological ones. If God has the authority to create fresh moral obligations, this must be in consequence of some principle different from John Locke's theory of property.

It may now be objected, by people whose religion is instinctive, that we do not need to find any principle that gives a god moral authority over us. It is enough to say that his authority is just a moral fact we perceive or intuit as an act of faith. That would not be to lapse back into the tautology that whatever a god does is by definition good. We might concede that his goodness is substantive but still insist that we can perceive or intuit his moral authority directly, as a brute

⁵ Bishop R.C. Mortimer was attracted to this suggestion. "The first foundation is the doctrine of God the Creator. God made us and all the world. Because of that He has an absolute claim on our obedience. We do not exist in our own right, but only as His creatures, who ought therefore to do and be what He desires" (Robert C. Mortimer, *Christian Ethics* [London: Hutchinson's University Library, 1950], 7).

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moral fact, just as many people insist that they perceive or intuit his existence and power as brute facts. This claim neglects, however, the crucial difference between the domains of fact and value that we have now several times noticed.

A god's existence and achievements, if any god does exist, are matters of fact, albeit rather special and exotic facts. Any god's moral authority, if this exists, is a matter of value. Claims of fact can be barely true: the kind of god I am imagining might exist, not in virtue of any law of nature but just as an independent brute fact. The world of value is different: nothing is barely true there. Something can be right or wrong only in virtue of a principle that ramifies across a whole terrain of morality. It cannot be a bare moral fact, one we can just intuit, that genocide is wrong or that poor people in an affluent society have a right to basic medical care. We cannot be right or wrong about those claims without also and in consequence being right or wrong about a great deal else. We may be ignorant of the principles in virtue of which an omnipotent and omniscient being has moral authority over us. But if we believe that he does have that moral authority, we must also accept that some principled account of that authority can, in principle, be constructed. This is just to repeat, in this rarefied context, the lessons of Part 1 and of Chapter 7.

The arguments for a god's moral authority we have been reviewing to this point all begin in some fact that makes a god unique: his power to impose punishments or grant favors, his role as creator of the universe, or the special epistemic power of religious faith. We need a very different argument: one that focuses not on the uniqueness of some supernatural creature but on the general conditions of moral authority, conditions that hold even in less exalted contexts of power. We are then immediately back in familiar terrain. Political rulers claim moral authority: they claim the power to impose fresh moral obligations on those subject to their dominion through legislation and decree. But we do not recognize that moral authority unless the rulers' governance is legitimate, and we do not accept government as legitimate unless it treats those over whom it claims moral authority with the right attitude. It must show equal concern for the importance of their lives, and it must allow each of them responsibility for his own life. If we claim that a god has moral authority over all peoples, then we must suppose an equal divine concern and respect for all peoples. The idea popular in some religions, that their god cares only

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or mainly for subscribers to their religion or for the particular ethnic stock of its faithful, subverts the claim of that religion to their god's moral authority.

We must, I said, stand on our own convictions, here as everywhere in the domain of value. We must insist, with due courtesy and after full reflection, that we are right. But we must not appeal to our religion or our god as proof of that claim. We may, if so persuaded, treat our god as a moral legislator on less fundamental issues: on elements of our ethics or personal or even political morality. We may come to think that a god's declaration makes some ethical ideal, some theory about how to live, true. But we cannot, without disabling circularity, treat any god as the source of the most fundamental part of our political morality: our convictions about legitimacy or about human rights.

My argument does not denigrate religion, which has been a remarkable force for good as well as evil over human history. Though the evil may be more prominent in our minds right now, fixed by terror and bigotry, history is too complex to allow that as the final word. My aim has rather been to place the case for human rights on a different plane. We need not rely on our own religion, leaving those of other faiths behind, when we argue for the innate rights of all human beings. We can argue not from what divides us but from what unites us. We all—Muslim, Jew, or Christian, atheist or zealot—face the same inescapable challenge of a life to lead, death to face, and dignity to redeem.

International Law

What Is It?

When I was last instructed in the subject – at Oxford in the 1950's – the first and most lively question, bound to appear on the examination paper together with tedious questions about the law of the sea, was a much more exciting one: Is there any such thing as international law? That question seems no longer to trouble anyone. (Old philosophical problems are not solved; they just go out of fashion.) Everyone assumes there is international law and also assumes that it includes, for example, the Statute of the United Nations and the Geneva Conventions – or at least

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some of them. But the old grounds for challenge remain, and that challenge is important, not because many people now doubt that there is international law and that rules and principles set out in these documents are part of it, but because the question of why these rules and principles are part of a distinct body of law remains crucial. It is crucial because appropriate strategies of interpretation depend on the answer to that question, and issues of interpretation are both controversial and dramatically important. Nations and lawyers diverge, for instance, about the status of associates of Al Qaeda and the Taliban under the Geneva conventions, or whether there is such a thing as an enemy non-combatant who is not covered by those conventions. I will discuss, later, another celebrated interpretive issue: whether the NATO intervention in Kosovo, without the consent of the Security Council of the United Nations, was a violation of international law.

When it was popular to debate whether international law exists, legal positivism dominated jurisprudence. The question was therefore a natural one, and a negative answer seemed plausible. In Austin's 19th Century version of positivism, still popular then, the ground of law is a social fact: law is the command of an un-commanded commander, a sovereign with absolute power over some territory. There is no meta-Austinian sovereign, commanding the parliaments of nations, in the international story. Herbert Hart had just introduced a more sophisticated version of positivism, substituting for Austin's sovereign a different social fact as the ground of domestic law: the wide internalization, throughout a political community, of a fundamental pedigree test for valid law. He called that fundamental test the community's "rule of recognition." He himself raised the question whether what was called international law really counted as law on this new test. His judgment deployed what I have called the sociological concept of law; he answered the question whether there is any system of practices that could sensibly be described as international law. He gave a cautious answer: he said that in some ways international law is like ordinary (or "domestic" or "municipal") law though in other ways it is not. He did not attempt to engage the doctrinal sense of international law: he did not propose a standard for deciding whether any particular statement of the content of international law is accurate.

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Many contemporary studies of the grounds of international law track Hart's version of positivism, or something very like it.⁶ Hart's reservations began in the fact that, though he had characterized a legal system as one requiring distinct institutions with the authority to make and enforce rules for a particular population, no such institutions exist with the acknowledged power to make and enforce law generally for national states. We should notice why that lack poses a serious threat to the status of alleged international law. We cannot sensibly assume that a group or population has law unless we have some way of distinguishing its legal from its political and moral obligation. I suggest, in *Justice for Hedgehogs*, that we should treat legal rights and obligations as a sub-set of political rights and obligations: legal rights are the political rights that are properly enforceable by or against citizens or officials on demand, without further collective law-making, in institutions that have the authority to direct the use of coercive force to enforce its rulings. That characterization makes sense only against a reasonably sophisticated institutional structure and though the international community of nations has some of that structure now, mainly through the United Nations and such special and regional organizations as the World Trade Organization and the European Union, its structure does not seem robust enough to allow us sensibly to characterize international law in the same way. Different organs of the United Nations are acknowledged to have some power to create obligations for its members, but that authority is carefully limited in range, and the United Nations does not have the force to enforce those obligations without the consent of member states to participate in the enforcement of even those limited obligations.

Consent?

International lawyers have offered a solution: a different kind of rule of recognition. Though the sovereign states that make up the international community are not subject to any external authority that might be thought to limit their sovereign status, they have nevertheless subjected themselves to law by their own consent, not in derogation but in the exercise of that status.

⁶ See, for example, Samantha Besson, "Theorizing the Sources of International Law," in Samantha Besson & John Tasioulas, *The Philosophy of International Law* (Oxford, 2010).

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Article 38 (1) of the Statute of the International Court of Justice, established by the United Nations, is often cited as setting out the appropriate sources of international law. It reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷

International lawyers also speak of what they call “ius cogens” or “peremptory norms” that cannot be cancelled by treaty or even by decisions of the United Nations. However, the Vienna Convention on the Law of Treaties brings these, too, under the umbrella of consent.

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Law for nations, on this view, is grounded in what nations have consented to treat as law.

Signatories to treaties are assumed to have consented to treating its provisions as law for them. States that have assumed, in their practices, that certain rules are law have in that way consented to the rules being law for them. If enough states to constitute “the international community of States” have recognized fundamental rules as non-avoidable law, then these are treated as

⁷ It would be nice to treat section (d) of this account as granting power to academic philosopher kings in international affairs. Law is what NYU’s international law group says it is. I assume, however, that the clause is only meant to allow the International Court to appeal to academic interpretations of the other clauses, so we must concentrate on those.

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unavoidable law for the whole community. If there is evidence that a general practice is very widely accepted as law, or that it recognized by civilized nations, then it is law for all nations. The scheme has one apparent advantage. Since it bases law on consent, it answers the question pressing from the start of the modern state system: How can a sovereign state nevertheless be subject to law? It answers: because it has accepted to be bound in the exercise of its sovereignty.

But the scheme has several, and finally fatal, defects as a proposed rule of recognition. First, it offers no priority among the different sources it recognizes. Must treaties yield to general practices? Or vice versa? More important, it offers no explanation why states that have not accepted a rule or principle as law may nevertheless be subject to it because the bulk of other states, or of “civilized” states have accepted it. It offers no standard for deciding how many states must accept a practice as legally required before the practice becomes “customary” and therefore binding on everyone. It offers no guidance as to which states are sufficiently civilized to participate in that essentially legislative power. Or which norms are “peremptory.” These latter difficulties stem from the scheme’s perfectly understandable ambition to extend the ambit of international law beyond those communities that have explicitly consented to its principles to include those who have not. International law could not serve the purposes it must serve in the contemporary world – disciplining the threat some states offer to others, for example – unless it escaped the straight-jacket of state-by-state consent. But yielding to that ambition seems to undermine the axiomatic place of consent in the scheme, and thus its assumed jurisprudential foundation.

However, I shall concentrate on difficulties that stalk even the core of the scheme: the proposition that treaties create law for signatory nations, and that the constraints that nations have accepted as law in their practices and statements are thereby made law for them. The interpretive strategies licensed by this jurisprudential core give out rather early. If a provision is part of international law for nations only because they have consented to it in either of those ways, then the master interpretive question must be: what is it most reasonable to assume that the nations whose consent made the principle law understood that they were consenting to?

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That question may in many cases be answered satisfactorily by the plain meaning of the text (though interesting issues may arise about translation.) But in many cases the text will not in itself be decisive. Here is an important example. Article 2(4) of the United Nations Charter provides that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

How should we understand “territorial integrity or political independence” in this provision? Does a humanitarian intervention undertaken by a group of states, as by NATO in Kosovo, violate territorial integrity or political independence if its sole aim to stop genocide or crimes against humanity? There is a division of opinion among international lawyers.⁸ It seems very unlikely that all the states that created the United Nations in 1945, or who joined that organization since, shared answers to these questions when they joined. It also seems unclear whose opinion, among the different officers or citizens of these states, counts as manifesting a state opinion. Nor has there been sufficient practice by nations or statements by their foreign ministries to provide a firm answer. Nor does there seem any disposition among states to accept, in the spirit of a positivist approach to law, that a body applying international law, like the International Court, should be deemed to have discretion to impose an answer.

If the consent theory of international law were persuasive, we would therefore quickly come to an interpretive dead-end on these questions. Fortunately – in my view – it is not persuasive. One difficulty is apparent. Consider, first, the proposition that international law is created for nations without any formal treaty when they accept that certain constraints on their acts and policies are required not just by decency or prudence but as a matter of law. This assumes that in some way nations decide for themselves whether some constraint they accept is imposed as a matter of law

⁸ See, eg, Alicia Bannon, *The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism*, *Yale Law Journal* 115, (2006): 1157-1164; Michael Reisman & Myres S. McDougal, *Humanitarian Intervention To Protect the Ibos*, in *Humanitarian Intervention and the United Nations* 167, app. A at 175-77 (Richard B. Lillich ed., 1973).

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or just by decency. What principle – what “rule of recognition” – do they supposedly follow in making that discrimination? It won’t do to say that they follow the principle that what they regard as law is law. They need some other standard to decide what they must regard as not just decency but law. Suppose we say: they accept the principle that what other nations accept as law is law. But then the other nations that each nation treats as making law for it need a test of what to treat as law for themselves. Our explanation needs to break out of the circle somewhere. Suppose we say: the requirement means that law is created not just by congruent practice but by convention: by the fact that each nation accepts the practice because and so long as other nations do. Perhaps so. But not all conventions generate obligations; there are many conventions of convenience that people are morally free to disregard when they wish so that the convention ends. When do conventions create obligations? The concept of customary law seems to presuppose that there is some different, more basic principle at work in the identification of international law, or at least that the subjects of international law think there is. What is that more basic principle on which they rely?

Now consider the idea, even more fundamental for the consent thesis, that treaties create international law for the parties to those treaties. Treaties are signed at a particular time: the all-important United Nations Charter over sixty years ago. Nations change dramatically over such periods of time. Boundaries change, regimes and constitutional structures change. We personify states when we treat them, rather than their citizens, as the subjects of international law, and we might therefore be tempted to say that just as individual people are bound by promises long after they make them, so are states, in spite of all these changes. But the fiction of a continuing national person, as distinct from its structure of government and its individual citizens, cannot bear that weight. When we cash out the fiction we see that old treaties can impose serious disadvantage on contemporary citizens through documents signed by entirely different people under entirely different constitutions many generations ago. We cannot justify that by any analogy to the law of contract: these cannot bind people not parties to them. True, the domestic law of some states make treaties a continuing obligation of the state. The American constitution,

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for example, makes treaties part of “the Supreme Law of the Land.” But what domestic law creates it can undo: international law cannot be just a function of what national laws allow.

We need an explanation why the citizens of contemporary Ruritania have an obligation under international law, which cannot be cancelled by any Ruritanian political process, that their officials continue to recognize obligations incurred in another time long ago. It does not serve to declare that international law contains a more basic principle – “pacta sunt servanda” – that treaties must be respected over generations. What makes that more basic principle part of international law? It would, once again, be circular simply to respond that states have consented to that principle when they sign treaties. Compare the familiar institutions of promising. As many philosophers have pointed out, there is mystery in the bare assumption that promising creates obligation. How can an individual change his moral situation just by speaking a runic phrase? We must suppose some different, more basic moral principle in virtue of which promises impose obligations. Philosophers have suggested a variety of such more basic principles.⁹ We must look for one within international law.

I draw this conclusion. We cannot take the self-limiting consent of sovereign nations as the ground of international law. The temptation to do so is understandable. It makes international law compatible, as I said, with the doctrine of state sovereignty. It also resonates with a very popular conception of political legitimacy: that coercive dominion can be justified only by the unanimous consent of those subject to that dominion. That conception of legitimacy generated the extravagant accounts of consent that appear in the social contract tradition in political philosophy. I have argued elsewhere that these all fail and are anyway unnecessary because consent is neither a necessary nor sufficient ground of legitimacy. We need to locate the source of domestic political obligation elsewhere: in my view in the more general phenomenon of associative obligation. I suggest that we face a parallel challenge in accounting for the nature and obligations of international law: parallel rather than identical because there is no close

⁹ I discuss several of these in a paper offered to this Colloquium some time ago. That paper, revised, is now Chapter 13 of *Justice for Hedgehogs*.

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equivalent, among nations, to the shared politics and vulnerabilities of citizens that generate and define their obligation to obey the law of their political community. The international community of nations is not yet – and presumably never will be – a genuine community of the kind that generates associative obligations through political requirements of equal concern and respect. But the modern international system of distinct sovereign nations, each with very great and insulated power over people under its dominion, nevertheless does give rise to very basic moral obligations of the people who exercise such power toward people in other such nations.

Saliency

We reconstruct an international jurisprudence by identifying those moral obligations. We abandon the positivistic, supposedly consent-based, jurisprudence of interpretation law. We return to what I take to be a golden age of the subject in 17th Century European politics – to the influential writings of Hugo Grotius, for instance. These suppose that international law is part of – though a distinct part of – the principles that decent nations are morally obliged to follow in their relations with one another. In *Justice for Hedgehogs*, I described a similar geometry for domestic law. We articulate law, as a distinct part of political morality, by posing a question of political morality. Which political rights and obligations of people and officials are properly enforceable on demand through institutions like courts that have the power to direct coercive force? That is a moral question whose answer is a legal judgment. We draw legal obligation from a more general account of political obligation and we draw political obligation not from consent but from circumstances of association. We construct a moral argument for identifying law in that way, and we use that moral argument as the foundation for a theory of legal interpretation.

The moral argument that ends in international law must be somewhat different. It must begin not in standing political association but its near opposite: in the Westphalian system of distinct sovereign nations, each with very great power over people, power that is understood to be insulated in principle from constraint imposed by other such nations. That system creates and structures coercive power. It therefore itself faces a demand of legitimacy, just as the regimes it creates do, each for itself. The system as a whole poses two different but equally grave risks on

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the people who are its ultimate subjects. The first is the Hobbesian risk that the political arrangements that people in a particular state have secured through constitutional arrangement and collective action will be usurped by external force: by another nation violating the territorial divisions of the system. The second is the risk of domestic terrorism by a local regime immune from any restraining interference by people of other nations.

The Westphalian system is not legitimate unless it incorporates some measure of protection against both dangers. National governments and regimes that are created and protected by the system must recognize a responsibility of political morality to seek an effective international order to reduce or ameliorate these risks. Their title to govern comes neither from popular consent nor from any divine or other non-political right, but only from the contingent history that produced their particular status within the overall system. Their title therefore depends not only on meeting the domestic conditions of legitimacy I discussed earlier in this paper, but on their international behavior as well. They must strive to protect their own people from incursion, which requires that they seek to participate in an international order that provides that protection. They must also strive help protect people elsewhere, to whom everyone everywhere owes a duty of rescue, from tyranny within their own borders. These are foundational moral responsibilities generated by the system of balkanized governance the world community has created.

International law has developed as a halting response to these twin moral demands.

One driving force behind the crystallization of international law, seen from this perspective, is a principle of salience. It is inherently controversial between and even within nations what these responsibilities require of them in their relations with other nations. But it is imperative that some principles of responsibility be understood as required by all nations if there is to be an effective international order serving the two goals I described. If some set of principles – for example about the justified occasions of and permissible methods within war – gains wide acceptance, then the officials of nations have a duty to embrace and follow that set of principles. They have that duty because, provided the principles are themselves decent and reasonable for all, embracing those principles is the most effective way of establishing and improving that international order. The Universal Declaration of Human Rights declares this in the final

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“whereas” of its preamble: “A common understanding of these rights and freedoms is of the greatest importance for the full realization” of the rights the declaration states. The salience principle has an obvious snow-balling effect. As more nations recognize a duty to accept and follow widely accepted principles, those principles, thus even more widely accepted, have increased moral gravitational force.

In the 17th century, salience was provided by two traditions. The first was the fact and political force of Christianity. The Westphalian system was European and Europe was Christian. Church teaching, so far as it was pertinent, could be treated as the spine of developing international law of, for example, the rules of *jus ad bellum* and *in bello*. The second was the idea, inherited from imperial Rome but put to different uses, of a *ius gentium*: legal principles common to nations across the Westphalian system.¹⁰ Early international law reflected both influences: of the natural law tradition developed through Aquinas and of the importance of principles widely shared by domestic legal systems – the latter idea fossilized now in paragraph (c) of Section 38 (1) of the International Court Statute I quoted.

But the world emerging from World War II was very different. There was no longer a dominant religious tradition across the world and widespread secularism in Europe and North America would have negated the influence of any such tradition anyway. War had made the Soviet Union, and revolution later made China, both nations crucial to world order and both sufficiently different in culture, legal tradition and political ambition radically to diminish the usefulness of reliance on shared fundamental legal principles. The retreat from colonialism that left behind many new or newly independent nations made that reliance even less useful. Some new focus of salience was needed and was quickly provided in San Francisco. The charter and institutions of the United Nations are best understood not as arrangements binding only through contract or on signatories but as an order all nations now have a moral obligation to treat as law. The obligation is created not by consent but by the moral force of the principle of salience as a route to a

¹⁰ I have had the advantage of reading a discussion of *ius gentium* in a draft of Jeremy Waldron’s new book, expanding his Storrs Lectures on the use of foreign legal materials in domestic courts.

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satisfactory international order surrounding individual coercive governments. Indeed, more generally, multi-lateral agreements setting out conceptions of such an order, like the Charter, the Geneva conventions, the genocide agreements and the Treaty of Rome establishing the International Criminal Court, are international law for all, not just their initial signatories, through that principle. It is therefore important to distinguish the force of, and the appropriate interpretive strategy for, such multinational treaties from those of agreements creating international organizations like the European Union and the WTO that are designed from the start for only a group of signatory nations and members they themselves later admit, with institutional procedures that cannot sensibly be used outside that club.

I have, I agree, stepped quickly from obligations of international morality to obligations of international law. One problem I described early in this discussion remains. I said that law is part of, but a distinct part of, political morality. We make the discrimination this requires in the domestic context, I said, by asking a special question of political morality: what political rights and obligations do people and officials have that are enforceable on demand through institutions like courts that have the power to direct coercive force? That, I said, is a moral question whose answer is a legal judgment. But how can we use that strategy of discrimination in an international context that lacks the institutional structure the question assumes? I suggest that we can make the necessary discrimination, now, counterfactually. We imagine, though initially in not much detail, that there is some international court with general compulsory jurisdiction and the power to direct an effective international police force. We ask: would people then have rights, enforceable on the demand of their governments through that imagined court? If so, what are their rights so enforceable?

Is it an objection to this counterfactual exercise that there is not and probably never will be, at least in foreseeable circumstances, a court of that character? No international court could deploy effective coercion without the cooperation of powerful nations, and that cooperation would not be effective in bringing those very nations under the rule of international law. But I offer the counterfactual exercise only as a way of identifying international law. It is of course a further question whether nations and scholars would accept that method of grounding international law

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or agree sufficiently about the international law it would identify. That is, sadly, only partly a question of the method's argumentative strength. But they might and experience shows that international opinion about what counts as international law is important even in the absence coercive judicial institutions. We should note, however, that the counterfactual exercise could not serve even that purpose unless it could justify the establishment of the court it supposes if means were available to establish it.

I believe that that counterfactual exercise yields roughly the grounds of international law codified in Article 38 (1) of the Statute of the International Court of Justice, and in the Law of Treaties provision, quoted above. The exercise yields that account in two ways. First, that account restates the substance of the principle of salience. Salience provides the reason we need why nations that sign treaties remain bound by their terms in spite of all the changes I imagined earlier. It provides a reason why the contemporary citizens of a nation have a responsibility to observe treaties signed long ago: in almost all circumstances respecting such treaties is indispensable to creating the stable international order that all nations and their citizens have a responsibility to create. The salience principle also explains the provisions that recognize customary law as issuing from the general practices of nations. There is no circularity in the requirement that these practices reflect a sense of legal not just moral constraint. The snow-balling effect I described explains how practices pass from the general category of international morality to the more specific category of international law: nations come to understand that a practice is sufficiently general so as to engage their responsibility to establish and protect a general order. Even a developing consensus among "the teachings of the most highly qualified publicists of the various nations" establishes a natural ground for salience and therefore of that responsibility.

In that way the salience principle explains the role of *ius gentium* in international law. It also helps to explain the domestic use of that idea: why the domestic constitutional courts of nations are (and should be) drawn to notice and to attempt to achieve some integrity with the domestic

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constitutional principles of other nations.¹¹ The international order that nations have a responsibility to seek is strengthened as the pertinent “general principles of law recognized by civilized nations” grow more uniform. In that way there is (and should be) mutual interaction between the international and the domestic laws of human rights.

Second, the principle of salience supports the common view of the sources of international law, set out in the passages I quoted, in this further way as well. That view is not only an expression of the importance of the principle but is itself a beneficiary of the principle. The principles of Article 38 of the International Court statute are apparently cited almost everywhere international law is examined: in treatises on international law as well as courts. They are in that way self-confirming: it contributes to international order to continue to treat them as sources of international law. Snow-balling works at that level as well. According to the positivist account that makes consent fundamental, these sources flow – imperfectly – from the very idea of law as based in consent. On the account I describe they flow instead from the moral demands on which the legitimacy of the Westphalian system depends. These are taken to be more fundamental than consent and not contingent on consent.

But if the two jurisprudential accounts end in roughly the same view of the actual sources of international law, does it make any difference which we choose? Have I only marched you up the hill, like the Grand Old Duke of York, and then marched you down again? No, because, as I said, the major impact of any theory about the ground of international law is an interpretive strategy for international law. The consent account, I said, yields no helpful strategy. But the responsibility account does. We should interpret the documents and practices picked out by the principle of salience so as advance the imputed purpose of confronting the twin dangers of the Westphalian system. The correct interpretation of an international document, like the UN Charter, is the interpretation that makes the best sense of the text given the underlying aim of international law, taken to be the creation of an international order that protects political communities from external aggression and protects citizens of those communities from domestic

¹¹ Jeremy Waldron discusses that issue extensively in his book.

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barbarism. These goals must be interpreted together: they must be understood in such a way as to make them compatible.

Humanitarian Intervention

I mentioned one important interpretive issue. It has been very widely assumed by distinguished international lawyers, including the late Tom Frank, that no humanitarian military intervention is legal under international law unless it has been approved by the Security Council. But the Security Council is often crippled by the power of each permanent member to veto even otherwise unanimous decisions. That power distorts what should be an essentially legal decision – does a violation of human rights justify intervention? – by questions of political and economic advantage. A permanent member might, for example, seek favorable economic treatment in Africa by promising its veto in aid of dictatorial regimes.

On occasions, however, states or groups or international organizations have intervened in force without Security Council authorization. The Iraq invasion is a minatory example. The United States did claim that it had Security Council permission– as did the United Kingdom, in spite of its Attorney General’s initial opinion to the contrary. But that claim was spurious. The invasion is, I believe, widely condemned in the wider international community. But another example, which I believe is generally approved, was the intervention by NATO forces in Kosovo. No one claimed Security Council authorization. Tom Frank declared this action illegal because it lacked that authorization. But he also declared the intervention morally necessary. He called it a morally mandatory act of international civil disobedience. That is a dangerous description, particularly from an eminent international lawyer. International law is fragile, still nascent and crucial: the proposition that a sense of moral duty can justify acts in violation of international law threatens the necessary development of that institution.

I mentioned another possibility: that the popular interpretation of Article 2 (4) of the United Nations Charter, on which Frank relied, is mistaken. Perhaps we should understand its prohibition to be limited to the use of violence to seek territorial or regime change so that unilateral military action to protect a population from genocide or other crimes against humanity,

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is not excluded. We might argue to that conclusion in several ways. We understand the “Purposes of the United Nations” cited in 2 (4) to be those that flow from the moral responsibility nations had to create that institution: the responsibility to protect people from the dangers of the Westphalian system. External aggression is one of those dangers, but internal terrorism is another and we can sensibly attribute protection from both dangers as among the United Nations’ purposes. That understanding is strengthened by the General Assembly’s early (1960) Uniting for Peace Resolution (often called the Acheson plan). The General Assembly:

"Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

It is further strengthened by the international community’s generally favorable reception to the Responsibility to Protect declaration of the International Commission on Intervention and State Sovereignty (ICISS) in 2001. The Commission’s report stated:

We have made abundantly clear our view that the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes. But the question remains whether it should be the last. In view of the Council’s past inability or unwillingness to fulfill the role expected of it, if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.

A “World Summit” of more than 170 nations in 2006 endorsed the spirit of the ICISS report in this language:

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[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

This language did not recognize intervention that is not authorized by the Security Council, but it nevertheless bears on the interpretation of Article 2 (4) because it clearly supposes that a nation's sovereignty, or "territorial integrity," does not protect it fully from legitimate intervention in its domestic affairs.

I cite these developments to offer a case for an interpretation of the UN Charter, and of international law more generally, that would permit humanitarian intervention if the Security Council failed to authorize that intervention because one or more of the permanent members exercised a veto. I mean only to illustrate the style of argument that is made possible by the alternate account of the grounds of international law I have suggested. This supposes that international law is finally grounded not in the consent of nations binding themselves as an exercise of their unchecked full sovereignty but in the responsibility of people, to be exercised by their leaders, to fulfill the moral requirements on which the legitimacy of the system of otherwise sovereign nations is based. We might ask: does the interpretation of the Charter that would permit intervention not authorized by the Council promote that goal? Does it violate the principle of salience by ignoring a practice reasonably conducive to the practical implementation of that goal? If we answer the first question yes, and the second no, we have made a case that the international court I imagined should not declare such intervention illegal.

I have suggested reasons favoring that legal answer. There is a powerful counterargument: its name is Iraq. Any doctrine that would allow powerful nations to justify aggressive war as a protection of basic human rights boils with the danger of abuse. (The humanitarian justification was not offered by American or British officials in advance in the Iraq case, but it has been offered by former officials of both in retrospect, and could be expected to be offered much more often if established in international law.) This counterargument is powerful because it suggests

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that legal permission to invade for that purpose would not further the overall goals of international law and would prove massively divisive rather than a principle around which further consensus and salience might develop.

But now consider a somewhat less fanciful fantasy than my earlier assumption of an international court with compulsory jurisdiction and effective coercive authority. Imagine that the General Assembly of the United Nations has adopted a resolution with the following substance: member states are forbidden, acting unilaterally or in groups or regional organizations, to threaten or use military force without the authorization of the Security Council, but not forbidden if the International Court, pursuant to its authority to issue advisory opinions upon the request of the General Assembly, declares that the actions of the regime against which force is proposed constitute crimes against humanity.

Should we think that imagined General Assembly resolution ultra vires or otherwise invalid? The argument I suggested for a permissive interpretation of Article 2 (4) would support the resolution and the counterargument I described, about the danger of unilateral action, would be removed by the resolution itself. Crimes against humanity have been sufficiently well defined in other documents and international practice to provide a satisfactorily clear standard for the International Court to apply in its advisory opinions, and to avoid the danger I described in the first part of this paper – that intervention in the name of human rights could mean invading Britain to establish a bigot's right to hate speech. Crimes against humanity have been defined in a variety of multi-lateral treaties including the Hague Convention of 1909 and in codification of the decisions of Nuremberg Tribunals following the second world war. I believe the most appropriate definition would be that of the Treaty of Rome, establishing the International Criminal Court. The treaty's explanatory memorandum states that crimes against humanity

are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. Murder; extermination; torture; rape,

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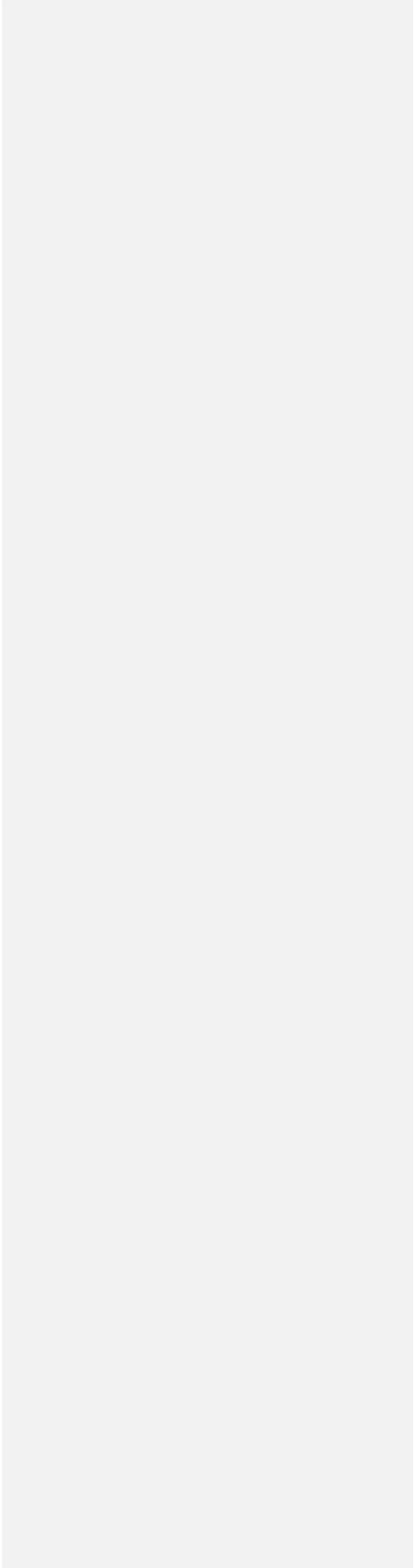
political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice.

Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances, war crimes, but may fall short of falling into the category of crimes under discussion.

So, on the moralized approach to international law I am now defending, the resolution I imagine would not be ultra vires and action taken pursuant to that resolution would not be illegal under international law. Any sensible resolution would be much more elaborate, of course. It would no doubt provide for consultation with the Security Council and deny its permission unless the Council failed to act. It might revise the procedures of the International Court so as to expedite the advisory decisions called for. Or – a more radical idea – it might bypass the International Court altogether and create a special international court for this ad hoc purpose. I shall not try to explore the appropriate character of any such court. But any of these possibilities would establish a remarkable and important improvement in international law.

You may be surprised by the free-wheeling character of the arguments I have been offering as arguments of international law. But remember that international law is very young: it was reborn in 1945. The arguments of famous judges in the comparable formative period of the Anglo-American common law – of Baron Bramwell, Edward Coke, and George Jessel – and those of some federal judges in the brave, halcyon days of *Swift v. Tyson* might strike contemporary lawyers as equally free-wheeling. The constitutional arguments of John Marshall, who transformed a written constitution, and of Aaron Barak who made a constitution without a written one to transform, surprised many of their colleagues. If law is understood as a special part of political morality, and if it serves its community well, its doctrines will crystallize over time. Its roots in morality will grow less prominent, though available when needed, in ordinary legal argument. That progress from principle to doctrine will signal its success. But a rigid separation between legal and moral argument in the development of international law would be premature now and would accelerate its practical irrelevance. Now is the time to nourish the roots not study the boughs and twigs of international law.

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Notes

