

## 8. Images of Religion in International Legal Theory

Our discipline tells a very specific story about its historic relationship to religion, a story that reveals more about our self-image than about religion or international legal history. Indeed, to my mind, scholarship about 'religion and international law' is primarily interesting for its industrious work embellishing, improving and reflecting international law's sense of self. As one part of a larger effort to rejuvenate and redefine our discipline, I would like, quite briefly, to describe and interrogate our collective psychosis about religion and suggest a thoroughgoing relationship between our discipline and our cultural faith.

The short 'historical introduction' to the 1987 edition of the West casebook by Professors Henkin, Pugh, Schachter and Smit presents international law's relationship to religion in classic form.<sup>1</sup> Let us read it together. The text is indeed short — 11 pages at the very start (before the Table of Contents) of a 1500-page basic text. We should pay close attention to religion here for it appears more in these pages than elsewhere in the book, seems inseparable from international law's history, indeed, seems essentially a historical phenomenon. What do these brief pages tell us about the relationship between international law and its history? That history is over, short, early, preliminary, severable from the 'cases and materials' of international law. And so also religion — we know already what is most important — religion is something we used to have.

The history is written in the collective voice of the editors, guiding us in unison to the present, where the voice fragments, explodes into a dizzy confusion of cases, notes, commentaries and questions. And religion belongs to that earlier, more comprehensible period, belongs to the era of a unison from which we have fallen into ecumenical dispersion — itself a quintessentially religious narrative. Things in the past make sense, had a coherent pattern that brings us sadly, inexorably, with resolve and also with aspiration to the challenge of the materials — can the reader bring them together, resolve contemporary doctrinal, theoretical, even political disarray as successfully as have the editors our history? And what is this but the ambition — the very project of the religious? Our resolve in pursuing this project is the earnest resolve of the exreligious, our aspiration that of the nostalgic.

This text, the text most overt about religion, sets up our approach to the

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'problems' of contemporary public international law and patterns successful responses, textually and historically. We should be particularly attentive then, to its messages, for the book recapitulates this structure each time historical 'context' is deemed relevant to an 'understanding' of the materials 'themselves.'

The story is developed in eight weird stages — eight phases that reduce to a familiar three-part time line: before 1648, 1648–1918, and 1918 to the present. The first four take up the period before what is termed the 'foundation' of international law in 1648, and foreground political or social change. The next two (covering the period from 1648 until 1918) shift dramatically to philosophy, documenting the displacement of the relationship between 'principles of international law' and 'natural law philosophy' by the 'turn to positivism.' The last two consider 'modern' institutional developments following each of the two world wars.

Already we find an interesting structure — political and social roots transformed by philosophy into institutional modernity. Religion begins as a social force, is transformed into a 'philosophy' and survives only as a set of 'principles,' guiding the practice of institutions. So far, a standard bit of enlightenment ideology. International law inherits principles from religion, is born of chaos, is refined by philosophy, tried by war and confirmed as an institutional response to military sacrifice. And what is this but the most familiar religious narrative?

This structure, the structure of international law's historical self-image, we find recapitulated at the heart of contemporary international law doctrine — in the movement from jurisdiction through the merits to remedies — or, more familiarly, from sources through process to substance. At first, word appears wrested from politics — sources or jurisdiction. Immediately word explodes as speech, proliferating as process and debate about the merits. But each complex dispersal projects its resolution into a text or outcome that will give way to the epiphany of substance or the institutional instrument of implementation. And we find this structure also at the core of modern institutional life — in the movement from membership or 'constitution' through plenary debate by vote to administration. It is politics displaced by speech and transformed into bureaucracy.

But let us take up the argument more slowly. The first section, introduction to the introduction, concludes: '[I]n a strict sense, therefore, the history of the modern law of nations begins with the emergence of independent nation-states from the ruins of the medieval Holy Roman Empire, and is commonly dated from the Peace of Westphalia (1648).' Choosing the end of the Thirty Years War, rather than, say, the beginning, implicates international law in the conflict itself not at all. States emerge naturally from 'ruins.' Indeed, later we will read: '[a]s the medieval Holy Roman Empire dis-integrated, the void was filled by a growing number of separate states.' International law is the response of philosophy, of reason, to this emerging fact, and shares nothing with the messy collapse itself.

Coming after the religious wars, moreover, international law is seen as a response to the inadequacies of religion. In this first section, these, the failures

of religion, are the inadequacies of 'universal political ideologies.' The text begins by distinguishing the eternal situation to which international law responds from pre-1648 religious resolutions. Here is the opening:

Human history has long known tribes and peoples [which we also know, which international law knows, knows as history knew them, namely], inhabiting defined territories, governed by chiefs or princes, and interacting with each other in a manner requiring primitive forms of diplomatic relations and covenants of peace or alliances for war. These relations between peoples or princes, however, were not governed by any agreed, authoritative principles or rules.

So far, the text is familiar: in the beginning, man lacked law, for this, agreed/authoritative principles/rules, not primitive alliances or princely authority, is law. But now comes a strange turn, a turn to empire and religion.

At various times, moreover, most of the peoples of the known world were part of large empires and relations between them were subject to an imperial, 'domestic' government and law. Empire, actual or potential, was also sometimes supported by an ideology that claimed universal authority over all peoples, or otherwise rejected the independence and equality of nations or any principles governing relations between them other than imperial law.

The text then illustrates by comparing 'classical Chinese philosophy,' Islam, Christianity (at least 'in its formative phase') and Judaism as ideologies which 'legitimate . . . conquest and subjugation of others.' Judaism's failure to develop a 'universalist political ideology' is attributed to the fact that Judaism 'has not been the ideology of a politically independent people for 2000 years.'

These are powerful associations: religion/empire/ideology. International law stands forward of subjugation, in 'independence and equality,' if only the independence and equality of 'nations.' Can we read this passage without thinking about communism, without prefiguring the post-1918 institutional structure of decolonization, self-determination and international administration? Without reaffirming international law as having done with all that, with empire, with universalism, with ideology, with war? The enlightenment attack on religion ends here, in the institutional, democratic West, with an intellectual McCarthyism. Challenges to international legal order are now to be expected from modern primitives, imperial ideologies.

And yet we find an immediate doubt. The second section, telling us about the 'origins of international law' takes us back, back to Greece and Rome. Greece, we learn, 'never achieved unity' before the Macedonian conquest and therefore 'alternated between peace and war.' Given the earlier emphasis on the 'void' of intersovereign conflict calling forth law, we might think that the Greeks therefore lacked international law. But no, we read: '[A]s a result, [precisely 'as a result'] the Greeks . . . developed rules governing relations between the various Greek states, rules that more closely parallel the modern system of international law than those of any other early civilization,' perhaps because they avoided universalist ideologies. Here we find international law grounded in the oscillation between war and peace, distinguished from the religious wars of 'ruin'

precisely in their secularity: religion marks the difference between the passions of imperial ruin and the merely remedial inadequacies of an early, partial accommodation of international conflict.

And the Roman Empire, we read, '[a]t its height comprised hundreds of different races, tribes and religions.' Following the logic of part one, you might think it therefore lacked international law 'in the strict sense,' possessing only a 'domestic' imperial order. So we also are told, but now 'the significance of the Roman contribution to international law' is foregrounded; namely the *jus gentium*, 'a system of legal rules governing the relations between Roman citizens and foreigners.' This might have seemed the very stuff of empire, of subjugation rather than civilization, but it is instead 'one of the sources of contemporary international law,' perhaps because its rules were not tainted by 'ideology,' indeed, by religion. Religion thus marks the difference between acceptable and unacceptable empire, exactly as it marked the difference between acceptable and unacceptable international conflict. The 1648 date situates international law forward of both empire and conflict, by situating itself forward of religion, while tracing its roots proudly to Greece and Rome.

Parts three and four confirm this development. By 1648 we find a 'void,' slowly being, having been, filled by 'a growing number of separate states.' Only then, after the void has been filled, after religion has been voided, does international law appear — as a philosophy, a study, a 'system of rules' made 'necessary for the newly emerging independent states.' As a philosophy, it arose 'where the Renaissance had revived the study of classical civilization and, in particular, the study of Roman law.' However secular the presentation, this narrative of law's arrival from the void as word is a familiar one from religion. And indeed, how else than as religious mythology could law be imagined to arrive so fortuitously or in such a disembodied form?

Activities, commerce, 'improvements in navigation and military techniques' all 'give rise' to concepts and principles that, when unified, recorded and rationalized, comprise the first works of the discipline. And our story moves now to the priesthood of believers, for the chaotic facts, have done their work, have 'called forth' a law.

By the beginning of the 17th century, the growing complexity of international customs and treaties had given rise to a need for compilation and systematization. At the same time, the growing disorders and sufferings of war, especially of the Thirty Years' War, which laid waste hundreds of towns and villages and inflicted great sufferings and privation on peasants and city dwellers, urgently called for some further rules governing the conduct of war.

Although the emphasis shifts now to the work of systematization and compilation, we learn that the 'details of their systems are not of much contemporary importance.' And indeed, we find little study of the particular relations among the practices calling forth doctrine and the doctrines called forth. Instead, we follow what 'is of interest and not without importance:' namely, 'the basic ideas underlying the evolution of international law and . . . the principal phases of development from the time of Grotius to the present.' Ironically, at the very

moment of religion's disappearance, international law appears as a universalist ideology of its own, temporally freed from its origin and context.

But it will not present itself so. Indeed, the story of idea's triumph is told as the triumph of the will. The traditional intellectual story of international law's evolution from 1648 to 1918 is familiar. Begun as a series of disassociated doctrines about navigation, war and relations with aborigines within a 'natural law' philosophy, international law slowly matured as a comprehensive doctrinal fabric rendered coherent by a set of 'general principles' and authoritative by its 'positivist' link to sovereign consent. The shift from fragmentation to coherence is accompanied, then, by a shift from 'natural law' to a combination of 'principles' and 'positivism.' Eventually even the 'principles' became subordinated to the 'positivism,' and subject to codification — exactly at the moment political conflict again breaks the narrative surface — after 1918. This narrative of authority's triumph over principle is repeated — in the shift from natural law to principle, from naturalism to positivism, and finally from law to institutions in the post-World War One era.

The move is paradoxical. On the one hand, international law is a matter of ideas, born in the move from state of law, instantiating law to facilitate the state. On the other, maturity is achieved at each stage through a double reversal of this order — first by a movement from thought to action, from belief to practice, from law to state, and second, exactly at the moment of law's movement from principle toward practice, law is set up against the state, separated from the sovereign it facilitates and mirrors. This double movement is sustained by law's singular and repressive relationship to religion.

By repressing religion back to origins, law first achieves a space to operate against the state — to inherit the critique. Second, by expelling religion, establishing it in a continuing extralegal field — as principle, and eventually ideology — law seems entwined with sovereignty, inseparable in its origin and practice from authoritative will. We thus find a trilogy, religion-law-state, that constructs law as recollection and anticipation; remembering faith, anticipating the state, projecting it forward as law's completion, object and origin — for it is the state that split law from religion. Could there be a more familiar religious narrative?

And it is a narrative that gives law a most peculiar set of obsessions. It must remember, but safely, and it must anticipate, both humble and discerningly critical of the state, for only law can certify the return of its origin. It is unsurprising that a law so constructed would be obsessed with the relationship, the line, the distinction, between international law and sovereignty, between the ideas that comprise our discipline and various historical practices of willed authority. And indeed, in a furious repetition compulsion, we theorize about little except the normative/descriptive relationship between law and state behaviour, exactly as our doctrines repeatedly trace (and seek to enforce) the line between law and politics — to differentiate custom from treaty, substance from procedure, and so on.

These are the preoccupations of a discipline that locates its origins in the

word. The post-1648 discipline of international law retains this preoccupation, even after its 1918 move to modernism, in both the increasingly idiosyncratic battles of 'neo'-positivism and 'neo'-naturalism, and the fragmenting rhetorics of realism, state behaviour theory and institutional pragmatism. But it should be no surprise that after the reemergence of the deed, in the disconnected space of modernism — after, say, the invention of world war, the triumph of the machine or the insistence of objectivism — these obsessions seem ever less stirring. Indeed, the post-1918 discipline of 'international institutions,' which locates its origin in deed, presents a *mirror image of preoccupations*. If international law frets about word's effect on deed, about law's influence, international institutions tinker with the word's bureaucratic instantiation — reforming, revising, getting it 'right.' Law presents itself as that which has been able to differentiate and defeat religion, by inheritance and banishment. Yet, we must smile at law here, repeating in a secular key a practice of distinction that, recast as the separation of the sacred and the profane, seems the most central concern of religion itself.

So far, I have told the traditional story of international law's relationship to religion. Religion belongs to our past, surviving in the present only as origin and principle. International law, although threatened by contemporary ideologies, is essentially ecumenical and anti-imperial. However universal, indeed proud of its universality, international law confirms, even institutionalizes, the Enlightenment struggle for an international order of respected will.

The center of our modern concern will be here — in the effort to square will with order. The solution will be some accommodation of law and state, of positivism and principle, of institutional democracy and administrative or judicial *restraint*. *The place of religion in international law will be understood now to be simply trivial, arcane, historical*. The secular order offers outsiders 'self-determination.' So long as religion can be kept marginal, the offer will be accepted. In short, the outside only can come into being as an institution — a 'state,' a 'people,' a 'citizen.' And we will insist on the marginality of religion at the core of our practice, writing and rewriting the practice of chastened participation, of faith reduced to inspiration, of religion as the animator or handmaiden of international order — never quite forgotten, indeed insisted upon in its intermittency. Thus, our odd fascination with the occasional importance of Quakers, Bishops and Christian civil disobedients.

But however often we interrogate and reconfirm religion's arcane historicity, its centrality as inspired loss, we *find ourselves redoubled in doubt, cynical about our normative aspiration, threatened by faith*. For now the entire terrain outside the struggle between state and law, whether presented as ideology, fanaticism, or terrorism, challenges the security of our doubts, recalling an authenticity we believe ourselves to have lost. And when there is an other, an outside, it will be most compelling, most fascinating, when it can be labeled religious — as early Soviet 'ideologists' or, more recently, Islamic fundamentalism. In our lexicon, these threats seem powerful because they remind us of the history we have repressed — a history that would recast relations between law and state and

among our doctrines and theories as repetitions of the work of faith, distinguishing the sacred and the profane. Yet we know we are not faithful, being all reasonable men.

Rather than review again the marginality of faith, or reconfirm the inheritance of religious principles, let me unsettle this traditional story somewhat. It is at least striking that the story of religion's disappearance should present such a mythologic face — recapitulating the motive, origin and plot of the religion it escapes. But there are other difficulties. However insecure as a secular narrative, our discipline's sense of its relation to religion is simply incorrect, both about its origins and religion. Let me outline a different story about religion, a story that rethinks our origins to permit a continuing relationship between international law and religion — as doctrine, ritual and narrative.

We might begin such a story with a second look at origins. After all, why commence the discipline in 1648 — why not 1618, or 1518, or 1220? Were we to focus on the evolution of a culturally independent, self-confident legal culture — professionally, doctrinally, institutionally — we would surely need to begin with religion, seeing the roots of law's arrogance, universality, indeed univocality, in the project of canon law and the development of catholicity. Catholicity not as we now regard it, as a virtual synonym for 'general, universal' — in the sense, strangely enough (according to the American Heritage Dictionary) of 'all-inclusive, broad and comprehensive in interests, . . . liberal,' — but as it developed from the Greek to mean the opinion of the greater, wiser, older, healthier part, in short, the orthodoxy established by council as arbiters of the public good. And we would see in the catholic not merely a precursor but an origin, a companion for international law's generalizing pretense — even unto its roots in the institutional structure of plenary and consent.

Second, launched back into the interplay of religion and law — to a time when the 'two swords' mingled, indeed established themselves as two swords precisely because of their intermingled bureaucratic and territorial involvements — we would think again about the collaborative project of division, exclusion and repression. Not simply the division of sacred and profane — a division as marked by law as by religion — or the division of true and false, the legislation of common judgement into orthodoxy, although these were collective, interactive projects of law and religion. But not these — more crucially, the exclusion and suppression of actual social difference.

And we would find in the origins of international law not a moment of tolerant generality, of liberality, but a well-articulated practice of social intolerance. For it was the law of peoples that worked to exclude the Jew, the homosexual, the heretic, and perhaps most crucially, worked to suppress the exuberance of spiritual fervor, displacing it with bureaucracy. The suppression of witchcraft, sorcery, but also of ecstatic millenarianism, whether of early Amurians or late Anabaptists, and their displacement by the logic of state orthodoxy, was a collaborative practice of religious intersovereign action. In this context, the relationship between the historical Antichrist and contemporary

institutional images of chaos and utopia seems unavoidable. This story would recapture the trace of Judaism, particularly of the mystical Jew, in the early literatures of international law — and I think here most readily of Gentili's obsession with Judaism — a Judaism that seems at once the law that revelation and redemption replace and the mysticism that law and state refuse. Paradoxically enough, we find here our own complex relationship between international law and religion exactly mirrored in the relationship between Christianity and Judaism. And we would need to explore the repetition of this opposition to ecstasy within Christianity in the secular consolidation of St. Augustine (indeed, in his own odd relationship to his confessions) and in the more general loss of agnostic possibilities.

Telling this story would return us to the development of interrogations, common rituals, taxations, citizenship and exiles, to the recognition and enforcement of papal enunciations and imperial denunciations, rooting the doctrines of international law in the earliest consolidation of authority in the West, and the first turn from enthusiastic to bureaucratic power. It would return us also to the Reformation, not as the divisive precursor to the collapse of 'universalist ideologies,' the precondition for the 'rise' of statehood and the instantiation of international law, not, in other words as fact, but as law.

The Reformation would need to be told as a set of political and religious accommodations, conditioned by the consolidation of dynastic rivalry and the Ottoman 'threat,' as crucial, perhaps even particularly crucial as a division, to the centrality of Europe to international law. To tell this story, we would need to look more closely at the relationship between Luther and the Empire in the suppression of peasant uprisings, in the military and ecclesiastical displacement of Thomas Muentzer by Martin Luther, of uprising by protestation, and again at the political displacement of enthusiasm by sovereign tolerance and religious calculation.

Doctrinally, we would need to follow the development of exile, and the slow territorial consolidation and reinterpretation of the doctrine of two swords. For the development of a territorial jurisdiction, so crucial to the image of a disembodied state, was first and foremost a religious notion, replacing and instantiating a disembodied deity as state. This is an association that could be explored both factually, in the reciprocal development of local mercantile and princely authorities, and conceptually, in the rituals of the sovereign body.

Third, leaving now the origins, we would rethink international law's conceptual and ritualistic structure in religious terms. Telling this story would see our eclecticism, and indeed our rationalism, not as the displacement of religion, but as a continuation of religion's will to power. We would need to recapture work done elsewhere — in psychoanalytic theory, literature and anthropology — on the state as father, monotheistic, abstract, unnameable and obsessed with naming and possession.

Such an inquiry would trace images of personal redemption through acceptance through to international positivism's obsession with consent. For Christianity's self-image as chosen, as willed through conversion, both isolates the redemptive



insight — safely barricading ecstasy to the moment of faith's origins, exactly as international law isolates inspiration to its origins — and develops an account of personal responsibility, objectivity, readability familiar from positivism. Indeed, it seems impossible to think of contemporary debates about state succession (with all their rhetoric of reciprocal participation and consent) without recalling the history of organized intolerance that hit upon the idea that the excluded *chose* to remain Jewish, or aboriginal or homosexual or heretical at a particular historical moment, when the state needed to implement the exclusion through objective procedures.

Following this line, we would develop the theory of the self as both internal, subjective and manifested, the theory so crucial to both the boundaries between fathers and diety and between international and municipal legal order. Finally, it might be profitable to uncover religious narratives of fall and redemption through intervention of the Messianic hero in our hopes for the state and its transformation through law — as well as in the images of international political redemption through reform of the state that we normally take for 'realism.' Suddenly, the 'realist' adage that 'some eggs must be broken to make an omelet' seems unthinkable except in the language of sacrificial violence, a violence channeled both domestically and internationally by the discursive practices of our discipline.

At this point, it seems impossible to do more than sketch the possibilities opened up by an interrogation of our discipline's traditional story of its relationship to religion. Once our enlightenment narrative has been jostled, the deep and abiding interaction of international law and religion seems unavoidable. I have sought to develop two different strategies of inquiry into that interaction. First, a strategy of narrative homology, tracing structural similarities among the stories told by law and religion — about themselves, about, each other, and about the 'other.' Second, a strategy of historical recovery, recovery of the mutual participations of religious and legal in the construction of the state, the sovereign and his law.

#### NOTES

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1. L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law: Cases and Materials* xxxiii–xlili (1987).