

Draft for Discussion Only (As at 19 March 2009)

THE CONCEPT OF INTERNATIONAL LAW

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The title of my talk is a variation on the title of H.L.A. Hart's famous book to suggest that the philosophical tradition in which Hart worked, broadly understood, is salvageable for international law. Consistent within that tradition, I have no interest in transcendent theories about international law, and do not see the claims that international law makes on states and persons as from a source of truth beyond social agreement humans have about purely human social practices. While much focus is placed on disagreement across the globe, in the form of pluralism, we actually agree on a good bit that we take for granted. I want to get clear on that agreement. Philosophy seeks to clarify what we already know.

I will talk about three connected concepts, normativity, validity, and justice, which I think are important ways of understanding law in the tradition in which this talk is located. From my own experiences in American law schools, I think that these concepts are unknown or misunderstood, and the result is confusion and the asking of wrong questions about what philosophy can deliver.

Normativity is about the idea of obligation in international law. It is about the claim to obedience that international law makes on states and persons. Another way of describing the task of understanding normativity is to account for why international law can be understood as having practical authority – as providing authoritative reasons for states to act according to its demands.

Validity is about how we determine which rules belong within a legal system. I will sketch an argument as to why legal positivism provides an account of the concept of international law, if we modify positivism to be cosmopolitan and less state centered. This is a controversial claim. I think that analytical jurisprudence has something to say about international law because of the location of its account of the law entirely in human social practices.

Justice is about the values that international law should promote. International law may be subjected to moral appraisal just like municipal law. Its structure can be understood as contractualist. To the extent that international law has a contractualist structure, it makes a legitimate claim of obedience on states and persons. As I explain below, contractualism locates the source of obligation in justification to others on grounds no one can reasonably reject. My aim here is to offer a deontological account of international law that does not rely on natural law. As part of this demonstration, I argue that theories of justice must become more institutionally sensitive.

Most of my work centers on using contractualist accounts of justice - distributive and corrective justice - to evaluate the content and legitimacy of international law. The basic point of this work is to understand how theories of justice - not of charity, beneficence, or acting virtuously in the superogatory sense - have play in the global realm. As Americans, because our political order is deficient in specifying fair terms of

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social cooperation around notions of distributive justice in particular, we focus too much on charity. We hear from our own government that charity is good. The US Internal Revenue Code rewards and incentivizes it. Charity indeed should be praised. Charity, however, is a much more limited form of moral action than justice. We need full-blown accounts of justice to identify for us the sort of obligations we owe to each other. We simply cannot turn off justice in the move from the municipal to the international, as that distinction itself is highly suspect.

I. NORMATIVITY

When someone asks whether they ought to do x , they are asking whether x makes a claim or demand on them for action. They are asking, is x action guiding? Does x give me a reason for action? The predicate x can be tying one's shoes or providing assistance to tsunami victims. Whether or not I actually do x or whether people generally do x are different sorts of questions as to whether I ought to do x . To confuse these questions is to make a category mistake. Questions about "actually doing x " are naturalistic questions, which are questions about facts and the contingencies of actual communities. Questions about "ought to do x " are about values.

Let's get more specific about law. When I ask whether I ought to obey a particular legal standard, I am asking a normative question. The question is whether the law or some particular legal rule makes a claim of obedience on me. California criminal statutes prohibiting murder make a claim of obedience on all persons within the state. It is an entirely different question to ask whether people in California actually obey the law prohibiting murder. In fact some do not. That is a naturalistic question. It is a question about facts, not values. But they should obey the law. That is a normative question, a question about values.

As someone influenced by Kant and who sees morality as coming from the kingdom of ends and human dignity, I am way out of my league when I try to talk about these points from a religious or theistic point of view, but I'll try. The distinction I am trying to make here is between the normative power of a divine command in the form of the Commandment, "do not kill" with the fact that people violate the Commandment and commit murder. Certainly that people disobey the Commandment does not threaten its power to command us.

The fact of obedience, a naturalistic question, relates to the claim of obedience, a normative question, in a limited sense. If there is widespread disobedience of the law, in analytical jurisprudence we ask whether a particular legal system is in force or effective across the community it purports to govern. The norms of communal property ownership in Papua New Guinea are not in force in California. We can say with confidence that these rules have no normativity in California. We might not be able to make a similar claim about morality, which is universal, a system of norms not tied to territories or institutions. Large scale failures to follow a moral norm do not threaten the power of the moral norm to make demands on us. That we fail to assist people in dire need in poor countries, even when such assistance would produce substantial benefits for others with limited burdens on us, does not somehow lessen moral demands on us. Even in the legal context, mass disobedience of legal norms that indisputably apply to a given population does not weaken the claim of obedience those legal norms make on that population.

Some law and economics scholars draw a false inference from instances of failures of states to comply with international law to argue that international law makes no claim of obedience on states. One does not follow from the other. A better question for a social scientist to ask is: *If* international law makes a claim of obedience on states and their rulers, and *if* states are not obeying international law, then why not? I do not think anyone has tried to answer that question. It is the sort of empirical question that social scientists are well-equipped to answer.

Here is an example from international law. If we ask whether a customary international law norm forbidding preventive intervention made a claim of obedience on the Bush Administration to not invade Iraq, the answer would be “yes.” The Bush Doctrine is not customary international law. Whether states violate the actual legal rule is an entirely different question. That the Bush Administration violated the legal rule does not mean that the rule has no normative power. The rule has been violated. We have what Hart called a critical reflective attitude about rule violations. When we say or think, “what the Bush Administration did was wrong; the United States should not have intervened,” that is evidence of our critical reflective attitude about the demand the legal rule makes on us.

But wait. Doesn’t international law itself conflate these points? It is certainly true that the fact of obedience is part of the rule of validity for customary international law, but so what. Let’s keep our concepts clear. A validity condition for a legal rule simply picks out the rule for us that makes a claim of obedience on us. That persistent adherence to custom happens to comprise part of the rule of recognition for customary international law signals for states the rules that make a claim of obedience on them. It is a publicity condition about legal rules, to help us identify the rules that make demands on states.

II. VALIDITY

The legal positivist challenge to international law has not been taken on from within legal positivism itself. H.L.A. Hart’s famous chapter X has not been thoroughly rebutted. Hart said, among other things, that international law comprises an important set of social rules and that international law is analogous in content to domestic law, but that there is no international legal system because there are no secondary rules of recognition in which secondary rule officials advise the primary rule users of the valid rules of law. He also said that treaties are not legislation because they are in force only between the parties who ratify or accede to them. The principal strategy among scholars seeking to defeat the positivist challenge has been to avoid legal positivism altogether and to seek answers to the question of what makes international law law from natural law. This is the so-called natural law turn in international law.¹ My own view of the matter is that I think natural law comes with its own set of worries and that such a turn substitutes one set of problems for another. And, I think that positivism does not totally fail us.

The main worry about positivism is its reliance on the state for secondary rule officials. It is mainly an account of the role of those officials in producing primary rules. The traditional notion of positivism is as an account of state dominated, municipal, territorial, legal systems, which I classify as the political conception of positivism. But I

¹ MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* (2008).

think a cosmopolitan conception of positivism is possible. While I do not have time to provide a detailed account here, a cosmopolitan conception of legal positivism, one removing the state as an enabling condition for a legal system, would seem to require that five conditions be met: (1) acceptance by the participants in the legal system of the rules of the system as valid, binding, and authoritative; (2) systemic qualities of normative consequence within the putative legal system that make the normative order the system represents intelligible or comprehensible to the participants; (3) secondary rules and secondary rule officials, though they can be distributed across different state and non-state hierarchies; (4) shared agency between secondary rule officials demonstrating sufficient mutual responsiveness and joint commitment to a legal system; and (5) primary rules dealing with issues that legal systems usually deal with, such as property, contract, and dispute resolution.

These descriptive conditions can be employed to support the claim that public international law forms a legal system. They can help us understand a number of institutional normative orders, from the system of international human rights law to a transnational commercial law order that includes the contemporary law merchant.²

III. JUSTICE

In the above discussion on the claim to obedience international law makes on states and persons, I left open the content of the claim itself. What values do binding rules direct us to follow? If one understands law deontologically, the questions do not neatly separate, because it is the value itself that might compel us to act. If the law reflects a requirement, of, say, corrective justice to compensate victims we negligently harm, then it is that requirement of corrective justice that comprises at least part of the practical authority of the law.³

Justice is the most important value a legal system can have. At the very start of *A Theory of Justice*, Rawls explains that “justice is the first virtue of social institutions, as truth is for systems of thought.”⁴ My approach is thoroughly contractualist, which means that I am in the mainstream in political theory about global justice but in the periphery of legal theory about international law. Of course, we know the difficulties that contractualist (some say contractarian) accounts of justice have for understanding global justice. But we cannot let that stop us. In his recent influential paper on global justice, Thomas Nagel explains the importance of the global justice project:

By comparison with the perplexing and undeveloped state of this subject, domestic political theory is very well understood, with multiple highly developed theories offering alternative solutions to well-defined problems. By contrast, concepts and theories of global justice are in the early stages

² The phrase “institutional normative orders” is from NEIL MACCORMICK, *INSTITUTIONS AND LAW: AN ESSAY IN LEGAL THEORY* (2008). For my recent attempt to use these conditions to conceptualize a transnational commercial law order, see John Linarelli, “Analytical Jurisprudence and the Concept of Commercial Law,” Northeastern University School of Law Research Paper No. 1331928, available at SSRN: <http://ssrn.com/abstract=1331928>. This paper more fully explains the cosmopolitan conception of legal positivism.

³ Exclusive legal positivists disagree.

⁴ JOHN RAWLS, *A THEORY OF JUSTICE I* (rev. ed. 1999).

of formation, and it is not clear what the main questions are, let alone the main possible answers. I believe that the need for workable ideas about the global or international case presents political theory with its most important current task, and even perhaps with the opportunity to make a practical contribution in the long run, though perhaps only the very long run.⁵

While I cannot respond to Nagel's call in the few minutes I have, I want to make a few remarks about one way of addressing the problem of global justice.

The problem to which Nagel refers is in the conception of justice found in moral and political theory. The idea is that duties of justice, in particular duties of distributive justice, presuppose a domestic political order, with its own political institutions and legal systems determined by statehood and territory, or by Rawls' notion of "peoples." The idea here is that domestic social contracts limit duties of justice to those among citizens in a political order, in which duties of justice are implemented through political cooperation at the level of municipal institutions. It seems beyond dispute that it is up to citizens in domestic societies to decide in a democratic process of public justification how society is to provide social security, health care, education, labor standards, environmental protection, product safety, criminal justice, allocate tax burdens, and so on. The fundamentals of justice seem closely connected to state dominated political order.

But many reject these limitations. This is not the place to survey the substantial literature on global justice. Dealing with state dominance in the business of justice is one of the greatest challenges for cosmopolitan theories of global justice. In *Law of Peoples*, Rawls discusses decent peoples with moral motives and a sense of justice resulting in limited duties of assistance and respect for basic human rights.⁶ Certainly, given the interdependence of peoples in the world today, more is owed to each other than these minimums. But how far do our obligations to each other go?

We can dispense with claims of the so-called realists about how morality makes no claims on states.⁷ It is a kind of Nietzschean skepticism about moral demands as a disaster for the actor bound by them. To a realist, complying with moral demands can be disastrous for states and the populations they represent. In a world in which such skepticism prevails, a moral framework for thinking about international law simply cannot get off the ground. If the skeptics are right, then international law is indeed simply ideology and politics. I think these claims are easy to reject because I doubt that many citizens of states are moral skeptics. And I doubt many of the government officials who represent their citizens on international matters are moral skeptics. Marshall Cohen got it right when he said that "these are not the terms a responsible constituency can be understood to have exacted from those who conduct its affairs."⁸

The idea of a "responsible constituency" has a certain appeal, in the sense that it could be made to refer to a reasonable constituency of persons represented by a state. The

⁵ Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUBLIC AFFAIRS 1 (2005).

⁶ SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 267 (2007).

⁷ The realism to which I refer is realism in international relations, not meta-ethics.

⁸ Marshall Cohen, *Moral Skepticism and International Relations*, 13 PHIL. & PUBLIC AFFAIRS 299 (1984).

idea here is contractualist in the sense of T.M. Scanlon's version of contractualism, which is that the form of moral argument is principles that no one can reasonably reject. The basic notion that Scanlon works from is "put yourself in my shoes and I'll put myself in yours." Moral principles are formed from the notion of putting ourselves in the place of others. Justification to others is the form of moral argument. At bottom, morality is based on the notion of reasonableness. I think the notion of reasonable rejection gets us more than simply duties of assistance and a list of basic human rights.

My approach is to take contractualist accounts of global justice and make them more institutionally sensitive, or one might say more responsive to facts, data, and history. As a lawyer I find frustrating that moral theory has not undergone the intellectual revolution that economics underwent with new institutional economics and organization economics. I do not think we should conceptualize principles of justice as external deontological constraints, superior in the hierarchy of normative orders, on actions of states, but as internal to international law itself. My approach is to ask whether international law norms are reasonably rejectable by anyone. We can do this with all of the sources of international law. For example, we can appraise various principles found in customary international law, the WTO agreements, the IMF Articles of Agreement, the Draft Principles of State Responsibility, the Statute of the International Criminal Court, and so on.

The skeptics might claim that international law has nothing to do with morality because international law in their scheme reduces to sovereignty, which is not a moral but a political concept. The objection is based on the Hobbesian notion that any rules about agreement come not from irreducible principles of right, such as those based on justification to others, but from bargaining and the self-interest of states. The notion of sovereignty is easily handled within the notion of reasonable rejection. There will be cases in which it is reasonable for sovereignty to be respected, and unreasonable for it to be respected. And it just might be true that contractualist justification does not describe every norm in international law, but that does not stop us from moral appraisal of these norms.

IV. CONCLUSION

The law and economics scholars have argued that it is time for law and economics to begin to focus seriously on international law. It is also time for moral theory to renew its connection to international law. We need to start putting international law under scrutiny using the tools we use for other categories of the law, in particular, deontological ethics. If we simply cede the territory to law and economics, I fear, to borrow loosely from Anthony Kronman, that the lawyers we educate in our law schools will be lost from an ethical point of view. The age of the lost international lawyer will persist, an age in which we will continue to witness moral failure by lawyers who cannot properly reason about values, whose memos authorize torture on the basis of the cruel precision of cost-benefit analysis. The theories that we discuss today have immediate practical relevance to the way international law will be practiced in this century.