

ASIL International Legal Theory Interest Group

The Role of Ethics in International Law

Conference Schedule

Friday, November 13, 2009, Tillar House/Cosmos Club, Washington D.C.

- 8:30 a.m. Breakfast (Tillar House)**
- 9:00 a.m. Introduction (Tim Sellers (Baltimore), Trey Childress (Pepperdine))**
- 9:15 a.m. Panel 1—The Role of Ethics in Public International Law**
Moderator: Brian Lepard (Nebraska)
Roger P. Alford (Pepperdine)
Oona A. Hathaway (Yale)
Edward T. Swaine (George Washington)
- 11:00 a.m. Coffee**
- 11:15 a.m. Panel 2—The Role of Ethics in Private International Law**
Moderator: Trey Childress (Pepperdine)
Lea Brilmayer (Yale)
Perry Dane (Rutgers)
Dean Symeon C. Symeonides (Willamette)
- 1:00 p.m. Lunch**
- 2:00 p.m. Panel 3—Normative and Theoretical Perspectives**
Moderator: Tim Sellers (Baltimore)
Samantha Besson (Duke/Fribourg)
H. Patrick Glenn (McGill)
Mary Ellen O’Connell (Notre Dame)
- 3:45 p.m. Coffee**
- 4:00 p.m. Open Forum**
- 5:30 p.m. Closing Comments (Brian Lepard, Tim Sellers, Trey Childress)**

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Paper Abstracts

Panel 1—The Role of Ethics in Public International Law

Roger P. Alford, *Moral Reasoning in International Law*

Individuals comply with rules for different reasons. Some do so out of fear of punishment, others out of respect for social order, while still others out of a perception that a norm has intrinsic moral force. States, acting through human agents, likewise differ in the reasons they comply with international norms. State compliance with such norms may be motivated by a desire to avoid sanctions, obedience to authority, utilitarian compliance, socialization, reputational concerns, or norm internalization. Yet these accounts fail to present the whole picture, since they ignore differences in the *forms* of moral reasoning used by agents of the state to support decisions about international norm compliance.

In this paper, we argue that political actors use different forms of moral reasoning to justify their actions when faced with moral dilemmas, which occur when incompatible norms require opposite behavioral outcomes. Examining the forms of moral reasoning that political actors employ to justify their actions sheds light on the ways in which states conceive of their relationship with specific norms, with each other, and with the structure of international society. In forming a theory of state compliance based on moral judgment, we take a cross-disciplinary approach, applying the insights of specialized scholarship in moral psychology developed by Lawrence Kohlberg to address the problem of international norm compliance. By bringing in a psychology of norms to understand state agents' relationship to international norms, we present a framework for modeling how states acting through human agents construct their own understandings of their relationship to the normative structure of international society.

In Part I, we outline the theoretical approaches to norm socialization and compliance in the psychological and sociological literatures. We outline the psychology of norms and describe Kohlberg's theory of moral judgment, emphasizing the forms of reasoning individuals use in resolving moral dilemmas—especially with regard to the compliance decision. In Part II, we develop a theory of moral judgment in international relations and international law. First, we survey existing theories of the compliance motive and explain why their monocausal explanations are imperfect and inconsonant with cross-disciplinary insights. Finally, in Part III, we apply that theory of moral judgment to a series of issues in contemporary international law—limited in this draft of the paper to torture, humanitarian intervention, and other war crimes.

Oona A. Hathaway, *Why Do States Comply with International Law?*

One of the most perennially perplexing and challenging questions facing international law scholars is when and why states comply with international law. There are well over 50,000 international treaties currently in force, covering nearly every aspect of international affairs and nearly every facet of state authority. All but a few of these tens of thousands of treaties are voluntary and have no central enforcement regime. That has led some to challenge them as ineffective and perhaps even meaningless.

This paper assesses and responds to this challenge. It offers an explanation of why states commit to treaties that potentially constrain their behavior and how the treaties, in turn, influence or fail to influence the behavior of these states. I emphasize two central ways in which treaties shape what states do. First, treaties influence states when they are enforced by transnational actors or by rule of law institutions within nations that join the treaty. Indeed, I argue, domestic legal enforcement is a crucial force pushing states to comply with international treaties. Second, treaties can generate what I have called “collateral consequences”—they can affect, among other things, foreign aid, foreign investment, trade, and domestic political support. These consequences arise from the response of an array of international and domestic actors to states’ decisions to accept a treaty commitment or not, or to comply with an existing treaty commitment or not. These actors are frequently motivated by what some scholars have called a “logic of appropriateness” and others might call “ethics”—that is, a vision of what behavior is right or appropriate and what behavior is not.

Edward T. Swaine, *Breaching*

Talking about ethics and international law is both nonsensical and inevitable: nonsensical because the difficulties of identifying and defending ethical norms in political life are compounded, hideously, in extrapolating them to the international plane and to the highly varied forms of international law; inevitable because the softness of international law invites comparison to non-legal obligations and because international law and its practitioners so often speak in moral terms.

The ethics of public international law must, at a minimum, be differentiated. Customary international law, for example, is typically descriptive in character—consider, for example, the normative character of claiming twelve or twenty-four miles of ocean—but peremptory norms are cut from a different cloth. What about treaties? Here the tendency is less to think of a fundamentally normative obligations—it is usually not compulsory for states to agree to any treaties—than to regard it as obligatory for a state to observe obligations into which it has freely entered; such a duty is frequently bottomed, in turn, on a theory of state consent. Lawyers interrogating the legal character of these obligations frequently ask whether this consensual system is meaningful given the absence of formal enforcement mechanisms and evidence of noncompliance; others answer, famously, that most states comply with most of their obligations most of the time, and that they do so because (at least in part) they are in fact obliged. Some of this behavior is driven by norms states develop and learn collegially, but it is still highly atomized—we postulate based on the observed compliance (or noncompliance) by states toward some aggregate that we take to be moral, ethical, or simply legal.

What can we learn from the opposite perspective—looking at any compliance-related conduct from the top-down vantage at the level of treaty law? Something quite different, in my estimation: States seem to expect that international agreements will be breached, and not only by themselves. Breaches, on this view, are not completely pathological, but instead are anticipated (if not wholly welcome) consequences of an international regime. The problem, from this perspective, lies in reducing the costs of breaches, including the costs imposed by reactions to those breaches. Some support for this view may be found in the law governing reactions to breach articulated in the Vienna Convention on the Law of Treaties and the International Law Commission's Articles on State Responsibility. If this is correct, it tends to temper claims for a descriptive ethics of compliance, while leaving room for a more nuanced descriptive ethics—perhaps one of cooperation—that instructs and constrains states in a substantially different way.

Panel 2—The Role of Ethics in Private International Law

Lea Brilmayer, *The Ethical Problem in Private International Law*

Private international law is permeated with ethical terminology. It justifies the conclusions it reaches in terms of “consent,” “implied consent,” and “state sovereignty” while citing concepts such as “fairness,” “substantial justice,” and “reasonableness.” One reason is that in the United States adjudicative and legislative jurisdiction are partially constitutionalized; due process of law is easily expressed in terms of fairness, justice, and so forth. But not all private international law is constitutional; and the ethical language of fairness, justice, and consent extends to its nonconstitutional pronouncements as well. This paper argues that the discourse of private international law, like that of public international law, suffers from one central methodological defect: the inability to identify the source of the normative concepts on which it heavily relies. Outside the US domestic constitutional area—which is where most of private international law takes place, after all—there is nowhere to situate the ethical norms that inform its holdings about how far state authority properly extends. Public international law, of course, has for centuries pondered responses to the charge that as there is no “world government” there can be no international law. It has not solved the problem, but it has at least confronted it. Private international law has not made it even that far.

There are several types of strategies for meeting this objection in private international law. First, one might avoid the issue altogether by saying that as private international law is a corollary of public international law, it can be safely assumed that the issue will be dealt with in that latter context. Second, one might draw upon shared norms of international practice, seeking a contextualized understanding of what states do, and basing decision upon their focused expectations. This surely is more satisfactory than the first, but suffers from an obvious response: choice of law is necessary because the norms of two states are not in agreement. Can it then be assumed that there will be agreement on some higher order of normative inquiry, namely, on the question which state’s law will govern? Third, one might ground normative judgments on some sort of natural law, political theory, or religious doctrine. In addition to the difficulties in convincing normskeptics of the existence of such a body of normative principles, this approach shares the methodological problems of the second strategy: choice of law is necessary precisely because states do not agree. In the face of such disagreement, how can it be assumed that a norm of private international law will be unbiased and mutually acceptable? My conviction is that there is no answer to this problem, and that this unhappy fact accounts for the rather thin and uninformative nature of much of the ethical discourse in private international law. In this respect, private and public international law are in the same boat.

Perry Dane, *The Natural Law Challenge to Choice of Law*

This paper is built on a thought experiment. Imagine a jurisdiction supremely confident that its own municipal law—down to the mundane doctrinal details of torts, contract law, family law, and the like—is grounded in universal natural law. Why would the courts of such a jurisdiction ever apply the substantive law of another place, even in a case involving clear foreign elements? This thought experiment might seem extreme, given the power of positivism in the modern legal imagination. But it is germane for at least two reasons. First, *to whatever extent* a forum is convinced of the natural law warrant of any part of its municipal law, it will *to that extent* face this dilemma. Second, and maybe more interesting, *to whatever extent* a theory of choice of law is itself grounded in an account of legal rights that has any flavor of natural law, supporters of that theory will *to that extent* need to ask themselves why they are privileging a proceduralist version of natural law over a more substantive one. The answer to this thought experiment will depend in large part on a further specification of the sort of substantive natural law theory to which my imaginary jurisdiction adheres. A radically thick account of natural law that understands it to be complete, universal, selfexecuting, lexically superior to positive law, and perfectly embodied in the substantive law of the forum will leave little or no room for applying foreign law. The challenge, however, is to thin out the account in certain respects, by thinking more carefully about the meaning of natural law and its relation to positive law, while not thinning it out so much (or in the wrong sort of way) as to spoil the power and interest of the thought experiment itself.

The paper begins by slicing off some parts of the problem that might admit of a fairly simple solution. It then looks to the more difficult kernel left behind. I explore various promising but inadequate arguments, including the institutional claim that even courts in a “natural law jurisdiction” should decide cases on purely positivist grounds. Finally, the paper explores two related paths out of the conundrum: First, it notes that not all views of natural law necessarily conceptualize it as a sort of constitution writ large, self-executing and trumping inconsistent positive law. To the contrary, much of the natural law tradition understood it as a substratum co existing in a complex and subtle relationship with positive law. Second, the paper argues that the problem at hand is actually of a piece with a larger set of puzzles, including the moral philosophical question of why “an individual may have the right to do something that is—from a moral point of view—wrong” and the theological question of why false religions should be tolerated. The analogy is not perfect; in particular, merely “negative” arguments about, say, the wrongness of coercing others do not translate well into the choice of law context. But to the extent that there are more “affirmative” arguments for respecting the normative selfdetermination of other persons and communities, it might be possible to find a similar grounding for a robust, adequately deferential, choice of law system even in a forum that is convinced to its bone that it has a privileged access to substantive legal truth.

The paper concludes with a brief discussion of what role substantive natural law might play in choice of law theory and practice even once the hypothetical forum of the thought experiment has brought itself to admit the possibility of applying foreign law at odds with its own municipal law.

Dean Symeon C. Symeonides, *The Quest for Multistate Justice: Suum Cuique Tribuendi*

1. Despite its name, private international law (PIL) is national rather than international law. Public international law does not restrain PIL, except in certain elementary ways. Being self-determinable and self-determined, PIL is free to establish its own moral compass.

2. Because PIL is national law, its quest for proper outcomes is *ex hypothesi* ethnocentric. Yet, even—or especially—before the advent of public international law (and except for medieval England), PIL did *not* take the position that all multistate cases must be decided under the law of the forum. Forum-chauvinistic choice-of-law theories are of relatively recent vintage. From its inception, PIL accepted the premise that multistate cases are sufficiently different from domestic cases to be exempted from the automatic reach of forum law, and that the presence of significant foreign elements justified the application of foreign law. Thus, the forum's justice was not necessarily the right justice for multistate cases. Instead the aim was what Gerhart Kegel later called “conflicts justice.”

3. However, contrary to today's perceptions, conflicts justice was not seen as antithetical to—or even independent from—substantive or “material justice.” Rather it was seen as a particularization of the ideal of justice in general as defined by Ulpian and later Justinian: “*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*—Justice is the constant and perpetual desire to *give each one his due*”). In multistate cases, giving each person his or her due meant finding and applying the law most appropriate to them—the “**proper**” law, which could be either forum or foreign law (and, for a brief period, a blend drawn from both—*praetor peregrinus, jus gentium*).

4. Initially, the “proper” law was the law of the tribe, city-state, or nation to which the person belonged, a notion later expressed as the principle of personality. Beginning with the 17th century, territoriality emerged as the competing principle, and the rationalizations for choosing one law over another changed (e.g., comity, vested rights, seat of the relationship, state interests), but the quest remained the same—finding the “proper” law, with propriety being defined in “spatial,” value-neutral, and forum-neutral terms (conflicts justice versus forum justice and material justice).

5. During the 20th century, the conflicts-justice view was attacked from two different, though in practice overlapping, directions: the material-justice view and the forum-justice view. The material justice view rejects the premise that multistate disputes are qualitatively different from domestic cases and that the choice of the applicable law should be controlled by spatial rather than substantive criteria. It argues that resolving these disputes in a manner that is substantively fair and equitable to the parties should be the goal of PIL as much as it is of internal law, and that the justness of the substantive result should be an important, if not controlling, factor in the choice-of-law process.

6. The forum-justice view rejects the premise that the forum state can be neutral in the resolution of multistate disputes. It assumes that, generally, states have an interest in the outcome of multistate disputes between private parties and posits that, whenever the forum has such an interest, its law should govern even if the other state also has a countervailing interest.

7. This paper takes the view that Ulpian's maxim of giving each one his or her due should remain the principal goal of the choice-of-law process, and that what is "due" should continue to be defined in spatial and forum-neutral terms. At the same time, the choice-of-law process should not be oblivious to considerations of material justice nor to important state interests. If this view has any validity, our focus should be to: (a) define or refine the criteria for assessing justness in the *multistate* context and identifying and evaluating state interests; and (b) define the circumstances under which justness or important state interests can tip the choice-of-law scale.

Panel 3—Normative and Theoretical Perspectives

Samantha Besson, *The Nature of Human Rights Theory: Beyond the Ethical/Political Divide*

(International) human rights theory is *en vogue*. It has been the case for quite some years in Germany, and is now also the case in Anglo-American circles (e.g. Nickel 2007; Griffin 2008 and 2010; Tasioulas 2008 and 2010; Beitz 2009; Raz 2010). One of the very first concerns human rights theorizing raises is the nature of human rights theory. The concept of human rights is both a moral and legal concept. Human rights theorists disagree about whether human rights theory should be (in part or exclusively) about conceptual analysis. However, whether or not it is the case, the moral and legal nature of human rights cannot but affect the nature of human rights theory. Interestingly, most human rights theorists writing about human rights claim they are writing about human rights as a legal and political practice and not (only) about human rights as moral rights. Doing so, they usually distance themselves from an ethical top-down approach and choose instead a practice-oriented bottom-up approach (Beitz 2009; Raz 2010) or a ‘middle game’ approach (Nickel 2007). Other theorists have portrayed themselves as writing from a bottom-up approach (Griffin 2008; Tasioulas 2008 and 2010), but are not regarded as having succeeded to escape ethical theorizing (critiques by Beitz 2009; and Raz 2010); they refer to human rights practice at most as a test case (Griffin 2008) or something to criticize (Tasioulas 2008 and 2010).

The answers to many of the important questions human rights theorists identify as being central to human rights theory, and in particular the existence, function, content, weight, scope and justification of human rights, depend on their original characterization of the nature of their theory. Surprisingly, few human rights theorists spend much time theorizing about the nature of their theory, however. As a result, they do not always succeed in bridging the hiatus between constructing a human rights account from legal practice and then criticizing it from a separate moral stance (Beitz 2009), on the one hand, or between focusing on an ethical substance distinct from human rights practice and then being faithful to the legal practice on that basis (Griffin 2008; Tasioulas 2008 and 2010), on the other. More curiously still, none of those human rights theorists focus extensively on the theoretical implications of the legal nature of human rights (they usually conflate the law and politics of human rights). From a legal theoretical point of view, however, it seems important to clarify what hinges on the legal nature of human rights and to draw some of the benefits of legal theory when theorizing human rights. After all, human rights like other parts of the law can be referred to as normative practices. And human rights like other normative concepts play a pivotal (legitimizing) role within a legal order. The normative nature of legal theory and the relationship between facts and norms are classical topics in jurisprudence and these debates could benefit human rights theorizing.

The gist of this paper is to show how this can be the case in the context of a normative legal theory of human rights. After a few considerations about the moral-political nature of human rights and the relationship between moral and legal human rights, I plan first to discuss the fundamental opposition between so-called ‘political’ or ‘practical’ and ‘ethical’ or ‘orthodox’ accounts of human rights (as it is portrayed in most recent human rights theories: Raz 2010; Griffin 2010; Tasioulas 2010) in order to clarify its meaning and unpack its implications regarding the nature of human rights theory, and then to challenge the divide before finally proposing a middle way.

Mary Ellen O’Connell, *Finding Jus Cogens: Preemptory Norms and Natural Law Process*

Most international lawyers agree that international law contains a category of norms called *jus cogens* or peremptory norms. Most also agree that the category is best explained using natural law theory. But that is about it. Beyond recognizing the category and the importance of natural law to it, few international lawyers can say more about *jus cogens*. Nevertheless, despite our limited understanding—or perhaps because of it—more and more judges, scholars, and advocates are discovering *jus cogens* norms and describing their impact on the international legal system. In so doing, they may be undermining the importance of *jus cogens* by making them all too common—often indistinguishable from human rights. This paper investigates what *jus cogens* are, and, more importantly, a process for identifying them. The paper proposes that we adopt a version of classical legal process methodology modified for identifying international natural law norms. Applying this approach to *jus cogens* indicates that *jus cogens* norms are rare. They act primarily as a governor on the positive law—as barriers to the application of domestic or international positive law that conflicts with a *jus cogens* norm. *Jus cogens* norms are not the source of affirmative or detailed legal prescriptions. Rules, norms and principles of that sort must come from international law’s three primary sources: treaties, custom, and general principles.

H. Patrick Glenn, *The Ethic of International Law*

International law, in both its public and private variants, has been profoundly impressed by positivist legal philosophy in recent centuries. Yet international law by its nature has had to face a greater variety of normative legal orders than has domestic state law. The contrast between such orders casts light on the ethic of international law, the set of moral principles which underlies it, and which Amartya Sen has recently described as “transcendental institutionalism.” To the extent that international law is today becoming more open to ethical argument, this represents an expansion of ethical debate and not a qualitatively different phenomenon.